

MANUAL
CONSTRUCTION AND MANAGEMENT
DISTRICT CANALS,

BY

COLONEL L. J. H. GREY, C. S. I.



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Proceedings of the Honble the Lieutenant-Governor of the Punjab, in the Revenue Department (Irrigation).—No. 13, dated 6th August 1883

READ—

A Manual of Construction and Management of District Canals by Lieutenant-Colonel Grey, c.s.i., submitted by the Financial Commissioner under cover of the letter of his Senior Secretary, No. 113 of 16th August 1883.

REMARKS.—In the Circular of this Government, No. 316 of 20th September 1882, on the subject of Famine Preventive Works, the attention of District Officers was specially invited to the importance of developing inundation canals. At that time the Extra Assistant Commissioner in charge of Ferozepore canals was engaged, under the direction of Lieutenant-Colonel Grey, in revising the various orders which had been issued from time to time by the latter officer for the guidance of the Revenue staff of the district in the construction and management of inundation canals, and seeing that special interest was likely to be turned to the subject, Colonel Grey offered to throw the compilation into the form of a brief manual for the instruction of Revenue Officers. This offer was accepted by the Financial Commissioner, and the manual under review has accordingly been completed by Colonel Grey.

2. The special thanks of the Lieutenant-Governor are due to Colonel Grey for the trouble which he has taken in this matter, and for the valuable assistance which the manual will be found to afford to all officers in those districts in which the construction of inundation canals can be undertaken and is desirable. The manual is particularly valuable in that it embodies the details of a system which has been worked for 10 years in the Ferozepore District with great success. It is not necessary of course nor is it desirable that the system set forth in it should be followed without modification elsewhere. On the contrary, success in the construction and management of inundation canals must always depend largely

Article 1
Note 1

(Claims) Act 23 of 1863 Under that Section a suit may be instituted by the claimant or objector on receipt of the award in a Court specially constituted under that Act The period prescribed under this Article is *thirty days from the date on which such notice of the award is delivered to the plaintiff*

There was no provision corresponding to this Article before the year 1871 but Section 5 of the Act 23 of 1863 itself provided that such suit shall be instituted within 30 days from the delivery of such notice It was held by the High Court of Calcutta in a suit arising before 1871 that the Court could not extend the period allowed by the Section for any reason¹ In the year 1871 the words as to limitation in the said Section were deleted and an Article corresponding to the present Article was inserted in the Limitation Act 1871 Under this Act it is of course clear that the period of 30 days is to be reckoned in accordance with the Sections of the Act which may result in extending the said period

The suit to contest an award referred to in the Article is not an application to set aside an award within the meaning of Section 12 sub section 4 *ante* Therefore time requisite for obtaining a copy of the award cannot be excluded under that Section in computing the period of limitation for the suit

PART II — Ninety Days

Article 2

2. For compensation for doing or for omitting to do an act alleged to be in pursuance of any enactment in force for the time being in British India	Ninety days	When the act or omission takes place
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* Act of 1877
Same as above

Act of 1871

PART II — NINETY DAYS

2 — For doing or for omitting to do an act in pursuance of any enactment in force for the time being in British India	Ninety days	When the act or omission took place
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1 (1866) 5 South W R 1 (2) *Woolerjee v. Joghshen Woolerjee*

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1. **Scope of the Article.**—There are several provisions in the statute books which are intended to afford protection to persons doing acts in pursuance of an enactment in force¹ It is not necessary for the applicability of such provisions that the act should be *directly justifiable* under the enactment as this would reduce the protection to a mere nullity^{1a} It is, however, necessary that the defendant should have *honestly believed* in the existence of a state of facts which if it had existed, would have justified him under the enactment to do the thing complained of² His error may be one of law³ and he need not have any knowledge of the particular enactment under which he has acted⁴ It is not even material whether his belief is a *reasonable* one⁵ It follows that where a

Article 2 — Note 1

- 1 See for example Section 1 of the Judicial Officers Protection Act
Section 80 of the Civil Procedure Code
Section 197 of the Criminal Procedure Code

1a Halsbury Vol 23 Page 343

2 (1846) 71 R R 701 (706) 3 D & L 702 15 L J Ex 233 10 Jur 884 15 M & W 346 *Hughes v Buckland*

(1871) 19 W R (Eng) 931 (932) L R 6 CP 474 *Chamberlain v King*
(Ref in 6 Mad 11 C R 423)

3 (1871) 6 Q B 724 (~28) 19 W R (Eng) 1110 (1112) *Selmes v Judge*

4 (1853) 93 R R 769 (779) 13 CB 850 10 CL R 746 22 L J C 1 201 17 Jur 990 *Read v Coker*

(1863) 133 R R 791 (793) 43 L J Ex 65 9 L T (NS) 727 12 W R 263
2 H & C 769 *Roberts v Orchard* (Ref in 6 Mad 11 C R 423)

5 Halsbury Vol 23 Page 343 and Vol 13 Page 179

Article 2
Note 1

person *knowingly and intentionally* acts in contravention of the provisions of an enactment he cannot claim that his conduct has any relation to acting "in pursuance of the enactment". In *Selmes v Judge*,⁶ Blackburn J observed as follows —

"It has long been decided that such a provision as that contained in this Section is intended to protect persons from the consequences of committing illegal acts which are intended to be done under the authority of an Act of Parliament but which, by some mistake are not justified by the terms and cannot be defended by its provisions. I agree that if a person knows that he has not, under a statute authority to do a certain thing and yet intentionally does that thing he cannot shelter himself by pretending that the thing was done with intent to carry out that statute.

This Article is one of such provisions intended to afford protection to persons acting in pursuance of an enactment, against stale claims⁷ and a specially short period of limitation is provided for such cases in order that such acts which are of a public nature shall not give rise to a protracted litigation,⁸ the policy of the law being that suits of this nature should be brought and investigated as promptly as possible.⁹ The principles above stated would therefore apply also to cases coming under this Article. Thus the act complained of need not be *directly justifiable* under the enactment. But the defendant is entitled to the benefit of the protection of the Article if he *honestly* believed in the existence of a state of facts which if it had existed, would have justified him under the enactment to do the thing complained of.¹⁰ The *reasonableness* of the belief is immaterial if his

⁶ (1871) 6 Q B 724 (727) 19 W R (Eng) 1110 (Ref in 25 Bom 387 (393))

⁷ (1909) 2 Ind Cas 819 (825) 1909 Pun Re No 72 *Pichard Watson v The Municipal Corporation of Simla*

(1936) A I R 1936 Pat 513 (517) 15 Pat 510 164 Ind Cas 600 *Secy of State v Lodna Colliery Co Ltd*

[See also (1913) 18 Ind Cas 84 (84) (Cal) *Hari Charan Dost v Surendra Nath Banerjee* (Damage caused by order under Section 144 Or P C—Article 2 applies)]

(1848) 4 Moo Ind App 353 (379 380) 1 Sir 863 6 Moo P C 257 *Perry O C 892 (P C) Richard Spooner v Juddow*]

⁸ (1913) 21 Ind Cas 426 (427) 16 Oudh Cas 211 *Wah ulloh v Raj Bahadur*

⁹ (1918) A I R 1918 All 63 (65) 41 All 219 48 Ind Cas 815 *Mukat Lal v Gopal Sarup* (Sale of plaintiff's property in execution of money decree—Tender of decretal amount by plaintiff—Sale by Amm in spite of tender in collusion with decree holder)

¹⁰ (1909) 2 Ind Cas 819 (822) 1909 Pun Re No 72 *Pichard Watson v The Municipal Corporation Simla*

(1900) A I R 1925 Rang 311 (312) 3 Rang 268 89 Ind Cas 861 *Maung Kyaw Nyan v Ma Ubun Municipality* (Following 100 P R 1883)

(1936) A I R 1936 Cal 653 (655 656) 156 Ind Cas 529 *Jaques v Narendra Lal Das* (Act done by Police Officer heedlessly but *bona fide*—Article 2 applies)

belief is honest, though it may be an important element in determining the question of honesty.¹¹ Again, the Article will not apply where the defendant has acted *knowingly and intentionally* in contravention of the enactment merely using it as a cloak for private purposes.¹² In *Secretary of State v. Loden Colliery Co.*,^{12a} Courtney-Terrell, C. J. observed as follows:—

"The object of the Article is the protection of public officials who, while *bona fide* purporting to act in the exercise of a statutory power, have exceeded that power and have committed a tortious act, it resembles in this respect the English Public Authorities Protection Act. If the act complained of is within the terms of the statute, no protection is needed, for, the plaintiff has suffered no legal wrong: the protection is needed when an actionable wrong has been committed, and to secure the protection there must be in the first place a *bona fide* belief by the official that the act complained of was justified by the statute, secondly, the act must have been performed under colour of a statutory duty, and thirdly, the act must be in itself a tort in order to give rise to the cause of action. It is against such actions for tort that the statute gives protection.

An act done *negligently* but honestly in pursuance of an enactment is within this Article.¹³ It is indeed to such acts that protection is intended to be afforded. An act may be done *maliciously* but yet under the honest belief that it is authorised by the

(1937) A I R 1937 Sind 281 (293) 172 Ind Cas 622 *Udharam Vaswama v. Grahams Trading Co. Ltd.* (There must be an enquiry regarding good faith before Article can be applied.)

(1937) A I R 1937 Lah 748 (750) 169 Ind Cas 922 *Amar Singh v. Jernai, Commissioner Gujranwala* (He must show he had reasonable grounds for justifying his action under the enactment.)

11 (1909) 2 Ind Cas 819 (822) 1909 Pun Re No 72, *Chander Singh v. Municipal Corporation of Simla*

(1893) 1883 Pun Re No 160 *Ganesh Dass v. Elliott*

[But see (1881) 1881 Pun Re No 124 (defendant should show that he

Article 2
Notes
1-2

enactment In such cases this Article will apply ¹⁴ It was, however, held in the undermentioned case ¹⁵ by the Chief Court of the Punjab that this Article will protect persons who have acted honestly as a *man of ordinary care and intelligence* It is submitted that this condition as to *ordinary care* is not necessary for the applicability of the Article, for, this would render the Article inapplicable to negligent acts i.e. acts done without reasonable care and caution

Where, owing to the negligence of the Municipality in keeping water pipes in good repair, the ground in which they were laid became damp and damaged the plaintiff's houses and the plaintiff sued the Municipal Board for damages, it was held that this Article did not apply but only Article 36, apparently on the ground that the omission was not "in pursuance of any enactment" ¹⁶ Where the enactment under which a person purported to act did not authorise him to do the act complained of, it was held by the Lahore High Court that Article 2 was not applicable ¹⁷ It is submitted that this is not correct ¹⁸

2. **Wrongful acts or omissions under contracts.**—Where it was provided by Section 527 of the Bombay City Municipal Act (3 of 1888) that no suit shall be instituted against the Corporation in respect of any act done *in pursuance or execution of the Act* until notice of one month was given, it was held that a wrongful act or omission under a contract entered into under the powers given by the enactment was not *in pursuance or execution of the enactment* ¹ The same view has been held in the undermentioned cases ² arising under other Municipal Acts It has been held that the same reasoning as applies to the construction of the provisions above referred to will apply to the construction of this Article also which will

14 (1932) A I R 1932 All 16 (18) 135 Ind Cas 558 *Shariful Hasan v Lachmi Narain* (The act itself was however justifiable in this case)

(1926) A I R 1926 All 538 (539) 48 All 560 95 Ind Cas 1030 *Municipal Board of Benares v Beharilal* (Malicious action of Municipality in omitting to do what it should have done under the Act)

Cas 430 *Paria*

15 (1886)

ng

16 (1929) A I R 1929 Lah 730 (735) 121 Ind Cas 500 *Maya Pam v Municipal Committee*

17 (1935) A I R 1935 Lah 47 (47) 152 Ind Cas 680 *Notified Area Committee, Chuncha Wain v Lada Rai*

18 See Halsbury, Vol 13 Page 179

Note 2

1 (1901) 25 Bom 387 (394) 3 Bom L R 158 *Ranclorodos Moorarji v The Municipal Commissioner for the City of Bombay*

2 (1914) A I R 1914 Sind 125 (128) 8 Sind L R 294 29 Ind Cas 507 *Municipality of Tala v Asanmal Chandoomal* (Case under Bombay District Municipal Act 3 of 1901)

(1916) A I R 1916 Mad 310 (313) 28 Ind Cas 45 *Municipal Council of Kumbakonam v Viraperumal Padayachi* (Madras District Municipalities Act 4 of 1884)

therefore not apply to acts or omissions under *contracts* entered into under the powers given by an enactment²

Article 2
Notes
2-5

3. Cases falling within this and another Article.—This Article will not apply where there is another special provision provided for a particular case^{1a}. This is in accordance with the general principle of law enunciated by the maxim *generalia specialibus non derogant*—a general provision must yield to a special provision. Where a suit was brought against a Municipal Board for making an illegal distress of the plaintiff's goods under colour of an enactment, it was held that Article 28 which provides specifically for cases of distress should be applied and not this Article¹. Where the principal (Municipal Board) sued its agent (the Executive Officer) for damages for negligence in the discharge of his duty under an enactment, it was held that such a suit was specially provided for by Article 90 and that therefore this Article did not apply².

See also the undermentioned case³

4. Doing or omitting to do.—It has been held in the undermentioned case¹ that the Article does not apply to cases where the damages arise not from the doing or the omission to do an act but from the doing it in an *improper manner* out of malice or carelessness. It is submitted that this view is not correct. "Doing" will include doing in an improper manner. Further, there cannot be an *omission to do* in an improper manner.

5. "Alleged to be"—The expression *alleged to be* does not mean "alleged by the plaintiff in his plaint or alleged by the defendant in his written statement"¹. Nor does it mean that the

3 (1916) A I R 1916 Mad 310 (313) 25 Ind Cas 45 *Municipal Council of Kumbakonam v Viraperumal Padayachi*

(1937) A I R 1937 Lah 226 (229) 159 Ind Cas 1107, *Girdhari Lal v Secretary of State* (Dismissal of Sub Divisional Officer from service—Suit by him for damages for wrongful dismissal—Suit is one for breach of contract and not one for any act done in pursuance of enactment)

Note 3

1a (1937) A I R 1937 Bom 491 (491) 172 Ind Cas 430 *Parietappa Vallappa v Hubli Municipality* (Case falling under Section 206 of the Bombay Act 18 of 1925—This Article not applicable)

1 (1904) 26 All 482 (489) 1 All L Jour 195 1904 All W N 95 *Municipal Board of Muscorie v H B Goodall*

2 (1924) A I R 1924 All 467 (470) 46 All 175 60 Ind Cas 241 *A C*

Article 2 applies to such a suit³ See also of Article 23 and 204

3 (1937) A I R 1937 All 90 (95) 167 Ind Cas 433 1 I L R (1937) All 390 *Venkat Madho Prasad v M Wajid Ali* (A I R 1935 All 538, Not followed)

Note 4

1 (1913) 21 Ind Cas 420 (421) 16 Oudh Cas 211 *Wah Ullal v Raj Bahadur*

Note 5

1 (1935) A I R 1935 All 588 (540) 1935 Cr Cas 560 155 Ind Cas 131 (F B) *Sham Lal v Abdul Paof*

Article 2
Notes
5-6

defendant at the time of doing the act must, in order to claim the protection of the Article, openly allege or assert that he is acting in pursuance of a particular enactment² for, as has been seen in Note 1 *ante*, he need not have any knowledge of the particular enactment under which he has acted. The words are merely intended to obviate the difficulty of the Article being interpreted too strictly. Without the said words the Article may not, construed strictly, be wide enough to cover the case of a person who, in good faith, has acted in pursuance of an enactment when it is found later that he has exceeded his powers. To protect such persons these words seem to have been added, presumably to widen the scope of the Article and give him protection where, although the power was exceeded, he still acted in good faith and honestly believed that he was acting in pursuance of an enactment³.

It is however necessary before applying this Article that *as a fact* the act was done, or was honestly intended to be done, in pursuance of an enactment. Where on the statements contained in the plaint the defendants did the act complained of at their own hands and not in pursuance of any statute, it was held by their Lordships of the Privy Council that the Court cannot, without going into the facts, assume that the act was done in pursuance of an enactment and apply this Article. It must be *proved* that the act was so done⁴. In *Sundary Shrivastava v Secretary of State*,⁵ where the plaintiff sued the Secretary of State for damages for wrongful conversion of his goods consigned to a Railway Company and the defendant alleged that the goods were sold under Section 55 of the Railways Act it was held that Article 2 did not apply on the ground that it was the *defendant* who alleged that the act was done under Section 55 of the Act and not the plaintiff who based his suit merely on conversion. In other words, it seems to have been impliedly assumed that the words "alleged to be" must be taken to mean "alleged by plaintiff in his plaint". It is submitted that the assumption is not correct and is really against the decision of the Privy Council above referred to⁶.

6. Compensation.—This Article applies only to suits for *compensation*. According to the undermentioned cases,¹ a suit for

2 (1909) 2 Ind Cas 819 (829) 1909 Pun Re No 72 *Richard Watson v Municipal Corporation Simla*

(1937) A I R 1937 Lah 748 (750) 169 Ind Cas 922 *Amar Singh v Deputy Commissioner Gujranwala*

3 (1935) A I R 1935 All 538 (540) 1935 Cr Cas 560 155 Ind Cas 131 (F B), *Shiam Lal v Abdul Raof*

4 (1927) A I R 1927 P C 72 (73) 103 Ind Cas 1 10 Lah 161 *Punjab Cotton Press Co Ltd v Secretary of State* (Reversing A I R 1924 Lah 192 and A I R 1924 Lah 169)

5 (1934) A I R 1934 Pat 507 (510) 151 Ind Cas 995 13 Pat 752

6 See (1936) A I R 1936 Pat 513 (517) 15 Pat 510 164 Ind Cas 860 *Secy of State v Lodna Colliery Co Ltd* (Where the same learned Judge holds that his previous opinion was erroneous)

Note 6

1 (1886) 1886 Pun Re No 123 *Seth Karanjee v Sardar Karpal Singh*

return of money wrongfully levied by the defendant is one for compensation. The High Court of Allahabad has dissented from this view and has held that a suit for compensation or damages is different from a suit for the return of a specific sum. In the former case the damage must be assessed by the Court for a wrongful act. A suit for a specific sum of money illegally levied by the defendant under colour of an enactment is therefore, according to that Court, not a suit for compensation.² In a recent case³ the High Court of Lahore has followed the view of the Allahabad High Court. In the undermentioned case,⁴ where octroi duty was legally levied, but owing to subsequent events had, under law, to be returned to the plaintiff and the latter sued for such return, the Allahabad High Court held that this Article did not apply but Article 120.

Article 2
Notes
6—8

See also Notes to Articles 29 and 36, *infra*

7. "Enactment in force."—Where a defendant pleads that the action of the plaintiff is barred under this Article, the plea necessarily imports an averment that the enactment was in force at the time and place when and where the acts complained of were done. It is not sufficient if the enactment is not in force, that the defendant honestly believed that it was in force and that he was acting under it.¹

8. Starting point.—The starting point is "when the act or omission takes place. When the act or omission does not, however, *per se* give a cause of action unless damage results therefrom, then, by virtue of Section 24 *ante* the period of limitation should be computed from the time when the injury results.² Where a suit was instituted on 5 2 1908 for compensation for damages of an injury occurring about 3 8 1906 caused by the construction of a sewage drainage system by the Municipality in 1904 05, it was held that the starting point of limitation for such suit under this Article was 3 8 1906, but that, even so, it was barred by limitation.³

(1886) 1886 Pun Re No. 65 *Narpat Rai v. Sirdar Kirpal Singh* (Suit for recovery of tolls illegally levied)

(1935) A I R 1935 Lah 47 (47) 150 Ind Cas 680, *Notified Area Committee Chinchavati v. Lada Par* (Assumed—but the decision proceeded on the view that it was an unauthorised act and that the Article consequently did not apply)

(1884) 8 Bom 17 (19 20) 8 Ind Jur 200 *Jagjyan Jaiherdas v. Golam Jilani Chaudhri* (Case however, under Article 29)

2 (1910) 6 Ind Cas 401 (403) 32 All 491 *The Rajputana Malwa Railway Co-operative Stores v. The Ajmer Municipal Board*

2a (1932) A I R 1932 Lah 17 (20) 133 Ind Cas 868 *Bakshish Singh v. Phuman Singh*

3 (1914) A I R 1914 All 333 (339) 36 All 555 25 Ind Cas 918 *Municipal Board of Ghazipur v. Deokimandan Prasad*

Note 7

1 (1886) 1886 Pun Re No. 105 *Jai Rai v. Gurnukul Singh*

Note 8

1 (1909) 2 Ind Cas 819 (822) 1909 Pun Re No. 72 *Richard Watson v. Municipal Corporation of Simla*

2 (1909) 2 Ind Cas 819 (825) 1909 Pun Re. No. 72, *Richard Watson v. Municipal Corporation of Simla*

Article 2
Note 8

Where a special or local law prescribes a different period for such a suit, it is that law that will apply (Section 29). Thus the United Provinces Municipalities Act (II of 1916) Section 326 sub section 3 extends the period of 90 days to one of 6 months. A suit falling under that Section will therefore be barred only after 6 months.³

Part III. — Six months

Article 3

3. Under the Specific Relief Act, 1877, Section 9, to recover possession of immovable property.	Six months.	When the dispossession occurs.
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Synopsis

1. Legislative changes.
2. Scope of the Article
3. Possession and dispossession.
4. Immovable property.
5. Person in possession without any title dispossessed by trespasser — Suit after six months, if barred.
6. Suit on title — Failure to prove title — Decree, if can be given under Section 9 of the Specific Relief Act.
7. Defendant maintained in possession under Section 145, Criminal Procedure Code — Plaintiff if can sue under Section 9 of the Specific Relief Act.

Other Topics

"Corpus" and "animus"	See Note 3
Incorporeal rights—Whether immovable property	See Note 4, Pt 4 & F N (4)
Juridical possession	See Note 3
Partial dispossession sufficient	See Note 3, Pt 5a
Specific Relief Act, S 9—Suit under—Scope of	See Note 2
Tenant dispossessed—Whether landlord can bring suit	See Note 3, F N (6)

* Act of 1877.

Same as above.

Act of 1871.

PART III—SIX MONTHS

3 —Under Act No 14 of 1859 (to provide for the limitation of suits), section fifteen, to recover possession of immovable property	Six months	When the dispossession occurs
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³ (1926) A I R 1926 All 538 (539, 540) 95 Ind Cas 1030 48 All 560, *Municipal Board, Benares v Behari Lal*

1. **Legislative changes.**—The earliest enactment with regard to suits for the summary recovery of possession of immovable property from a wrong-doer was Section 15 of the Limitation Act, 11 of 1859. This Section ran in terms similar to the present Section 9 of the Specific Relief Act, 1877, and further provided that the suit should be commenced within six months from the time of such dispossession. The Limitation Act, 9 of 1871, which took the place of the Act of 1859, left unrepealed so much of Section 15 as did not relate to the limitation of possessory suits. The portion relating to limitation was repealed and re-enacted as Article 3 of Schedule 2 of the Act. The unrepealed portion itself was repealed and re-enacted as Section 9 of Act 1 of 1877. But in so re-enacting it, the portion referring to limitation was also re-enacted in that Section. Thus the period of limitation was prescribed both under Article 3 of Limitation Act, 15 of 1877 and under Section 9 of the Specific Relief Act. The provision for limitation in Section 9 was evidently unnecessary and hence so much of the portion as related to limitation in Section 9 was repealed by Act 12 of 1891. The present Limitation Act, like its predecessor, provides a limitation of six months for these possessory suits.¹

2. **Scope of the Article.**—The Specific Relief Act, 1877, provides for two kinds of suits for possession. Section 8 provides that a person entitled to the possession of immovable property may recover it in the manner prescribed by the Code of Civil Procedure, that is to say, by a suit for ejectment on the basis of title. Section 9 gives a summary remedy to a person who has without his consent been dispossessed of immovable property otherwise than in due course of law, for recovery of possession thereof, notwithstanding any other title that may be set up in such suit. The second paragraph of the Section provides that the person against whom the decree may be passed under the first paragraph may, notwithstanding such decree, sue to establish his title and recover possession. Section 9 thus specifically excludes any consideration of title, whether such title be to land or other immovable property or to

Act of 1859 — Section 15

15 If any person shall, without his consent, have been dispossessed of any immovable property otherwise than by due course of law, such person, or any person claiming through him shall, in a suit brought to recover possession of such property, be entitled to recover possession thereof notwithstanding any other title that may be set up in such suit provided that the suit be commenced within six months from the time of such dispossession. But nothing in this section shall bar the person from whom such possession shall have been so recovered, or any other person, instituting a suit to establish his title to such property and to recover possession thereof within the period limited by this Act.

Person dispossessed of immovable property otherwise than by due course of law may recover possession notwithstanding any title that may be set up. Suit for dispossession to be brought within six months. Suits to establish title not to be affected.

Article 3 — Note 1

¹ See (1893) 3 Mad L Jour 9 (9) (Jour)

Article 3
Note 2

possession only.¹ In a suit under Section 9, all that the plaintiff has to allege and prove is

- 1 that he was in possession of the immovable property when he was dispossessed, and
- 2 that he was dispossessed by the defendant otherwise than in due course of law

On proof of these facts the plaintiff will be placed in possession of the property.² It is not necessary for him to prove his title to the property. Nor can the defendant in such a suit set up any plea based upon title, even where he has one.³ A suit, in which it is necessary for the plaintiff to allege and prove title whether to immovable property or to mere possession thereof, will not come under Section 9,⁴ but will be governed by the general Section,

Note 2

- 1 See (1910) 7 Ind Cas 490 (496) 33 All 174 (F B), *Lachman v Shambhu Narain*
(1889) 1889 All W N 89 (90) *Chuthan Rai v Sheo Ghulari Rai* (In this suit the plaintiff sought a declaration of title to property.)
(1872) 9 Bom II O R 53 (56) *Lakshimibai v Yithal Ramchandra*
(1910) 7 Ind Cas 700 (700 701) (Cal) *Raj Krishna v Mukhtaram Das*
(1916) A I R 1916 Mad 323 (330) 23 Ind Cas 1 *Tharasi v Irumugam*
(1914) A I R 1914 Mad 382 (383) 22 Ind Cas 279, *Devata Sri Ramamurthy v Venkata Sitaram Chandra Rao Garu*
(1914) A I R 1914 Nag 55 (56) 10 Nag L R 183 27 Ind Cas 506 *Sambha sheo v Mahadeo*
- 2 (1907) 4 All L Jour 601 (607) 1907 All W N 244, *Farbhu Lal v Ram Charan*
(1904) 29 Bom 213 (216) 7 Bom L R 12 *Padrayya v Narasing Rao* (A tenant holding over can successfully maintain suit under S. 9 against his landlord if dispossessed otherwise than in due course of law.)
(1868) 9 Suth W R 123 (124) *Sofaell Khan v Wopeean Khan* (A tenant in possession holding over under an expired lease if dispossessed without his consent of the land otherwise than by due course of law, is entitled to sue and recover possession.)
(1914) A I R 1914 Mad 382 (383) 22 Ind Cas 279 *Devata Sri Ramamurthy v Venkata Sitaram Chandra Rao Garu*
{See (1868) 9 Suth W R 513 (514) Beng L R Sup Vol 1020 (F B)}

reference to the title of the landlord to eject him.)

Specific Relief Act]]

[But see The Punjab Tenancy Act 1887 Section 51.]

- 3 (1907) A I R 1927 All 669 (670, 671) 103 Ind Cas 408, *Ganesh v Dasso*
(1915) A I R 1915 All 244 (245) 29 Ind Cas 210, *Makhdoori Bakhs v. Hashim Ali*
(1931) A I R 1931 Cal 483 (484) 53 Cal 29 132 Ind Cas 906 *Satis chandra De v Madanmohan Jati*
- 4 See (1904) 31 Cal 617 (651 655 656) 8 Cal W N 446 (F B) *Tamiruddin v Asirub Ali* (Non occupancy tenant holding over is a tenant and has a title to possession. 7 Cal W N 218, Overruled.)

namely Section 8. The present Article applies to suits only under Section 9 and such suits must be instituted within six months from the date of dispossession⁴. It must be noted that the fact that the summary remedy is not availed of by the person dispossessed will not disentitle him from availing himself of the other remedies and sue on his title⁵.

3. Possession and dispossession. — "Possession" implies, *first*, some actual power over the object possessed, and *secondly*, some amount of will to avail oneself of the power. These essential elements were described in Roman Law by the terms "*corpus*" and "*animus*" respectively. The corporeal element is the physical control. To be the possessor of an object a man must have it so far under his control as to be able to exclude others from it. The mental element varies greatly in *degree*. It is in the lowest degree when the person having control of the object asserts no right over it on his own behalf, but merely intends to protect it. Such is the *animus* of the servant or manager, or any person who exercises control in a purely representative capacity. Control accompanied by such degree of intention does not amount to *juridical* possession. The possession in such instances is in the person on whose behalf the control is being exercised.

The highest degree of intention is manifested when the possessor denies the existence of any right over the object in any other person but himself. Such is the *animus* of the actual owner. Between these two extremes, we have the cases of a lessee usufructuary mortgagee, and trustee etc., where the title of another is not denied, but where there is the power of control and an intention to exclude not only all the strangers, but even the owner himself. Now, possession in law is a substantive right or interest, which exists and has legal incidents and advantages apart from the true owner's title¹ and where a person has, in his own right, and not merely as a representative of another, such control over immovable property as to be able

(1899) 1899 All W N 89 (90) *Chulhan Rai v Sheoghulam Rai* (This was a suit for declaration of title to property)

5 (1879) 7 Ind App 73 (80-81) 6 Cal L R 249 4 Sar 127 3 Suther 370 (P C) *Wise v Ameerunnissa Khatoon*

(1912) 19 Ind Cas 541 (542) (Cal) *Gnan Chandra v Loch Mohan*

(1871) 15 Suth W R 88 (40) 6 Beng L R 652 *Grant v Bangsi Deo*

For a similar provision see Bombay Mamlatdar & Courts Act (2 of 1906), Sections 5 and 22 and (1900) 24 Bom 251 (F B) *Ramchandra Balaji v Narsinhacharya*

6 (1872) 9 Bom H O R 53 (57) *Lakshminbas v Vithal Ramachandra* (The existence of S 9 does not take away the plaintiff's right to bring a suit for ejectment)

(1865) 2 Mad H C R 313 (314) *Komajen Kurupu v Chembata Ambu*

(1937) 4 I R 1937 Nag 281 (284), *Pannalal Bhagerath v Bhayyalal Bindra*

ban

Note 3

1 Pollock and Wright on "Possession" cited in 23 Mad 179 (183)

(1909) 4 Ind Cas 359 (362, 363) 3 Sind L R 149, *Dara Chhatagir v Matanomai*

Article 3 Note 3

to exclude any other person from it and has the intention of exercising such power of exclusion he has a right if dispossessed by such other person without his consent otherwise than in due course of law to seek relief under Section 9 of the Specific Relief Act²

A person cannot obtain relief under Section 9 unless he had had juridical possession³ or is occupying the premises in a representative capacity⁴ or as a servant⁵

Even a partial dispossession entitles a person to bring a suit under Section 9^{6a}

As to whether a landlord can bring a suit when his tenant is dispossessed see the undermentioned cases⁶

- 2 (1909) 4 Ind Cas 359 (360-363) 3 Sind L R 149 *Datta Chhatagir v Matanomal*
- 3 (1870) 7 Bom H C R (A O) 80 (87) *Dadlabai Narsidas v Sub Collector of Broach* (A mere trespasser cannot succeed under S 9)
- (1899) 12 C P L R 52 (53) *Dalaram v Bairagi*
(See also (1891) 15 Bom 685 (687) *Isrudhan v Mohanmad Jamal* (Trespasser cannot sue under S 9 Specific Relief Act))
- 4 (1895) 20 Cal 562 (564-565) *Nritto Lall Mitter v Rajendra Naram Deb*
- 5 (1909) 4 Ind Cas 359 (363) 3 Sind L R 149 *Datta Chhatagir v Matanomal*
- 5a (1881) 3 Mad 250 (251) *Sabapathi Chetty v Subbaraya Chetty*
- 6 (1896) 18 All 440 (448) 1896 All W N 162 (F D) *Sita Ram v Pam Lal*
(1906) A I R 1906 Mad 18 (20) 92 Ind Cas 20 *Veeraswamy Mudali v Venkatachella Mudali* (When a landlord creates a tenancy under him which entitles the tenant to the exclusive use of the property the landlord cannot have any right to actual possession so long as the tenant is entitled to possession and therefore the landlord cannot maintain a suit under S 9 against a trespasser for immediate possession)
- (1928) A I R 1928 Nag 313 (314) *Chandray v Sanbashi* (Widowed by a person other than the plaintiff under the Specific Relief Act 1928 Nag 200 Overruled)
- (1909) 6 Cal W N 616 (617) *Sawato Sions v Sheikh Helal* (Plaintiff was in constructive possession of a plot of land through his tenant and the latter was dispossessed—Held that the plaintiff had no right to maintain a suit under S 9 that plaintiff was not entitled to bring a suit even where subsequent to such dispossession the tenant in collusion with the person who dispossessed refused to bring the suit)

over abandoned kotha — While so C took possession of kotha — A brought suit under S 9 — Held that A was entitled to have physical possession of the kotha as soon as it was finally abandoned by B)

4. Immovable property.—The term ‘immovable property’ has been defined in the General Clauses Act, 1897, as including land, benefits to arise out of land, and things attached to the earth, or permanently fastened to anything attached to the earth.¹ Accordingly it has been held that a right to recover rent by a landlord from his tenant is immovable property.² But a *hat*, the possession of which is held by collecting tolls or rents is not ‘immovable property’ within the meaning of Section 9 of the Specific Relief Act, and a suit to recover its possession is not, therefore, maintainable under that Section.³

As to whether the term ‘immovable property’ in Section 9 of the Specific Relief Act includes an incorporeal right, such as a right of way or a right of fishery, there seems to be a conflict of decisions among the High Courts for which see the undermentioned cases.⁴

suit against t under Section 9—Held that as t was dispossessed, he was entitled to bring the suit)

- (1911) 10 Ind Cas 455 (456) (Cal) *Ikhil Chandra Deb v Ikhil Chandra Biswas* (Ouster of a tenant is an ouster of the landlord for which the landlord can sue under Section 9)

1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 29 30 31 32 33 34 35 36 37 38 39 40 41 42 43 44 45 46 47 48 49 50 51 52 53 54 55 56 57 58 59 60 61 62 63 64 65 66 67 68 69 70 71 72 73 74 75 76 77 78 79 80 81 82 83 84 85 86 87 88 89 90 91 92 93 94 95 96 97 98 99 100

- (1911) 12 Ind Cas 190 (191) 5 Sind L R 42 *Sulabrahma v Jumromal* (Landlord can bring a suit where his tenant is dispossessed)

[See (1910) 5 Ind Cas 630 (631) 33 Mad 452 *Rathnasabapathi v Ramasamy* (Possession by receipt of rents may be disturbed and the person dispossessed may bring a suit for possession under Section 9)]

- (1909) 3 Ind Cas 466 (467) (Cal) *Shyama Churn v Muhammad Ali* (6 Cal W N 616 Not followed)]

[See also (1887) 14 Cal 649 (652) *Tarika Motan Mozu ida v Gunga Prasad Chuckerbaji*)]

Note 4

- 1 General Clauses Act Section 3 (25)

- 2 (1929) A I R 1929 Bom 467 (468) 53 Bom 773 122 Ind Cas 54 *Ratanlal Ghelabhai v Imarsingh Rupsingh* (19 Cal 544 (F B) Distinguished)

- (1904) 23 Mad 238 (239) *Jagannatha v Rama Payer*

[See (1888) 15 Cal 527 (530 531) *Sarbajit Dasu Mozumdar v Pran Sankar Roy*]

- 3 (1902) 29 Cal 614 (617) *Fuzlur Rahman v Krishna Prasad*

- 4 (1873) 21 Suth W R 178 (181) 1 Ind App 34 13 Beng L R 254 10 Bom H O R 281 3 Sar 306 (P C) *Malarana Fulehsangji v Desai Kullianraji* (A *toda* Girashak upon *nam* village and the right to recover arrears due in respect of that *hak* is an interest in immovable property)

- (1889) 13 Mad 54 (55 56) *Krishna v Akilanda* (Term immovable property includes incorporeal rights therein as tangible immovable property. A right of ferry is immovable property within the meaning of S. 9)

- (1887) 12 Bom 221 (224) *Bhundal Panda v Pandol Pos Patil* (A private right of fishing is immovable property within the meaning of S. 9)

Article 3
Notes
5-6

5 Person in possession without any title dispossessed by trespasser.—Suit after six months, if barred.—A is in possession of a certain land for 10 years without any title and is then dispossessed by B a trespasser. Is A bound to sue under Section 9 of the Specific Relief Act within six months of the dispossession, or can he maintain a suit for possession (under Section 8 of the Specific Relief Act) merely on the strength of his previous possession? According to the undermentioned cases,¹ he is not bound to sue within six months under this Article but can sue the trespasser on title the fact of previous possession being sufficient title against a mere trespasser. See for further discussion Article 142 *infra*.

6. Suit on title — Failure to prove title — Decree, if can be given under Section 9 of the Specific Relief Act.—Where a person bases his suit on title and fails to establish his title it has been held that a decree cannot be given on the basis of dispossession by treating the suit as one under Section 9 of the Specific Relief Act.²

[See (1848) 3 Cal 276 (279) 1 Cal L R 592 *Parbally Nath Roy Chowdhury v Mudho Parol* (The right to a *jalkar* is an interest in immovable property within the meaning of Article 144)]

(1909) 4 Ind Cas 116 (117) (Cal) *Bejoy Chandra v Banku Behari*

(1899) 23 Bom 673 (674 675) 1 Bom L R 167, *Mangaldas v Jivanram* (Per Cand J — A right of way would certainly seem to be an interest in immovable property but there is in my opinion something in the subject or context of S 9 of the Specific Relief Act which prevents such an effect being given to the definition. The repugnancy arises because it appears that the nature of the relief provided by the Act is repugnant to the character of the property in question.)

(1892) 19 Cal 544 (547) (F B) *Fadu Jhala v Gour Motan Jhala* (Per Petheram C J — I am of opinion that the whole of S 9 is repugnant to the idea that immovable property in that Section includes an incorporeal right such as a right of fishing in waters belonging to another.)

(1891) 18 Cal 80 (83) *Natabar Parue v Kubir Parue* (A suit for the possession of a right to fish in a *khal* the soil of which belongs to another does not come under S 9.)

(1872) 18 C L R 20 (21) *Har Datt v Ram Chander*

property.))

Note 5

1 See (1884) 8 Bom 371 (376) *Krishnarai v Vasudev* (Where T I A 73 is explained.)

(1891) 13 All 537 (559) 1891 All W N 196 (F B) *Wah Ahmed Khan v Ajudhia Khandu* (Per Mahmood J *contra*.)

(1879) 5 Cal L R 276 (280) *Aawa Manji v Khewas Nussio*

(1899) 23 Mad 179 (182 183) *Mustapha Saheb v Santha Pillai*

(1902) 1902 Pun L R No 137 Page 584 (595 596) 1902 Pun Re No 78 *Abdul Hamid v Sarbuland Khan*

[See also (1882) 11 Cal L R 183 (184) *Brojo Sunder Gossami v Aolash Chunder Kur*]

Note 6

1 (1910) 7 Ind Cas 495 (496) 33 All 174 (F B) *Lachman v Shambu* (15 All 384 Overruled.)

Article 3
Note 7

7. Defendant maintained in possession under Section 145, Criminal Procedure Code—Plaintiff, if can sue under Section 9, Specific Relief Act. — Where the plaintiff was forcibly dispossessed by the defendant and in a proceeding under Section 145 of the Criminal Procedure Code his possession was maintained, it was held in the undermentioned cases¹ that the existence of the order was no bar to a suit by the plaintiff under Section 9 of the Specific Relief Act. The High Court of Calcutta has on the other hand held that where there is an intervening attachment also under Section 145 sub-section 4 of the Criminal Procedure Code, such a suit is not maintainable².

Article 4

4. Repealed by Section 3 of the Repealing and Amending Act, XX of 1937.

The repealed Article was as follows :

4 Under the Employers and Workmen (Disputes) Act, 1860, Section 1	Six months.	When the wages, hire or price of work claimed accrue or accrues due
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Part IV — One year.

Article 5

5. Under the summary procedure referred to in section 128 (2) (f) of the Code of Civil Procedure, 1908, where the provision of such summary procedure does not exclude the ordinary procedure in such suits and under Order XXXVII of the said Code.	One year.	When the debt or liquidated demand becomes payable or when the property becomes recoverable.
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* Act of 1877.

5.—Under the Code of Civil Procedure, Chapter XXXIX (Of summary procedure on negotiable instruments)	Six months	When the instrument sued upon becomes due and payable.
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(1927)

(1902) 25 Mad 448 (451) 11 Mad L Jour 403, *Ramasamy Chetty v. Paraman*
[See (1915) A I R 1915 All 244 (245) 29 Ind Cas 210, *Makhdoon Bakhsh v Hashim Ali*]

Note 7

- 1 (1908) 30 All 331 (333) 5 All L Jour 297 1908 All WN 142, *Jwala v Ganga*.
(1902) 26 Bom 353 (358) 3 Bom L R 919, *Nagappa v Sayad Badruddin*.
2 (1918) A I R 1918 Cal 137 (137) 43 Ind Cas 153, *Azimuddin Ahmed v. Alauddin Bhimya* (7 Cal L Jour 547, Followed)

Synopsis

1. Legislative changes.
2. Limitation for summary suits.

1. Legislative changes.

1 Changes introduced by the Act of 1908

For the words "Under the Code of Civil Procedure, Chapter XXXIX (Of summary procedure on negotiable instruments)", the words "under the summary procedure referred to in Section 128 (2) (f) of the Code of Civil Procedure" were substituted See Note 2 *infra*.

2 Changes introduced by the Amending Act XXX of 1925

(a) The words "where the provision of such summary procedure does not exclude the ordinary procedure in such suits and under Order XXXVII of the said Code" were added See Note 2 *infra*

(b) For the words "six months" the words "one year" were substituted in the second column See Note 2 *infra*

2. Limitation for summary suits.—Article 5 of the Limitation Act, 1877, prescribed a period of six months for suits on negotiable instruments instituted under Chapter 39 of the Civil Procedure Code of 1882 (corresponding to Order 37 of the Code of 1908) There was no specific provision for other summary suits such as those specified in Section 128 sub section 2 clause (f) of the Civil Procedure Code of 1908 When Section 128 was newly introduced in that Code in 1908, Article 5 of the Limitation Act was also amended by providing a period of six months for suits "under the summary procedure referred to in Section 128 sub section 2 of the Code of Civil Procedure," the intention of the Legislature obviously being to provide for all summary suits under the Civil Procedure Code¹ It was, however, held by the High Court of

Act of 1871.

5.—Under Act No V of 1866 (to provide a summary procedure on bills of exchange, and to amend, in certain respects, the commercial law of British India)

Six months

When the bill or promissory note becomes due and payable

Act of 1859.

No corresponding provision

Article 5 — Note 2

¹ (1927) A I R 1927 Sind 90 (92) 98 Ind Cas 78 21 Sind L R 257, *Firm of Jetha Deys & Co v Firm of Srs Ram Moolchand*.

Calcutta in the undermentioned case² that the words "summary procedure referred to in Section 128 (2) (f) of the Code of Civil Procedure" did not include suits under Order 37. In view of this, Article 5 was again amended by Act XXX of 1925 so as to include suits under Order 37. The period of six months has also been increased to one year. Therefore, a summary suit, whether under Order 37 or under Section 128 of the Code of Civil Procedure, has to be filed within one year from the date when the debt becomes payable or when the property becomes recoverable.³

**Article 5
Note 2**

6.* Upon a Statute, Act, Regulation or Bye-law, for a penalty or forfeiture.	One year.	When the penalty or forfeiture is incurred.
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Article 6

Synopsis

1. Scope of the Article.
2. Suit must be for a penalty or forfeiture.
3. Bye-law.
4. Special remedy provided for in other Acts — Effect.
5. Special or local law.
6. Suit by Government.

Other Topics

Article—To be read subject to Article 149

Suit for damages

Suit for debt—Article does not apply

See Note 6

See Note 2, Pt 2

See Note 2, Pt 1

1. Scope of the Article.—This Article deals with what are known as "penal actions" in England. Penalties or forfeitures in England under penal statutes are generally recoverable by the Crown or the party aggrieved or a common informer as the case may be. The remedy is generally designated a "penal action" or, where one part of the forfeiture is given to the Crown and the other to the informer,

* **Acts of 1877 and 1871**

Same as above

Act of 1859 — Section 1, Clause 2.

To suits for pecuniary penalties or forfeitures for the breach of any law or regulation — the period of one year from the time the cause of action arose

2 (1925) A I R 1925 Cal 781 (782) 52 Cal 954 88 Ind Cas 400, *Rabindra Nath Dutt v Abdul Ahad & Co*

3 (1927) A I R 1927 Sind 90 (91, 92) 98 Ind Cas 78 21 Sind L R 257, *Firm of Jetha Devji & Co v Firm of Sri Ram Woolchand*

Article 6
Notes
1—4

a popular or *qui tam* action¹ A penalty created by statute, if nothing is said as to who may recover it, and if it is not created for the benefit of a party aggrieved and the offence is not against an individual, belongs to the Crown and the Crown alone can sue for it²

The suit must be one for a penalty or forfeiture upon a *Statute, Act, Regulation or Bye law* A suit for a penalty in a *bond* is not within this Article³

2. Suit must be for a penalty or forfeiture. — A debt is neither a penalty nor a forfeiture A suit for a debt is not one governed by this Article¹ Similarly a suit to recover damages caused by the misconduct of the defendant is not within this Article, although such damages may be given by statute²

3. Bye-law. — Certain cattle of the defendants were caught grazing, without the permission of the plaintiffs, in a *chak* of which they were the lessees from the Government and as such, entitled to grazing fees A clause in the lease authorized the plaintiffs to levy an extra fee in the case of cattle grazed without permission It was held that the clause was a "bye law" within the meaning of this Article¹

4. Special remedy provided for in other Acts—Effect.—It is a general principle of law that where a statute creates a right and provides a remedy, that remedy, and no other is available¹ A suit

Article 6 — Note 1

1 Wharton's Law Lexicon

2 (1883) 31 W R (Eng) 677 (677) L R 8 App Cas 354 47 J P 405 52 L J Q B 505 48 L T 681 *Bradlaugh v Clarke*

See also Halsbury, Vol 10, page 7 and Vol 27, page 192

3 (1908) 31 Mad 54 (58) 17 Mad L Jour 537 2 Mad L Tim 461, *Taluk Board, Kundapur v Lakshminarayana Kamplhi*

Note 2

1 (1881) 3 Mad 124 (125) *President of the Municipal Commission, Guntur v Srikahulapu Padmarasu* (Suit for taxes)

2 (1900) 16 T L R 296 (297) L R 1 Ch 718 69 L J Ch 337 82 L T 277 48 W R (Eng) 488 6 Manson 51, *Thomson v Lord Clanmorris*

Note 3

1 (1875) 1875 Pun Re No 3, *Mera Lal v Mukhta*

Note 4

1 (1924) A I R 1924 Mad 521 (522) 78 Ind Cas 82, *Secy of State v Kuppusamy Chetty*

(1928) A I R 1928 Mad 641 (647) 110 Ind Cas 765, *Mangala Goundar v Ayyothurai Mudaliar*

(1921) A I R 1921 Nag 60 (64) 65 Ind Cas 230 *Lachmichand v Chaturbhuj*

(1917) A I R 1917 Nag 149 (151) 42 Ind Cas 799 13 Nag L R 210 *Basodi v Muhammad Ray*

(1933) A I R 1933 All 358 (363) 142 Ind Cas 403 55 All 406 *Joti Prasad v Amba Prasad*

(1930) 1930 Mad W N 651 (652), *Periammal v The Official Receiver of Coimbatore*

(1918) A I R 1918 Cal 850 (856) 39 Ind Cas 465 44 Cal 816 18 Cri L Jour 497, *Budhu Lal v Chaitu Gope*

(1900) 4 Ind Cas 795 (796) 5 Nag L R 176, *Jagannath v Ahuba*

in such cases will be impliedly barred.² In many Acts penalties imposed thereby are recoverable as if they were arrears of revenue. In such cases a suit for such penalty would be barred.

5. Special or local law. — This Article, like any other Article, will not apply where a different period of limitation is prescribed for a similar suit, by a special or local law. See Section 29 Clause (b), *ante*.

6. Suit by Government. — This Article as well as all other Articles of the Limitation Act must be read subject to Article 149 of the Act, which provides that the period of limitation prescribed for any suit by or on behalf of the Secretary of State for India in Council is 60 years from the time when the period of limitation would begin to run under the Act against a like suit by a private person. See Notes to Article 149, *infra*.

7.* For the wages of a household servant, artisan or labourer not provided for by this schedule, article 4.	One year.	When the wages accrue due.	Article 7
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Synopsis

1. Scope of the Article.
2. "Wages."
3. "Household servant."
4. "Labourer."
5. "Artisan."
6. Starting point of limitation.

* Act of 1877.
Same as above

Act of 1871

7 — For the wages of a domestic servant, artisan or labourer not provided for by this schedule No 4	One year	When the wages used for accrue due
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Act of 1859 Section 1, Clause 2

To suits to recover the wages of servants, artisans or labourers—the period of one year from the time the cause of action arose

- (1933) A I R 1933 Nag 193 (195) 143 Ind Cas 514 29 Nag L R 278 (F B),
Vithoba Chinnaji v Govindarao Vithal Rao
2 (1907) 31 Bom 604 (609 610) 9 Bom L R 417 *Bhaishankar Nanabhai v Municipal Corporation of Bombay*
(1922) A I R 1922 Cal 4 (5) 65 Ind Cas 711 *Saibesh Chandra v Bejoy Chand Mohatop Bahadur*
(1928) A I R 1928 Lah 562 (564) 111 Ind Cas 508 10 Lah 333 *Dera Singh v Fatal Dad*
See also Authors' Civil Procedure Code, Section 9 Notes 55 and 62

Article 7
Notes
1—2

Other Topics

Archaka—Not household servant	See Note 3, Pt 12
'Labourer'—Who are not, examples	See Note 4, Pts 3 to 10a
Motor driver provided with boarding and lodging is household servant	
Salary	See Note 3, Pt 12a
'Servant' must be read <i>ejusdem generis</i> with artisans or labourers	See Note 2, Pt 2
	See Note 3, Pt 3

1. **Scope of the Article.**—A suit for wages under the *Employers and Workmen (Disputes) Act, 1860, Section 1* was governed by Article 4 which has now been repealed by Act 20 of 1937. Suits for the wages of household servants, artisans or labourers fall under this Article. Suits for seamen's wages are dealt with by Article 101 *infra*. Suits for wages not falling under any of the above specific Articles are governed by Article 102 *infra*.¹

2. **"Wages."**—"Wages" means the payment agreed upon by a master to be paid to a servant or any other person hired to do work or business for him.¹ The real test to find out whether an emolument is "wages" or not, is to see whether such emolument is payable by an employer to the employee.^{1a} Thus the emoluments of office of an archaka payable by the temple trustee are "wages".^{1b} In general, however, the word 'salary' is used for payment of servants of a higher class and 'wages' is confined to the earnings of servants of a lower class such as labourers or artisans.² Usually the word 'wages' is used in connection with daily wages, but it would include the amount paid as monthly emoluments.³

Since 'wages' means the payment agreed upon by the employer to be paid to the employee, it is clear that this Article will apply only

Article 7 — Note 1

- 1 (1926) A I R 1926 All 172 (173) 90 Ind Cas 120 48 All 164, *Mutsaddi Lall v Bhagwan Das*
 (1935) A I R 1935 Mad 128 (129) 155 Ind Cas 591, *Vedagiri Sastriar v Jagath Guru Sankarachariar Swamigal, Kumbakonam*
 (1918) A I R 1918 Mad 366 (368) 45 Ind Cas 414 41 Mad 528, *Bharadwaja Mudahar v Arunachalla Gurukkal*

Note 2

- 1 Wharton's Law Lexicon
 (1926) A I R 1926 All 172 (173) 90 Ind Cas 120 48 All 164, *Mutsaddi Lall v Bhagwan Das* (Wages include payment for any services)
 1a (1935) A I R 1935 Mad 128 (129) 155 Ind Cas 591, *Vedagiri Sastriar v Jagathguru Sankarachariar Swamigal, Kumbakonam*
 1b (1935) A I R 1935 Mad 128 (129) 155 Ind Cas 591 *Vedagiri Sastriar v Jagathguru Sankarachariar Swamigal, Kumbakonam*
 (1936) A I R 1936 Mad 149 (150) 161 Ind Cas 475, *Shivaram Joshi v Nagappa*
 2 (1926) A I R 1926 All 172 (173) 90 Ind Cas 120 48 All 164, *Mutsaddi Lall v Bhagwan Das*
 (1917) A I R 1917 All 466 (468) 36 Ind Cas 371 39 All 81, *Sushil Chandra Das v Gauri Shanker*
 3 (1918) A I R 1918 Mad 366 (368) 41 Mad 528 (532) 45 Ind Cas 414, *Bharadwaja Mudahar v Arunachalla Gurukkal*

to suits by an employee *against the person liable as employer to whose services he had been employed* ⁴. A suit by one Government servant against another for the recovery of a sum of public money received by the defendant for disbursement to the plaintiff is not a suit for wages such as is contemplated by this Article ⁵. Nor will the Article apply to a suit by an *archaka* of a temple against the temple trustee (who is his employer) for perquisites received by the trustee from third persons and to which the plaintiff is entitled ⁶. The reason is that such perquisites are not 'wages' which were *agreed upon by the employer to be paid in the archaka for his services*.

Servant's wages are a "debt" but the suit on such debt is governed by this Article only. If the debt has been acknowledged by the debtor within the period prescribed by this Article, then by virtue of S 19 of the Act, the suit may be filed within a further period of one year prescribed by this Article ⁷. It has been, however, held by a Single Judge of the High Court of Madras that where the employer gives credit in his account books to the wages due to the servant, then a suit for the recovery of the amount so given credit to is not governed by this Article but is governed by the ordinary rule of limitation applicable to debtors ⁸.

A suit by a goldsmith to recover the price of labour for making certain ornaments has been held in the undermentioned case ⁹ as not one under this Article but one falling under Article 56 apparently on the ground that it is not a suit for "wages".

Where certain *duaris* of the temple of Baidyanath at Deogbar were bound to perform certain services and by way of emoluments became entitled to certain specific payments in kind, it was held by the High Court of Patna that the payments were not 'wages' on the ground that they were emoluments attached to the hereditary office and on the ground that although the services were performed only by a few of the *duaris*, the fees to which they were entitled were distributable amongst the whole body of *duaris* ¹⁰.

3. "Household servant." — In order that a person may be a "household servant," he must be *firstly* a "servant" within the meaning of this Article and *secondly* he must be one who is attached

4 (1868) 4 Mad II C R 43 (43), *Shiva Ram Pillai v Turnbull*

(1918) A I R 1918 Mad 366 (368) 41 Mad 528 45 Ind Cas 414, *Bharadwaja Mudaliar v Arunachalla Gurukhal* (Wages means remuneration for work done payable by a master to his servant)

5 (1868) 4 Mad II C R 43 (44), *Siva Ram Pillai v Turnbull*

6 (1918) A I R 1918 Mad 366 (368) 41 Mad 528 45 Ind Cas 414, *Bharadwaja Mudaliar v Arunachalla Gurukhal*

7 (1866) 5 Suth W R S C C Ref 3 (4), *Nobin Chunder Mozoomdar v T J Kenny*

8 (1928) A I R 1928 Mad 27 (27) 106 Ind Cas 223, *Chinnan Chetty v Vilathan*

9 (1885) 1885 Bom P J 197 (197), *Lishnu v Gopal*

10 (1926) A I R 1926 Pat 205 (206) 5 Pat 249 91 Ind Cas 820, *Sri Sri Baidyanath Jiu v Hardutt*

Article 7
Note 3

to the household of the employer. Where A and B are both employed by C, A cannot be said to be the "servant" of B though he may receive his remuneration through B.¹

The word "servant" in view of its being coupled with the words "artisans or labourers" must be read as relating to persons whose personal services are employed in capacities similar to those of labourers and artisans.² In other words, the expression "servant" must be read *ejusdem generis* with the words "artisans or labourers" which follow it.³ A cook is a "servant" though he may be an expert in cooking.⁴ But a person employed for collecting rents,⁵ or as a companion on a journey,⁶ or as a *mukhtear*,⁷ or as a wet nurse employed to suckle a child,⁸ or as a teacher for teaching, fencing and wrestling,⁹ cannot be said to be employed in a capacity similar to that of a "labourer" or "artisan" and is not a servant within the meaning of this Article.

The Article does not apply to all servants but only to household servants. Section 1 clause 2 of the Limitation Act, 1859, provided that the period of limitation for a suit to recover the wages of "servants, artisans and labourers" was one year from the time the cause of action arose. It was, however, held in cases arising under that Act that the word "servant" meant, having regard to the context, *domestic or menial* servant.¹⁰ The Act of 1871 gave effect to this view by introducing the word "domestic" before the word "servant". The substitution of the word "domestic" by the word "household" in the Acts of 1877 and 1908 seems to be a merely verbal one. In *Sitaram v Jagannath*^{10a} it was held that a domestic servant was the same thing as a household servant, and the following definition of "domestic servant" was approved:

"Domestic servants are servants whose main or general function it is to be about their employers' persons or establish-

Note 3

- 1 (1870) 13 Suth W R 150 (151) 4 Beng L R App 69, *Obhoy Churn Dutt v. Huro Chander Doss*
- 2 (1868) 4 Mad H O R 43 (43), *Sitaram Pillai v Turnbull*
- 3 (1933) A I R 1933 Oudh 393 (394) e Luck 119 147 Ind Cas 227, *Mt Subhani Begam v Imtiaz Ahmed Khan*
- 4 (1916) A I R 1916 Mad 633 (633) 28 Ind Cas 956 *Kuppu Rao v Narasim*
- 5 (1933) A I R 1933 Oudh 393 (393, 394) e Luck 119 147 Ind Cas 227, *Mt Subhani Begam v Imtiaz Ahmed Khan*
- (1868) 10 Suth W R 260 (261), *Oroon Chunder Mundul v Romanath Rukheet* (Tahsildar or Collector of rents is not a domestic servant)
- 6 (1933) A I R 1933 Oudh 393 (394) e Luck 119 147 Ind Cas 227, *Mt Subhani Begam v Imtiaz Ahmed Khan*
- 7 (1866) 6 Suth W R Civil Ref 11 (12) *Nitto Gopal Ghose v A B Mackintosh*.
- 8 (1912) 17 Ind Cas 658 (659) (All), *Mohan Lal v Jumerat*
- 9 (1975) 8 Mad H O R 67 (68), *Pylwan Jarkan Sahib Vastath v Jenaka Raja Tatar*
- 10 (1866) 6 Suth W R Civil Ref 11 (12), *Nitto Gopal Ghose v A B Mackintosh*
- (1868) 10 Suth W R 260 (261), *Oroon Chunder Mundul v Romanath Rukheet*
- 10a (1936) A I R 1936 Lah 661 (662) 160 Ind Cas 1042

ments, residential or quasi-residential, for the purpose of ministering to their employer's personal or ordinary needs or wants or to the needs or wants of those who are members of such establishments, including guests "

A person who performs the service of sweeping and cleaning a temple, providing flowers and garlands to the idol,¹¹ or an *archaka* of a temple,¹² may be a servant of the temple trustee but is not his household servant. A suit by such person for remuneration due to him is therefore not within this Article. A motor car driver who was provided with board and lodging was held to be a household servant.^{12a}

See also the undermentioned cases¹³

4. "Labourer" — A "labourer" is a person who performs physical labour as a service or for a livelihood, e.g. one who does work requiring chiefly bodily strength or aptitude and little skill or training, as distinguished for example from an artisan.¹ A "labourer" has also been defined as a person "who digs and does other work of the kind with his hands."²

The following persons are not labourers within the meaning of this Article —

(a) A weighman employed to work in a shop³

(b) A person employed as a salesman to assist the dealer in the shop⁴

11 (1884) 7 Mad 99 (100) *Bhatathradan v Rama*

12 (1918) A I R 1918 Mad 366 (366) 41 Mad 523 (532) 45 Ind Cas 414, *Bharadwaja Mudaliar v Arunachalla Gurukkal*

(1911) 10 Ind Cas 518 (519) 85 Mad 631, *Seshadri Aiyangar v Ranga Bhattar*

12a (1936) A I R 1936 Lah 661 (662) 160 Ind Cas 1042, *Sitaram v Jagannath Singh*

[But see (1936) A I R 1936 Cal 608 (608) 167 Ind Cas 294, *Khagendra Nath v Kanti Bhushan* (Bus or motor car driver is not a household servant)]

13 (1872) 18 Suth W R 298 (299) *Golamee Chowkeedar v Sheikh Paelan* (Village chowkidar under Regulation 20 of 1827 S 21, is a servant)

(1937) A I R 1937 Mad 340 (341) 171 Ind Cas 72, *Kunhi Raman v V Govindan* (Hotel servant is not a household servant)

Note 4

1 (1935) A I R 1935 Rang 235 (236) 157 Ind Cas 732, *Musa Meah Sawdagar v Shirazulla*

(1926) A I R 1926 All 172 (173) 90 Ind Cas 120 48 All 164, *Mutsaddi Lall v Bhagandas*

2 (1926) A I R 1926 All 172 (173) 90 Ind Cas 120 48 All 164 *Mutsaddi Lall v Bhagandas*

(1904) 1904 Pun Re No 28 (Cn) at page 76 1904 Pun L R No 64 1 Cri L Jour 1103, *Imamuddin v Hurmazee* (Actor employed in a theatrical company is not a labourer)

3 (1926) A I R 1926 All 172 (173) 90 Ind Cas 120 48 All 164, *Mutsaddi Lall v Bhagandas*

4 (1935) A I R 1935 Rang 235 (236) 157 Ind Cas 732, *Musa Meah Sawdagar v Shirazulla*

Article 7
Notes
4—8

- (c) A *shakna* or *bisardar* engaged merely to watch crops and see that they are not taken away ⁵
- (d) A *uaramdar* who is paid a share of the crops ⁶
- (e) A bus conductor ⁷
- (f) A contractor supplying labour and materials and supervising the labourers but not himself labouring with them ⁸ But where a person is both a supplier of labour and a labourer himself, it must depend upon the terms of the contract whether the character of work as a whole is or is not that of work done by a workman or a labourer ⁹
- (g) A carpenter—although he works with his hand his work requires *skill and training* ¹⁰ As to whether he is an 'artisan' within the meaning of this Article see Note 5 *infra* See also Article 102 *infra*
- (h) A workman earning his living by laying and burning bricks ^{10a}

5 "Artisan"—The word 'artisan' means an artificer or one trained to mechanical dexterity in some mechanical art or trade ^{1a} Carpentry for example is a mechanical art and requires some dexterity in its application to the work in hand Therefore a carpenter is an artisan ¹ So also is a person engaged to drive an engine on board a

5 (1935) A I R 1935 All 102 (107) 152 Ind Cas 932 *Babu Lal v Hukam Singh*

(1924) A I R 1924 Oudh 189 (189) 26 Oudh Cas 827 79 Ind Cas 576 *Ghasi Ram v Uma Dutt*

6 (1965) 2 Mad H C R 387 (388) *Andi Konan v Iekata Subbayan*

¹ Q B 350 51 L T 213 32 W R 759
General Omnibus Co (Referred in

8 (1915) A I R 1915 Mad 88 (90) 25 Ind Cas 979 15 Cri L Jour 651 *In re Mamu Beari*

(1884) 7 Mad 100 (102) 1 Weir 690 *Gibby v Sbbu Pillai* (Decided under Act 13 of 1859)

(1890) 13 Mad 351 (352) 1 Weir 651 *Caluram v Chengappa* (Carrier by boat not rendering personal labour is not a labourer—Decided under Act 13 of 1859)

[See also (1885) 10 Bom 96 (97) *In re Balakrishna Saligram* (Sub-contractor who does not himself work is not a workman, 'labourer or artisan within S 2 of the Act 13 of 1859)]

9 (1915) A I R 1915 Mad 88 (90) 25 Ind Cas 979 15 Cri L Jour 651 *In re Mamu Beari*

10 (1926) A I R 1926 All 172 (173) 90 Ind Cas 120 48 All 164 *Mustaddi Lall v Blag van Dass*

(1884) 13 Q B D 832 (834) 53 L J Q B 352 51 L T 213 32 W R (Eng) 759 48 J P 503 *Morgan v London General Omnibus Co* (Referred to in A I R 1926 All 172 (173))

10a (1914) A I R 1914 All 194 (195) 25 Ind Cas 351 15 Cri L Jour 599 *Bharosa v Emperor*

Note 5

^{1a} Webster's Dictionary

1 (1934) A I R 1934 Nag 260 (260) 162 Ind Cas 885 *Naldeo v Ramkrishna Mahadeo*

steamer² or a motor car driver³ The word however does not apply to higher classes of work which involve responsibility and intellectual training⁴ Thus an artist employed to paint pictures⁵ or a person qualified as an engineer to manage a boiler⁶ is not an artisan within the meaning of this Article

Article 7
Notes
8-6

6. Starting point of limitation. — The starting point of limitation is the time when the wages *accrue due* Where the salary or wages are to be paid at the expiration of each month, limitation begins to run at the end of each month and not from the time at which the plaintiff's services were ended¹ Where the defendant promises to pay the wages and the suit is brought after one year after the wages become due but within one year of the promise, the suit will be barred under this Article Nor will the promise give a fresh cause of action as it is without consideration²

See also Note 6 to Article 102 *infra*

8.* For the price of food or drink sold by the keeper of a hotel, tavern or lodging-house.	One year.	When the food or drink is delivered.
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Article 8

1. "Hotel, tavern or lodging-house." — A hotel is a house for entertaining strangers or travellers A tavern is a hotel usually

* Acts of 1877 and 1871
Same as above

Act of 1859 Section 1, Clause 2

To suits to recover the amount of tavern bills or bills for board and lodging or lodging only—the period of one year from the time the cause of action arose

- 2 (1908) 32 Bom 10 (18) 9 Bom L R 1059 7 Cri L Jour 238 *Emperor v Haji Sheik Muhammad Shustars* (Under the Indian Emigration Act)
- 3 (1927) A I R 1927 Rang 279 (279) 5 Rang 477 104 Ind Cas 520 *Sewaram v Lachminarayan*
- (1936) A I R 1936 Lah 661 (662) 160 Ind Cas 1042 *Sita Pam v Jagannath Singh*
- (1936) A I R 1936 Cal 808 (809) 167 Ind Cas 294, *Khagendranath v Kanti Bhusan*
- 4 (1927) A I R 1927 Rang 279 (279) 5 Rang 477 104 Ind Cas 520 *Sewaram v Lachminarayan*
- (1919) A I R 1919 Sind 54 (55) 12 Sind L R 140 50 Ind Cas 37, *Natalmal v Mangaldas*
- (1934) A I R 1934 Nag 260 (260) 152 Ind Cas 885, *Namdeo v Pamkrishna Mahadeo*
- 5 (1864) 2 Mad H O R 6 (7) *Viraswamy Nayak v Sayambabay Sahiba*
- 6 (1919) A I R 1919 Sind 54 (55) 50 Ind Cas 37 12 Sind L R 140, *Natalmal v Mangaldas*

Note 6

- 1 (1866) C Suth W R Civ Ref 33 (33) *Kah Churn Mstler v Mahomed Soleem* (See also (1916) A I R 1916 Mad 633 (633) 28 Ind Cas 956, *Kuppurao v Narasim*)
- 2 (1920) A I R 1920 Low Bur 136 (137) 64 Ind Cas 361 10 Low Bur Rul 332, *Shree Hla Gyi v San Dwe*

Article 8
Note 1

licensed to sell liquors in small quantities. A village liquor shop will be a "tavern" within the meaning of this Article.¹ A lodging house is a house where lodgings are provided and let.²

See also the undermentioned case³

Article 9

9. ³ For the price of lodging.	One year.	When the price becomes payable.
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Synopsis

1. Lodging.
2. Starting point.

1. Lodging. — A lodger must be distinguished from a *tenant*. The former has not in law an *exclusive occupation*, although he may have a separate apartment, and is therefore in the position of a *licensee* if the landlord retains the general control and dominion of the house including the part occupied by the lodger.¹ In *Toms v Luckett*² it was held by Maule, J., that where the owner of a house takes some person into his house who occupies a room and has the right of egress and ingress but retains his general character of master of the house, the person so occupying is a lodger. Where

* Act of 1877.

Same as above

Act of 1871.

9.—For the price of lodging	One year	When the lodging ends
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Act of 1859.

Same as given under Article 8, *supra*

Article 8 — Note 1

1 (1908) 1908 Pun L R No 142 (at page 429) 1908 Pun Re No 27. 1908 Pun W R 43, *Bhag Singh v Dharta Singh*

2 Webster's Dictionary

[See (1908) 1908 Pun L R No 142 Page 429 1908 Pun Re No 27 1908 Pun W R 43, *Bhag Singh v Dharta Singh*]

3 (1926) A I R 1926 Cal 530 (531) 91 Ind Cas 839, *Jogeshchandra Misra v. Ramnikanta Mahanta* (The question of applicability of Arts 8 and 9 was left open)

Article 9 — Note 1

1 (1860) 119 R R 930 (934) 29 L J Q B 161 6 Jur (N S) 867 8 W R (Eng) 413 2 El & El 721, *Wright v Staver* (Cited in Halsbury, Vol 18, page 339)

(1874) L R 9 Q B 180 (192) 43 L J M O 69 30 L T 93 22 W R (Eng) 330, *Allan v Liverpool* (Cited in Halsbury, Vol 18, page 339)

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1 page 144 Notes)
195 51 L J Q B
3aylis (Cited in

the landlord exercises no control over the part occupied by another, the latter is a *tenant*. The occupier does not, however, become a lodger merely by reason of the fact that the landlord resides on the premises and retains control of the passages and staircase and other parts used in common.³

It would follow from what has been stated above that the "price of lodging" is not the same thing as *rent* payable by a tenant. A suit for rent is governed by Article 110, *infra*.

2. Starting point. — Under the Act of 1871, the starting point of limitation was *when the lodging ended*. Under the present Act the starting point is when the *price becomes payable*. In cases therefore where the price of lodging is payable by the week or by the month, limitation will begin to run as each instalment becomes due, notwithstanding the fact that the lodging has not terminated.

Article 9
Notes
1—2

10.* To enforce a right of pre-emption, whether the right is founded on law, or general usage, or on special contract.	One year.	When the purchaser takes, under the sale sought to be impeached, physical possession of the whole of the property sold, or, where the subject of the sale does not admit of physical possession, when the instrument of sale is registered.
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Article 10

* Act of 1877.

Same as above

Act of 1871.

10 —To enforce a right of pre-emption, whether the right is founded on law or general usage, or on special contract	One year	When the purchaser takes actual possession under the sale sought to be impeached
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Act of 1859, Section 1, Clause 1.

Limitation of one year — Pre-emption suits	To suits to enforce the right of pre-emption, whether the same is founded on law or general usage or on special contract, the period of one year to be computed from the time at which the purchaser shall have taken possession under the sale impeached
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8. (1906) L R 1 K B 60 (73) 75 L J K B 310 94 L T 76 54 W R (Eng) 225
4 L G R 86 69 J P 429 22 T L R 63, *Kent v Fittal*. (Cited in Halsbury, Vol 18, page 340)

Article 10
Note 1

Synopsis

1. Scope of the Article.
2. Nature of the right of pre-emption
3. Pre-emption right founded on law.
4. Right founded on general usage.
5. Right founded on special contract
6. Starting point of limitation
7. When property admits or does not admit of physical possession.
8. The possession must have been taken under the sale.
9. Sale
- 10 "Of the whole of the property sold"
11. "Is registered"
12. Burden of proof.
13. Suits not within this Article.
14. Parties to suit for pre-emption.
15. *Lis pendens*.
16. Value of the plea of limitation.
17. Plea of right of pre-emption in defence

Other Topics

Article 120—Applicability	See Notes 6, 13, 14
Execution sales—Applicability of Article	See Note 9, Pts 9 to 11
Land in possession of trespasser	See Note 7 Pt 11
Minority—No ground for extending period	See Note 6 Pt 6
Mortgage by conditional sale	See Note 9 Pts 11a to 14
Sale must be valid sale	See Note 9
Sale—Valid ty questioned and sale held valid—Time runs from date of sale and not from date of decree	See Note 9 Pt 6
Symbolical possession—Delivery of — Not equivalent to delivery of physical possession	See Note 7, Pt 15

1. **Scope of the Article** —The first column of the Article would seem to suggest that this Article applies to all suits for pre-emption whether the right of pre-emption is based on law, or general usage, or on special contract. But when read with the third column, it is clear that the scope of the Article is limited. *First*, the Article applies to suits to enforce a right of pre-emption in respect of a *sale* only. According to the general usage in several parts of India, a *mortgage* or even a lease may be pre-empted¹. In some cases there

Article 10—Note 1

- 1 (1921) A I R 1921 All 154 (155) 52 Ind Cas 884 *Mukhlal Rai v Hiranand Singh* (Mortgage can be pre-empted)
[See also (1894) 1894 All W N 49 (49) *Parag Lal v Jauhar Lal* (Article 120 applies)]

is a right of pre-emption recognized even where a contract to sell has been entered into^{1a} This Article is, as has been said before, not applicable to such cases² Secondly, the Article applies only to a suit against the purchaser whose purchase has given rise to the right of pre-emption, and not to a suit against any other person. Thus, where A sells property to B and, before X brings a suit for pre-emption of such sale, B transfers the property to C, and C is added as a party to the suit, the suit so far as C is concerned is not one governed by this Article³ The reason is that the suit against him is really not for pre-emption at all but is in effect a suit for a declaration that the transfer by the original vendee would not affect the rights of the pre-emptor and the transferee would be bound by the decree passed against the original vendee⁴ Thirdly there are many cases where there may be a valid sale of property not admitting of physical possession being given and not evidenced by any registered instrument. Thus, in the Province of the Punjab where the Transfer of Property Act does not apply, an oral sale of an intangible interest such as the equity of redemption or a reversion in a lease is not invalid. A suit for pre-emption in respect of such sale is not governed by this Article⁵

The principle underlying the fixing of the starting point of limitation as the date of the delivery of physical possession, or the registration of the instrument of sale, is that parties who have or claim to have a right of pre-emption should have notice of any transfer adverse to their interests⁶ If physical possession is given

(1926) A I R 1926 All 549 (549) 95 Ind Cas 138 *Gopal Ram v Lachma Misir* (Lease)

1a (1922) A I R 1922 Nag 14 (15) 65 Ind Cas 959 *Rai v Sudakalli* (Central Provinces Tenancy Act S 41)

2 (1885) 1885 Pun Re No 103 *Uttam Singh v Fattah Singh* (Article 120 applies to such cases)

(1926) A I R 1926 All 549 (549) 95 Ind Cas 138 *Gopal Ram v Lachma Misir*

(1921) A I R 1921 All 154 (155) 62 Ind Cas 884 *Muklat Rai v Hiranand Singh* (Article 120 applies)

(1922) A I R 1922 Nag 14 (15) 65 Ind Cas 959 *Rai v Sudakalli*
[But see (1879) 2 All 237 (238) *Gulab Singh v Amar Singh* (Pre-emption of mortgage—Art 10 applied—Submitted wrong)]

3 (1913) 18 Ind Cas 70 (77) 1913 Pun Re No 31 *Karam Dad v Ali Muhammad*

(1914) A I R 1914 Lah 402 (403) 1914 Pun Re No 49 25 Ind Cas 443, *Fazal Hussain v Malik Jinda*

(1914) A I R 1914 Lah 520 (521) 1915 Pun Re No 17 28 Ind Cas 695, *Hari Ram v Allah Ditta*

(1914) A I R 1914 Oudh 216 (217) 24 Ind Cas 116 *Razau and Singh v Dukchhor*

(1911) 13 Ind Cas 792 (794) 1911 Pun Re No 84 *Shah Muhammad v Piara Mal*

4 See the cases cited in Foot Note (3) above

5 (1924) A I R 1924 Lah 394 (395) 71 Ind Cas 823, *Misra Khan v Shahji*

(1924) A I R 1924 Lah 695 (696) 76 Ind Cas 206, *Dhanna v Lekh Ram*.
(Oral sale of property in possession of tenant)

6 (1865) 2 Suth W R 5 (6) *Ghoshain Gobind Pershad v Bebee Fatima*

Article 10
Notes
1—3

under the sale, it puts such persons on inquiry. If a registered deed is executed, the registration operates as a constructive notice.

2. Nature of the right of pre-emption. — A right of pre-emption is a right which the owner of certain immovable property has, to acquire by purchase, certain other immovable property which has been sold to another person. The right is not a right of *re-purchase* but a right of *substitution* for the original vendee. A decree for pre-emption therefore merely places the pre-emptor in the place of the original vendee.¹

3. Pre-emption right founded on law. — A right of pre-emption is recognized by the Muhammadan law and this law is applied to Muhammadans, as a matter of justice, equity and good conscience, except in the Madras Presidency where such a right is not recognized at all.^{1a} A right of pre-emption is also recognized by the Buddhist law in certain cases.^{1b}

There are also various enactments in British India recognizing a right of pre-emption under given circumstances and in areas to which the enactments are respectively applicable. See the following Acts —

The Agra Pre-emption Act of 1922
The Bengal Tenancy Act of 1885
The Punjab Pre-emption Act of 1913
The Central Provinces Land Revenue Act (XI of 1898)
The Berar Land Revenue Code of 1896
The Oudh Laws Act of 1876
The Punjab Civil Code

See also the undermentioned cases bearing on those Acts.¹

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- (1922) A I R 1922 Lah 210 (211) 3 Lah 261 69 Ind Cas 715 *Tola Ram v Lorinda Ram*
(1915) A I R 1915 Lah 479 (480) 29 I O 146 *Imam ud din v Khuda Balhsh*
(1923) A I R 1923 Lah 654 (655) 76 I C 202 *Gyan Singh v Gyan Singh*
(1925) A I R 1925 Lah 165 (165) 82 Ind Cas 203, *Thakur Singh v Karam Singh*
(1917) A I R 1917 Nag 187 (192) *Baziram v Bhikaji*
(1921) 62 Ind Cas 791 (793) (Lah) *Nagma Singh v Dwar Chand*
(1892) 6 C P L R 67 (69) *Pamji v Dwaji*
(1887) 9 All 234 (239) 1887 All W N 21 *Shyam Sundar v Amanat Begam*
(1889) 1889 Pun Re No 100 *Gaffar Khan v Saitar Khan*

Note 2

- 1 (1927) A I R 1927 All 664 (665) 103 Ind Cas 123 50 All 61, *Kundan Lal v Amar Singh*
(1893) 1893 Pun Re No 30 *Kalu v Bhupa*
(1907) 7 Ind Cas 295 (297) 13 Oudh Cas 219 *Jagannath v Shivratan Singh*
(1923) A I R 1923 Lah 31 (34) 69 Ind Cas 409, *Dharam Singh v Kirpal Singh*

Note 3

- 1a (1870) 6 Mad H O R 26 (30 31) *Ibrahim Saib v Munni Vir Udin Saib*
1b See (1905 OC) 3 Low Bur Rul 7 (8) *Ma Ko U v Tun E.*
1 Cases under the Agra Pre-emption Act, 1922 —
(1932) A I R 1932 All 372 188 Ind Cas 272 54 All 546, *Mahabir Pershad v Chitoo Lal*

4. Right founded on general usage. — The right of pre-emption is recognised by custom in various parts of British India.

(1927) A I R 1927 All 664 (GG3) : 103 Ind Cas 123 : 50 All 61, *Kundan Lal v. Amar Singh*.

Case under the Bengal Tenancy Act, 1885 :—

(1934) A I R 1934 Cal 830 38 Cal W N 1002 : 151 Ind Cas 576, *Brojendra Kumar Banerjee v. Symannessa Bibi*

Cases under the Punjab Pre-emption Act :—

(1914) A I R 1914 Lah 166 (167) 20 I. C. 272, *Mt Mangli v. Sobha Singh*.

(1914) A I R 1914 Lah 402 1914 Pun Re No 49 25 Ind Cas 443, *Fazal Hussain v. Malik Jinda*

(1914) A I R 1914 Lah 520 (521) 1915 Pun Re No 17 23 Ind Cas 605, *Hari Ram v. Allah Ditta*

(1917) A I R 1917 Lah 190 1917 Pun Re No 53 41 Ind Cas 266, *Amar Chand v. Amar Singh*

(1917) A I R 1917 Lah 269 1917 Pun Re No 97 40 Ind Cas 618, *Bishen Singh v. Feroz Chand*

(1918) A I R 1918 Lah 353 1918 Pun Re No 68 47 Ind Cas 359, *Lehna Singh v. Bagat Singh*

(1919) A I R 1919 Lah 79 1919 Pun Re No 15 49 Ind Cas 358, *Sunder Singh v. Bhuan Singh*.

(1919) A I R 1919 Lah 426 52 Ind Cas 49, *Udmi v. Ram Gopal*

(1922) A I R 1922 Lah 210 9 Lah 261 69 Ind Cas 715, *Toia Ram v. Lorinda Pam*

(1929) A I R 1929 Lah 75 63 Ind Cas 895, *Sardar Ali v. Fazil*

(1924) A I R 1924 Lah 196 (196) 69 Ind Cas 418, *Tulsi Ram v. Ganra*

(1924) A I R 1924 Lah 695 76 Ind Cas 206, *Dhanna v. Lekh Ram*

(1927) A I R 1927 Lah 958 102 Ind Cas 429, *Gurdas Mal v. Qadir Baksh*

(1929) A I R 1929 Lah 265 115 Ind Cas 767 *Ram Sahai v. Mahomad Tufail*

(1929) A I R 1929 Lah 294 117 Ind Cas 229, *Gurdas Mal v. Ram Bheja Mal*

(1930) A I R 1930 Lah 93 124 Ind Cas 338, *Madho v. Mt Mehro*

(1935) A I R 1935 Lah 808 160 Ind Cas 349, *Jasraj Junival v. Gokul Chand*

(1912) 16 Ind Cas 775 1912 Pun Re No 82, *Said Khan v. Matwala*

(1913) 19 Ind Cas 239 1913 Pun Re No 79, *Saghar v. Nur Ahmed*

(1912) 14 Ind Cas 823 (328) (Lah), *Ilahi Buz v. Mahamed Rab Nawaz Khan*

(1911) 12 Ind Cas 512 (Lah), *Wazira v. Narain Singh*

(1909) 4 Ind Cas 935 (Lah), *Gul Mohammad v. Faqir Muhammad Khan*

(1909) 4 Ind Cas 973 (Lah), *Ghulam Sarwar v. Ilahi Bakhsh*

Cases under the Central Provinces Land Revenue Act :—

(1927) A I R 1927 Nag 110 22 Nag L R 19 91 Ind Cas 290, *Piluram v. Mahadeo*

(1922) A I R 1922 Nag 14 65 Ind Cas 939, *Rai v. Sadakathi*

Case under the Berar Land Revenue Code :—

(1927) A I R 1927 Nag 64 99 Ind Cas 659, *Balwant v. Sheodas*

Cases under the Oudh Laws Act :—

(1910) 7 Ind Cas 295 (297) 13 Oudh Cas 219, *Jagannath v. Sheoratan Singh*.

(1894) 21 Cal 496 (502) 21 Ind App 26 6 Sar 339 R & J 134 (P C), *Abdul Wahid Khan v. Shalukha Bibi*

(1904) 7 Oudh Cas 98, *Bhairon Bakhsh v. Baldeo Singh*.

Cases under the Punjab Civil Code :—

(1875) 1875 Pun Re No 34, *Fais Bakhsh v. Ramji Das*

(1870) 1870 Pun Re No 22, *Mektab Singh v. Mul Singh*.

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Thus, it exists among Hindus in Gujerat,¹ in Behar,² in Malabar,³ in several parts of the United Provinces⁴ and in certain parts of the Punjab.⁵ The circumstances under which a right of pre-emption is recognised in such places depends upon the particular usage prevailing there. See the undermentioned cases.⁶

5. "Right founded on special contract." — A contract for pre-emption is an enforceable contract.^{1a} It does not create any interest in the property which is the subject-matter of the contract,¹ but gives rise to an obligation arising out of contract and annexed to the ownership of immovable property within the meaning of Section 40 of the Transfer of Property Act.² Such an obligation can be enforced against a transferee of the property with notice thereof or a gratuitous transferee of such property.³ Suits to enforce such obligations will be governed by this Article.

There is a difference of opinion between the several High Courts as to whether a contract for pre-emption is subject to the rule against pre-emption enacted in Section 14 of the Transfer of Property Act, the High Courts of Calcutta and Patna holding that

Case under the Central Provinces Tenancy Act :—

- (1904) 1 Nag L R 6 (7), *Seetaram v Ramdayal Marwari* (A suit by a landlord to enforce a right of pre-emption under S. 41 of the Tenancy Act is governed by Art. 10 of the Limitation Schedule.)

Note 5

- 1 (1869) 6 Bom H C R (A C) 263 (264), *Gordhan Das v. Prankor*.
- 2 (1863) Beng L R Sup 35 (47) Suth W R F B 143 (F B), *Fakir Panot v. Sheikh Emambakhsh*.
- (1905) 82 Cal 999 (900) 9 Cal W N 874, *Farsakh Nath Tewari v. Dhanraj Ojha*.
- (1908) 35 Cal 575 (585), *Jadu Lal Sahu v. Janki Koor*.
- 3 (1916) A I R 1916 Mad 743 (744) 17 Ind Cas 337 (339) 98 Mad 67, *Manabai v Kunhifappa Haji*.
- (1897) 20 Mad 305 (306), *Krishna Venon v Kesavan*.
[See also (1890) 13 Mad 490 (491), *Kanharankutti v Uthotti*.]
- 4 (1906) 28 All 590 (591, 592) 3 All I Jour 333 1906 All W N 144, *Chahauri Devi v Sundari Devi* (City of Benares).
- (1875) 7 N W P H C R (A C) 1 (3), *Jai Kuar v Heera Lal* (Muzaffarnagar).
- 5 (1880) 1880 Pun Re No 97, *Kalan Khan v Ram Sarandas* (Custom of pre-emption has been shown to exist in the town of Gurdaspur).
- 6 (1921) A I R 1921 All 154 (155) 62 Ind Cas 684, *Mukhtal Pas v Hiranand Singh* (Custom as per *wajib-ul arz* confined to sales and mortgages and not to leases).
- (1875) 1 All 207 (212), *Raja Ram v Bansu* (Custom recorded in Record of Rights excluding minors from having a right of pre-emption).

Note 5

- 1a See cases cited in Foot Note (5) below.

[See also (1921) A I R 1921 Mad 554 (555) 62 Ind Cas 27, *Velayudham Pillai v Velayudham Pillai*.]

- 1 See Section 54 of the Transfer of Property Act, 1882.
- 2 (1927) A I R 1927 All 170 (172) 100 Ind Cas 683 49 All 527 (F B), *Aulad Ali v Syed Ali Athar*.
- 3 See Section 40, third paragraph, of the Transfer of Property Act.

it is so subject,⁴ the other High Courts holding a contrary view.⁵ The discussion is, however, not relevant for the purposes of this Article

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6. Starting point of limitation.—The *terminus a quo*, that is, the starting point of limitation under this Article is the date—

1 when the purchaser takes under the sale physical possession of the whole of the property sold, or

2 where the subject of sale does not admit of physical possession, when the instrument of sale is registered

The first thing to be considered in applying this Article is, therefore, to see whether the subject of sale *admits of physical possession*, at the date of the sale. If it does, then limitation will start from the time when the purchaser takes such physical possession.¹ Where the subject of sale does not admit of physical possession at the date of sale, then the second part of the third column will apply in cases where there is a registered instrument of sale, and time will run from the date of registration.² Where the property does not

4 (1909) A I R 1929 Cal 263 (269) 56 Cal 487 117 Ind Cas 855, *Kala Chand v Jatindra Mohan*

(1975) A I R 1929 Pat 637 (639) 113 Ind Cas 106 8 Pat 213, *Matura Subba Rao v Surandra Nath Sahu*

(1927) A I R 1927 Pat 412 (412) 105 Ind Cas 54, *Maharaj Rajaramji v. Ramnath Upasni*

5 (1977) A I R 1927 All 170 (172) 100 Ind Cas 683 49 All 527 (F B) *Aulad Ali v Syed Ali Athar* (Overruling A I R 1923 All 511 A I R 1922 All 514 and A I R 1924 All 657)

(1921) A I R 1921 Sind 118 (120) 17 Sind L R 1 80 Ind Cas 962, *Ahemchand Ramdas v Mohson Shah*

(1926) A I R 1926 Bom 497 (500) 50 Bom 566 93 Ind Cas 634 (F B), *Harisandas Bhagwanandas v Bai Dhanu*

(1901) 24 Mad 449 (457) 11 Mad L Jour 137, *Ramasamy Pillai v Chinnan*

Note 6

1 (1906) 3 Nag L R 142 (144) *Vesaji v Ramkrishna*

(1893) 2 Oudh Cas 9 (10) *Fakhr ud din Ahmad v Mt Rasulan*

(1929) A I R 1929 Lah 705 (706) 109 Ind Cas 382 *Jhanda v Ditt* (Sale of specific plot and delivery of possession—Time runs from such delivery)

(1903) 8 Oudh Cas 275 (277) *Dr Shyam Sabal v Sharan Beg*

(1928) A I R 1928 Nag 89 (89) 23 Nag L R 178 107 Ind Cas 194, *Mohan Lal v Satyabhama* (Land in possession of trespasser admits of physical possession. See Note 7)

(1926) A I R 1926 All 70 (71) 69 Ind Cas 444 45 All 12 *Jagamaya Das v Tulsa* (Do)

(1921) A I R 1921 Mad 554 (556) 62 Ind Cas 27, *Velayudham Pillai v Thina Velayudham Pillai* (Do)

(1888) 1888 All W N 227 (228) *Chandan Singh v Chand Prasad* (Transfer of property for the possession of which a decree had been obtained by the vendor)

possession)

2 See the cases cited in Foot Notes (1) and (2) to Note 7 *infra*

(See also (1918) A I R 1918 Lah 393 (394) 1918 Pan Re No 63 47 Ind Cas 359 *Lehma Singh v Bhagat Singh*)

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admit of physical possession at the date of sale and there is no registered instrument also, then, as has been seen in Note 1 *ante*, this Article will not apply at all and the starting point of limitation must be considered with reference to the appropriate Article applicable in such cases. It has generally been held that the Article applicable in such cases is Article 120³.

As to when property admits of physical possession and when not, see Note 7 *infra*. And as to when an instrument of sale is said to be registered see Note 11 *infra*.

Where the purchaser took physical possession under a sale but he was subsequently dispossessed, and thereupon he filed a suit for possession, obtained a decree and got possession again, it was held that time ran from the date on which he first obtained physical possession under the sale⁴.

Where, owing to the fraud of the vendor and vendee, the pre-emptor is kept in ignorance of his right, time will run from the date when the fraud first becomes known to him⁵. *Minority* is not a ground for extending the period of limitation prescribed by this Article, as Section 8 of the Act expressly provides that nothing in Sections 6 and 7 applies to suits for pre-emption⁶.

7. When property admits or does not admit of physical possession — Under clause 1 of Section 1 of the Limitation Act of 1859 the starting point of limitation for a suit to enforce a right of pre-emption was the date on which the purchaser took possession.

3 (1899) 1889 Pun Re No 160 *Gaffar Khan v Sattar*

1 *Duni Chand*

2 *Ali Khan*

3 *v Sheikh Mansur*

(1909) 4 Ind Cas 973 (974) (Lah) *Ghulam Sarwar v Ishaq Bakhsh*

R No 154

(1893) 1893 Pun Re No 87, *Khunda v Ghans Lal*

(1897) 1897 Pun Re No 30 *Ali Gauhar v Jouhar*

(1927) A I R 1927 Nag 64 (64) 99 Ind Cas 539 *Baluani v Shrodas*

(1906) 28 All 424 (426) 3 All L Jour 191 1906 All W N 73 *Kaunsilla*

Kunwar v Gopal Prasad

(1907) 10 Oudh Cas 374 (376) *Arjun Singh v Pandit Iqbal Narain*

(1883) 1883 All W N 6 (6) *Muthra Prasad v Bhurej Singh*

(1886) 1886 Pun Re No 90 *Jawala Sahai v Ala Ditta*

(1904) 1904 Pun Re No 14 1904 Pun L R No 140 *Aishen Chand v Kehr Singh*

4 (1871) 1871 Pun Re No 34 *Ramsoolk v Nanoo*

5 (1934) A I R 1934 Lah 578 (579) 155 Ind Cas 654 16 Lah 408 *Bhagwana v Shadi*

(1937) A I R 1937 Lah 97 (98) 172 Ind Cas 104 1 L R (1937) Lah 202, *Ganeshia v Sadq*

6 (1919) A I R 1919 Lah 25 (26) 52 Ind Cas 597 1919 Pun Re No 86 *Uf Hussain Bibi v Hakim*

(1924) A I R 1924 Mad 57 (60) 76 Ind Cas 467, *Viswanathan Chetty v Ethirajulu Chetty*

(1873) 1873 Pun Re No 1 *Sadhu Wahab v Aladad Khan*

under the sale impeached. There was a difference of opinion as to the construction of the words "taking possession". In *Goshain Gobind Pershad v. Bebee Fatima*,¹ their Lordships of the Calcutta High Court observed as follows. —

"We are of opinion that these words must be construed literally, and that the meaning of the Section is an actual possession, and not a mere constructive one. The object of the law was to give parties, who had, or thought they had, a right of pre-emption, due notice of any transfer adverse to their interests, and this could best be known by the fact of the new purchaser taking manual possession of his property. Were constructive possession sufficient, it would be impossible for intending claimants to know of the existence of a right which was inimical to their own."

But in a later case under the same Act where the land sold was the subject of a lease, the vendor did not oppose the taking of possession and the lessee claimed to hold the land by attorning to the purchaser, the same High Court held that there was a "taking of possession" within clause 1 of Section 1 of the Limitation Act of 1859.² The Allahabad High Court also took a similar view.^{3a}

It was to clarify the position and to give effect to the view expressed in *Goshain Gobind's case*¹ that the word "actual" was introduced in the Act of 1871. Limitation ran therefore from the date when actual possession was taken by the purchaser. But, notwithstanding this, there was a conflict of opinion as to the meaning of the words "actual possession". In *Jogeshar Singh v. Jauahir Singh*,³ it was held by a majority of a Full Bench of the High Court of Allahabad that the expression "actual possession" would equally apply to subjects of sale which admit of physical tangible possession as well as to subjects of sale which do not admit of such possession, and actual possession meant such possession as was enjoyed by the seller before the sale, if he had enjoyed tangible possession, then in that case actual possession meant tangible possession, if he was only in constructive possession, then actual possession must be deemed to have been transferred when the vendor completely conveyed his rights and vested them in the vendee. Stuart, C. J., dissented from this view and observed as follows:

"The time mentioned in the former Act was 'the time at which the purchaser shall have taken possession under the sale impeached,' and the meaning of this being doubtful, as various rulings of the Calcutta Court and this Court show, the word "actual" has been introduced into the present Act with the

Note 7

1 (1865) 2 Suth W R 5 (6)

2 (1865) 3 Suth W R 225 (225), *Bechun v. Mahomed Yalooob Khan*

2a (1869) 1 N W P H C R 8 (8, 9) *Mahomed Mashook Allee Khan v. Imdad Allee Khan*

3 (1875) 1 All 311 (314) (F B)

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view no doubt of making it plain what the real date was intended to be. Actual possession, in my opinion, means personal and immediate enjoyment of the profits and as in the present case the mortgagee was in possession at the time of the sale, the purchaser could not take actual possession till the mortgage terms had expired.

The view of the majority of the Full Bench was adopted in several cases⁴

The word "actual" was substituted in the Limitation Act of 1877 by the word "physical". In *Batul Begum v Mansur Ali Khan*,⁵ where the subject of sale was an *undivided share* in certain villages Lord Robertson, in delivering the judgment of the Board of the Judicial Committee, observed as follows:

"What has to be considered is, as the High Court accurately formulated, the question, does the property admit of physical possession? The word 'physical' is itself a strong word highly restrictive of the kind of possession indicated, and when it is found, as is pointed out by the High Court, that the Legislature has in successive enactments about the limitation of such suits, gone on strengthening the language used, first in 1859 prescribing 'possession,' then in 1871 requiring 'actual possession' and finally in 1877 substituting the word "physical" for actual, it is seen that that word has been very deliberately chosen and for a restrictive purpose.

Their Lordships consider that the expression used by Stuart, C J, in regard to the words 'actual possession' is applicable with still more certainty to the words 'physical possession' and that what is meant is a 'personal and immediate possession'."

See also the undermentioned cases^{5a} holding the same view.

It follows that the following subjects of sale do not admit of physical possession:

1. An undivided share in property⁶

- 4 (1883) 1883 Pun Re No 65 *Pam Saran v Hirde*
(1879) 1879 Pun Re No 160, *Himma Gul v Akh Lal*
(1878) 1878 Pun Re No 29, *Ram Djal v Beli Ram*
(1875) 1 All 592 (594) *Bijai Ram v Kallu* (1 All 311 (F B) Followed)
(1875) 7 N W P H O R 5 (9) *Jai Kumar v Heera Lal* (Sale of $\frac{2}{3}$ share in house—*Terminus a quo* is date of getting possession—It is however not clear whether the shares were specific portions in the house or not)
- 5 (1907) 24 All 17 (95) 23 Ind App 243 5 Cal W N 888 8 Sar 133 3 Bom L R 707 (P C)

v *Raghubar Dayal*
Charan v Mathura

- (1919) A I R 1919 All 329 (329) 50 Ind Cas 80, *Umrao Beg v Mukhtar Beg* (Fractional shares of zamindari situate in different talukas)
- (1906) 28 All 421 (426) 3 All L Jour 191 1906 All W N 73, *Kaunsilla Kunwar v Gopal Prasad*
- (1899) 20 All 315 (320 321) 1899 All W N 61 (F B), *Batul Begam v Mansur Ali Khan*
- (1881) 4 All 179 (180) 1881 All W N 176 *Eloli v Imam Ali*

2 Property in the possession of a usufructuary mortgagee, that is, an equity of redemption in property that has been mortgaged with possession⁷

3 Property that has been leased. In such cases the subject of sale is a reversion in a lease⁸

The words "admit of physical possession" have no reference to the ability or inability in fact of the vendor to place the vendee in

- (1881) 4 All 24 (27) 1881 All W N 116 (F B) *Udhar Das v Narain*
 (1895) 1895 All W N 46 (46) *Mahadeo Narain Singh v Sheonandan Singh*,
 (1884) 1884 All W N 317 (317), *Dakar Hussain v Bhagu Pat*
 (1881) 1881 All W N 146 (146) *Shib Lal v Bhawan Das*
 (1901) 1 All L Jour 247 (249) *Inti ar Husain v Jamna Prasad*
 (1923) A I R 1923 Lah 75 (75) 68 Ind Cas 895 *Sardar Ali v Iqbal*
 (1923) A I R 1923 Lah 74 (75) 69 Ind Cas 906 *Muhammad Iqbal Ullah Khan v Gopala Mal*

- (1882) 1882 Pun Re No 23, *Jowala Singh v Tel Chand*
 (1881) 1881 Pun Re No 10, *Karn v Iqbal*
 (1927) A I R 1927 Nag 64 (64) 99 Ind Cas 659 *Balwant v Sheodas*
 (1928) A I R 1928 Oudh 875 (976) 111 Ind Cas 715 *Hirdey Bihari v Ganesh Dutt*

- (1899) 2 Oudh Cas 9 (11), *Pakhr un din Ahmed v Mt Rasulan*
 (1909) 4 Ind Cas 973 (974) (Lah) *Ghulam Sarwar v Iqbal Bahsh*
 [But see (1887) 1887 All W N 235 (235) *Ganpat Das v Masita Khan*
 (Undivided share in house is susceptible of being reduced to physical possession by partition—Case is different with Mahala
 —Therefore limitation runs from date of getting physical possession after partition suit)]

- 7 (1900) 8 Oudh Cas 184 (190), *Raja Paghuraj Singh v Raj Raghunath Singh*
 (1932) A I R 1932 Lah 99 (98) 135 Ind Cas 512, *Darabali v Hussaina*
 (1924) A I R 1924 Mad 57 (61) 76 Ind Cas 467, *Tisuanathan Chetty v Pithurajulu Chetty*
 (1919) A I R 1919 Nag 6 (12) 16 Nag L R 37 52 Ind Cas 940 (F B),
Jairam v Sitaram (Overruling A I R 1917 Nag 187 (193))
 (1915) A I R 1915 Oudh 121 (122) 28 Ind Cas 208, *Narendra Bahadur Singh v Iqbal Muhammad*
 (1921) 62 Ind Cas 797 (793) (Lah) *Magina Singh v Duni Chand*
 (1885) 9 All 234 (239) 1887 All W N 24 *Shiam Sunder v Amanat Begam*
 (Mortgagee in possession purchasing equity of redemption—Time runs from registration)
 (1910) 5 Ind Cas 667 (663) (All) *Pamjas v Aman Sahai*
 (1909) 4 Ind Cas 754 (755) 1907 09 Upp Bur Rul Limitation Act page 7
Nya Sura Doh v Nya Sura
 (1884) 1884 Pun Re No 68 *Bhauans Pershad v Attar Singh*

[But see (1878) 2 All 409 (410) *Lachmi Narain Lal v Sheonambar Lal* (Mortgagee in possession purchasing equity of redemption Held time ran from the date on which his possession became that of an owner under the sale)]

- 8 (1915) A I R 1915 Oudh 121 (122) 28 Ind Cas 208 *Narendra Bahadur Singh v Wali Muhammad*
 (1919) A I R 1919 Nag 155 (155) *Hari v Shanjar Appa Wans*
 (1927) A I R 1927 Lah 784 (785) 105 Ind Cas 501 *Parlab Singh v Gulab*
 (1925) A I R 1925 Lah 165 (165) 82 Ind Cas 203 *Thalur Singh v Karam Singh*
 (1924) A I R 1924 Lah 394 (395) 71 Ind Cas 823 *Misir Khan v Shahji*
 (1924) A I R 1924 Lah 302 (303) 73 Ind Cas 903 *Ganra v Joti Prasad*
 (1923) A I R 1923 Lah 94 (95) 68 Ind Cas 811 *Haydar Ali Shah v Bhiskhe Shal*
 (1913) 20 Ind Cas 475 (476) (Lah), *Sheoji v Fajar Ali Khan*
 (1912) 15 Ind Cas 890 (891) 8 Nag L R 68, *Pamji v Sheikh Mansur*

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actual possession of the property sold, but to the nature of the property sold.⁹ Further, the capability of the property for physical possession must be determined with reference to the date of the sale, for, property which by its very nature is not capable of physical possession at one time may admit of physical possession at another time, but the law does not contemplate that the starting point of the period of limitation is to be postponed till it becomes capable of possession.¹⁰

Land in the possession of a trespasser cannot be said to be property that does not admit of physical possession.¹¹ In *Mohanlal v Satyabhama*,¹² it was held that the words "does not admit of physical possession" did not refer to the inability of the vendor in fact to give possession to the purchaser, but referred to the inability both in fact and *in law*, and the principle applicable was that where the vendor was in personal and immediate possession of the property sold or where the right to such possession was in the vendor at the date of sale, the property was one capable of physical possession, it was accordingly held that when property was in the possession of a trespasser, the right to immediate and personal possession was with the vendor, and the property was thus one admitting of physical possession.

Where property which was the subject of a lease was sold with a stipulation that the sale was to take effect after the termination of the lease, the lessee being liable to pay rent during the period of lease, it was held that what was sold was not a reversion in the lease but the property itself after the termination of the lease, that such

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- (1899) 20 All 315 (321) 1899 All W N 61 (F B), *Batul Degani v Mansur Ali Khan*
- (1903) 1903 Pun Re No 49 1903 Pun L R No 63 1903 Pun W R No 1 (F B), *Ghulam Mustafa v Shahab ud din Khan*
- (1905) 1905 Pun Re No 83 1905 Pun L R No 179 1905 Pun W R No 113, *Sharif Hussain v Muhammad Yusuf*
- (1885) 1885 Pun Re No 73, *Gauhari Mal v Jamni Mal*
- (1884) 1884 Pun Re No 43, *Bishan Singh v Samdu*
- (1880) 1880 Pun Re No 97, *Kalan Khan v Ram Sarn*
- (1904) 7 Oudh Cas 8 (9) *Raghunath Parshod v Ram Dayal*
- (1924) A I R 1924 Lah 695 (696) 76 Ind Cas 205 *Dhanna v Lekh Ram* (Oral sale of property in possession of tenant)
- (1924) A I R 1924 Lah 391 (395) 71 Ind Cas 823, *Misri Khan v Shahji*
[But see (1924) A I R 1924 Lah 106 (196) 69 Ind Cas 418 *Tulsi Ram v Ganua* (Property in possession of tenant at the date of sale admits of physical possession—Submitted wrong)]
- 9 (1888) 1888 All W N 227 (228), *Chandan Singh v Chand Prasad*
- 10 (1915) A I R 1915 Oudh 121 (122) 23 Ind Cas 203, *Narendra Bahadur Singh v Wali Muhammad*
[See also (1892) 1892 All W N 77 (77), *Dil Chand v Naudat Singh*]
- 11 (1928) A I R 1928 Nag 89 (89) 23 Nag L R 178 107 Ind Cas 194, *Mohanlal v Satyabhama*
- (1926) A I R 1926 All 70 (71) 49 All 12 89 Ind Cas 444 *Jaganna Das v Tulsi*
- (1921) A I R 1921 Mad 554 (550) 62 Ind Cas 27, *Velayudham Pillai v Velayudham Pillai*
12. (1923) A I R 1923 Nag 89 (89) 23 Nag L R 178 107 Ind Cas 194

property was capable of physical possession at the date of the sale, namely the date of the termination of the lease, and that physical possession must be deemed to be taken on the termination of the lease¹³

The words "physical possession" mean *lawful* physical possession¹⁴ The delivery of *symbolical* possession is not equivalent to the delivery of physical possession within the meaning of this Article¹⁵

8 The possession must have been taken under the sale.—The physical possession referred to in the Article must have been taken by the purchaser *under the sale* sought to be impeached Where the property sold is already in the possession of the vendee either as lessee or as mortgagee, the subject of sale is, as has been seen already in Note 7 *ante*, incapable of being physically possessed. It cannot also be said that such vendee takes any possession *under the sale* in such cases¹ It has been held in the undermentioned case² that where, without being a lessee or mortgagee, the prospective vendee takes possession from the prospective vendor under a convenient arrangement come to between them and, subsequently, a sale deed is executed, the possession taken before the sale cannot be said to have been under the sale but possession would be deemed to be taken under the sale on the date of the sale A contrary view, namely that even on the date of the sale the vendee cannot be said, in such cases to have taken possession *under the sale*, has been held in the undermentioned cases³

Where physical possession of the subject of sale could not be taken *under the sale*, the first part of the third column will have no application If the subject of the sale is one that admits of physical

13 (1907) 9 Nag L R 142 (145) *Vesay v. Ramkrishna*

14 (1892) 1892 All W N 77 (71) *Dal Chand v. Naubat Singh*

15 (1867) 7 Suth W R 195 (190 196) *Mahomed Hossein v. Mohsun Ali*

(1922) A I R 1922 Pat 601 (602) 1 Pat 578 69 Ind Cas 666, *Achutananda Parsait v. Bibi Bibi*

(1923) A I R 1923 Lah 81 (34) 69 Ind Cas 409 *Dharam Singh v. Kirpal Singh*

Note 8

1 (1924) A I R 1924 Lah 394 (395) 71 Ind Cas 823, *Misra Khan v. Shahji*

(1925) A I R 1925 Lah 152 (153) 78 Ind Cas 57, *Sheo Ram v. Indraj*
(There was a registered document in this case—Time would run therefore under Art 10 from the date of registration—The case however has proceeded on the view that Art 10 does not apply)

(1923) A I R 1923 Lah 654 (655) 76 Ind Cas 902 *Gyan Singh v. Gyan Singh*

2 (1918) A I R 1918 Lah 79 (81) 1918 Pun Re No 80 48 Ind Cas 102 *Ram Pears v. Rup Lal*

3 (1902) A I R 1922 Nag 200 (200) 68 Ind Cas 715 *Ragho v. Sakharam*
(Art 120 applies)

(1922) A I R 1922 Lah 210 (211) 3 Lah 261 69 Ind Cas 715 *Tola Ram v. Lorinda Ram*

(1915) A I R 1915 Lah 479 (480) 29 Ind Cas 146 *Imam Ud din v. Ahuda Bakhsh* (Person already in possession purchasing property—Art 10 does not apply)

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possession, the second part of the third column is also inapplicable. It seems to have been assumed in the undermentioned case,⁴ however, that if a property could not be taken possession of *under the sale* because it is in the possession of a third person without any right, it must be taken to be property which does not admit of physical possession. It is submitted that this view is not correct. See Note 7 *ante*.

9. Sale. — Where under the law prevailing in any place a right of pre-emption arises on sale, the sale contemplated must be taken to be a *valid sale*. In territories where the Transfer of Property Act is in force, a valid sale can be effected—

1 in the case of tangible immovable property of the value of one hundred rupees or upwards, or in the case of a reversion or other intangible thing, only by a registered instrument,

2 in the case of tangible immovable property of a value less than one hundred rupees, either by a registered instrument or by delivery of the property.^{1a}

It follows that in such territories an oral sale of immovable properties of the value of more than one hundred rupees followed by delivery of possession or a sale by an unregistered instrument without delivery of possession in case of property of the value of less than one hundred rupees, is not a valid sale and will not give rise to a right of pre-emption.¹ In territories where the Transfer of Property Act is not in force, such as the Punjab, an oral sale irrespective of the value of the property sold is valid and may give rise to a right of pre-emption.²

But sale for the purposes of pre-emption means a *complete sale*. There must be an entire cessation of right on the part of the vendor. Where the vendor retains a right to the property until certain conditions are fulfilled, the sale is not complete and does not give rise to any right of pre-emption.³

There is a difference of opinion as to whether a sale, in order to give a right of pre-emption must be in *actual form* a deed of sale or whether it is sufficient if it is in reality a sale, though the form may not be that of a sale. Where a real sale was effected but was called in the document a *hiba-bil ewaz*, it was held that it was a sale for

4 (1922) A I R 1922 Lah 210 (211) 3 Lah 261 69 Ind Cas 715 *Tola Ram v Lorinda Ram*

Note 9

1a See Section 54 of the Transfer of Property Act, 1882

1 (1892) 19 Cal 623 (627) (F B), *Makhan Lal Pal v Banw Behari Ghose*

2 See cases cited in Foot Note (6) to Note 1

(See also (1878) 1878 Pun Re No 29, *Ram Dyal v Bel's Ram*

(1900) 1900 Pun L R 203 (205) *Mulsaddi v Dhani Ram*

(1923) A I R 1923 Lah 654 (655) 76 Ind Cas 202, *Gyan Singh v Gyan Singh* (Oral sale of property in possession of tenant without delivery of possession assumed to be valid)]

3 (1873) 20 Suth W R 216 (217), *Duksha Ali v Tofer Ali*

the purposes of this Article ⁴ In *Sukh Lal v. Madhuni Prasad*,⁵ it was held by the High Court of Allahabad that the Article refers to an instrument which is not only in reality but also in terms a sale deed. Hence where the vendor, with the concurrence of the vendee, in order to defraud the pre-emptor, instead of executing a sale deed executed a deed of gift, it was held that this Article did not apply but Article 120. See also the undermentioned case ^{6a} Under the Punjab Pre-emption Act 1913, the Court is not prevented from holding that an alienation purporting to be other than a sale is in effect a sale ^{4b}

A mere error in the instrument of sale as to the property sold, where there is no question as to what the parties intended to sell or purchase will not alter the nature of the transaction ⁶ Nor can a subsequent agreement between the parties convert what was an out and out sale into any other transaction and thus take away the right of pre-emption which arose on the date of the sale ⁷ Similarly, where subsequent to the sale the validity of the sale is questioned and a decree is passed holding the sale valid, it was held that time ran not from the date of the decree but from the date of the sale ⁸

According to the High Court of Patna and the Judicial Commissioner's Court of Nagpur, this Article will apply to execution sales also ⁹ In *Abdul Juleel v. Khellat Chunder Ghose* ¹⁰ the High Court of Calcutta held that the law of pre-emption did not apply to execution sales on the ground that a neighbour or a partner had an opportunity to bid at the auction sale. The High Court of Allahabad has also held that a right of pre-emption does not arise upon a transfer effected by a decree but only where property is acquired by a contractual relation of sale or transfer ¹¹ A mortgage by conditional sale becomes on foreclosure a sale within the meaning of this

4 (1909) 8 Ind Cas 590 (599) 12 Oudh Cas 185 *Wilayat Husain v. Karam Husain* (27 All 510 Dissented from)

5 (1906) 27 All 540 (543) 1905 All W N 88 2 All L Jour 350

6a (1905) 8 Oudh Cas 288 (289) *Harpal Singh v. Bajrang Bahadur* (Deed not on the face of it a sale—Article does not apply)

5b See Section 4 last paragraph of the Act

(1934) A I R 1934 Lah 878 (8 9) 155 Ind Cas 654 16 Lah 403 *Bhagwana v. Shadi*

6 (1916) A I R 1916 Lah 396 (397) 35 Ind Cas 278 *Ganga Ram v. Sardara*

(1926) A I R 1926 Oudh 475 (476) 94 Ind Cas 318 *Sheo Narain v. Khaderu*

(1905) 8 Oudh Cas 289 (289) *Harpal Singh v. Bajrang Bahadur*

7 (1895) 17 All 451 (453) 1895 All W N 103 *Ismi Din v. Pang Lal Singh*

(1900) 1900 Pun Re No 43 1900 Pun L R 444 *Mansabdar v. Nabi Bakhsh*

8 (1919) A I R 1919 Lah 79 (80) 1919 Pun Re No 15 49 Ind Cas 358, *Sunder Singh v. Dhian Singh*

9 (1922) A I R 1922 Pat 601 (602) 1 Pat 578 69 Ind Cas 666 *Achutananda Parsait v. Bihari Bibi*

(1892) 6 C P L R 67 (70), *Pamaji v. Dewaji*

10 (1868) 10 Suth W R 165 (166) 1 Beng L R A C 105

11 (1903) 25 All 334 (336) 1903 All W N 63 *Abdi v. Jazzaq v. Mumtaz Hussain*

(1904) 1 All L Jour 217 (219) *Intizar Hussain v. Jamna Prasad*

(1919) A I R 1919 All 301 (302) 50 Ind Cas 48 *Ram Bharosa Sahu v. Mt. Kabutra*

pre-emption will not begin to run until physical possession is taken of the whole of the property sold¹. Where part of the property is taken possession of on one date and the other part on a later date, limitation will run only from the later date. In cases where part of the property sold is not capable of physical possession, it cannot be said that "the subject of the sale" admits of physical possession, and consequently limitation will run, under the second part of the third column, from the date of the registration of the sale deed². Where there is no registered instrument evidencing the sale, this Article will not apply³.

Article 10
Notes
10—11

11. "Is registered." — Section 60 of the Registration Act runs as follows

"(1) After such of the provisions of Sections 34, 35, 53, and 59 as apply to any document presented for registration have been complied with, the registering officer shall endorse thereon a certificate containing the word 'registered' together with the number and page of the book in which the document has been copied

(2) Such certificate shall be signed, sealed and dated by the registering officer, and shall then be admissible for the purpose of proving that the document has been duly registered in manner provided by this Act and that the fact mentioned in the endorsements referred to in Section 59 have occurred as therein mentioned "

It is clear therefore that the words, "when the instrument of sale is registered" mean the date when, under Section 60 of the Registration Act, a certificate containing the word "registered" is made on the document¹. For the purposes of this Article the registration will not date back to the date of the execution of the document and limitation will not start to run from the latter date².

Note 10

- 1 (1876) 1876 Pun Re No 98 *Dena v Dia Ram*
(1892) 1892 All W N 77 (77), *Dal Chand v Naubat Singh*
- 2 (1892) 1892 All W N 77 (77) *Dal Chand v Naubat Singh* (Part of property in possession of usufructuary mortgagee)
- (1899) 1899 Pun Re No 65 *Maluk Singh v Muhammad* (Sale of separate holding including share in shamlat)
- (1885) 1885 Pun Re No 61 *Sohan v Hummat* (Separate property and undivided share in other property)
- (1892) 1892 Pun Re No 156 *Umar Baksh v Chogatta* (Sale of share in certain property and separate property 1891 Pun Re No 10, Followed)
- 3 (1898) 20 All 315 (321) 1898 All W N 61 (F B), *Batul Begam v Mansur Ali Khan*

Note 11

- 1 (1881) 1881 Pun Re No 10, *Karm v Fazl*
(1906) 1906 Pun Re No 92 1906 Pun L R No 126 1906 Pun W R No 100, *Bhanjan Ram v Gopala Ram*
- 2 (1922) A I R 1922 Nag 200 (200) 63 Ind Cas 715 *Ragla v Sakharam*
[See also (1936) A I R 1936 Cal 17 (18) 62 Cal 979 100 Ind Cas 730, *Nareesh Chundra Dutta v Girish Chandra Das*]

Article 10
Notes
11—13

A sale certificate granted to a purchaser in court auction under the provisions of the Civil Procedure Code is not a registered document. The mere fact that a copy is forwarded to the registering officer in accordance with Section 89 of the Registration Act and duly filed does not make the certificate a registered document.³

Where the instrument of sale comprised property, a portion of which was situated in District G and the rest in District B and the instrument was registered at G on the 6th October 1921 and upon information by the Registration Officer in District G, entry was made by the Registration Officer at B in his register on 24th November 1921, it was held that the instrument was registered, within the meaning of this Article, on 6th October 1921.⁴

12. Burden of proof.—In a suit for pre-emption it is for the defendant to show that he took possession of the property more than a year before the date of suit¹ or, where the property sold did not admit of physical possession, that the sale deed was registered more than a year before the date of suit.

Where fraud is alleged as a ground for extension of the period of limitation, the burden of proof of establishing the fraud is on the person alleging it.²

13. Suits not within this Article.—As has been seen in Note 1 *ante* this Article does not apply to cases —

1 where the right of pre-emption claimed is in respect of a mortgage or a lease or a foreclosure of a mortgage

2 where the subject of sale does not admit of physical possession and there is either no instrument of sale or the instrument of sale is an unregistered document

The Article does not also apply to cases where the subject of sale admits of physical possession but no possession could be taken *under the sale*. See Note 8 *ante*.

In all such cases Article 120 will apply.¹ Where there is, however, a special or local law providing a different period of limitation for

3 (1908) 1908 Pun Re No 142 1908 Pun W R No 186 (F B), *Fatteh Singh v Diropindi*

4 (1925) A I R 1925 All 324 (324) 86 Ind Cas 130 *Sitopujan Misra v Mahiraj Rai*

Note 12

1 (1864) 1864 Suth W R (Gip) 117 (117) *Hosseinet Khanum v Mt Lallun*

2 (1874) 22 C 11 W D 170 (170) *N v S* 12 — 11 *gdhun Singh*

Chand

Haji Ghulam Para v

Sitapuri Khan

(1898) 1 Oudh Cas 262 (267), *Munna Lal v Ausari Tal*

Note 13

1 See cases cited in Foot Note 3 to Note 6

[See also (1900) 1900 Pun L R No 13 p 48 *Har Chand v Mehbub Khan* (Unregistered sale of equity of redemption in Punjab — Case before the Pre-emption Act of 1905)]

(1886) 1886 Pun Re No 90, *Janala Sahai v. Ala Dita* (Do)]

such cases it is that period that will apply (See Section 29 *ante*) Section 30 of the Punjab Pre-emption Act, 1913, enacts that notwithstanding Article 120 of the Limitation Act, a suit for pre-emption must be filed within a period of one year from certain dates, in all cases not governed by Article 10². In cases therefore governed by that Act, Article 120 will not apply.

A suit to enforce a contract which among several other terms, includes the recognition of a right of pre-emption, is not a suit for pre-emption within the meaning of this Article but one for specific performance of a contract governed by Article 113 of the Act³.

Where A has no authority to sell except under certain conditions, a sale without fulfilling such conditions will be invalid. A suit to set aside such sales is not a *suit for pre-emption* and is not governed by this Article⁴.

14. Parties to suit for pre-emption.—As has been observed in Note 1 *ante*, this Article applies only to suits against a purchaser whose purchase has given rise to a right of pre-emption. Where a

- 2 (1918) A I R 1918 Lah 893 (384) 47 Ind Cas 359 1918 Pun Re No 68
Lehna Singh v Bhagat Singh
(1910) 8 Ind Cas 603 (604) (L B) *U Tet Tun v Ma N*
(1922) A I R 1922 Lah 210 (211) 3 Lah 261 69 Ind Cas 715 *Tola Rasi v Lorinda Ram* (Time will run from mutation)
(1930) A I R 1930 Lah 33 (34) 124 Ind Cas 338 *Madho v Mt Mehro* (Do)
(1924) A I R 1924 Lah 695 (696) 76 Ind Cas 206, *Dhanna v Lehh Ram* (Do)
(1924) A I R 1924 Lah 394 (395) 71 Ind Cas 823 *Misri Khan v Shajji* (Do)
(1915) A I R 1915 Lah 479 (480) 99 Ind Cas 146, *Imam ud din v Khuda Baksh* (Do)
(1927) A I R 1927 Lah 388 (390) 102 Ind Cas 423 *Curdas Mal v Qadir Baksh*
(1923) A I R 1923 Lah 75 (76) 68 Ind Cas 895 *Sardar Ali v Fazil*
[But see (1925) A I R 1925 Lah 152 (153) 78 Ind Cas 5 *Sheo Ran v Indraj* (Registered sale to person already in possession as lessee—Property held not to admit of physical possession—Under Art 10 time would run from registration—But Art 10 was assumed not to apply and S 30 Pre-emption Act applied—Submitted not correct)
(1917) A I R 1917 Lah 269 (271) 40 Ind Cas 618 1917 Pun Re No 97, *Bishen Singh v Feroz Chand* (Oral sale of property partly capable and partly not admitting of physical possession—Time will run where part of property is taken physical possession of under S 30 of the Act)
(1919) A I R 1919 Lah 496 (427) 52 Ind Cas 48 *Udmi v Ram Copal*]
- 3 (1921) A I R 1921 Sind 118 (120) 17 Sind L R 1 80 Ind Cas 962 *Khemchand Pamdaz v Mohsan Shah*
- 4 (1886) 1 C P L R 53 (53) *Umrav v Daxalat Singh*
(1886) 1 C P L R 132 (133) *Pendara Gend v Hara Singh*
(1905 OC) 3 Low Bur Rul 7 (8), *Ma Ko U v Tun E* (Suit for possession on the basis of the sale being void as being without authority—Art 142 and not Art 10 applies)

Article 10

Notes 14

real pre emptor is added as a party to such a suit for the determination of the question as to which of the two had a better right of pre emption, the suit, so far as such person is concerned, is governed, not by this Article but by Article 120 of the Act¹ Similarly, where a suit is filed in time against the vendee but the vendee is found to have transferred his rights to another and the transferee is added as a party but after the period of one year prescribed by this Article, the suit so far as he is concerned is not barred as being governed by Article 120 (See Note 1) But where A transfers property to B and B transfers the same to C and H files a suit for pre emption one year after the first transfer but within one year after the second, the suit will be barred so far as B is concerned, under this Article, and there is consequently no enforceable right against C²

A executes a joint sale to B C and D A suit for pre emption is instituted against B and C only, within the prescribed period D is added as a party to the suit after the prescribed period The suit must be dismissed as against all defendants³ A sale was executed in favour of three brothers 3rds of the property being mentioned in the deed as sold to G & M and the 3rd to P, but the price was recited to be payable in a lump sum of Rs 2000 G having died before institution of the suit his legal representatives were brought on record on a date on which the suit had become time barred against G, it was held that the suit being barred against G was barred against all on the ground that G was a necessary party to the suit⁴ But where the sale was in favour of two vendees but there was a distinct specification of the shares of each and their prices it was held that a suit for pre emption brought against them which was dismissed against one as time barred was maintainable against the other It was observed that the sale in this case was divisible⁵

Where a necessary party is a minor and is made a party within time the fact that a *guardian ad litem* is appointed for him after limitation does not make the suit time barred⁶

Notes 14

- 1 (1884) 7 All 167 (169) 1884 All W N 315 *Durga v Hawdar Ali*
(1893) 1893 Pun Re No 11 *Mutsadda Singh v Hamira*
(1912) 14 Ind Cas 328 (329) 1912 Pun Re No 80 *Ilahi Bux v Mohamed Rab Nawar Khan*
- (1912) 13 Ind Cas 645 (646) (All) *Sat Narain v Badri Nath*
(1899) 1899 Pun Re No 25 *Ganga Ram v Waryam*
(1908) 1908 Pun Re No 20 1908 Pun W R No 221 *Ram Pd v Ganga Dutt*
- 2 (1905) 1905 Pun L R No 86 p 340 *Ghulam Jilani v Hassan Ali*
- 3 (1911) 11 Ind Cas 938 (939) (All) *Mamraj Singh v Herday Ram*
(1921) A I R 1921 Oudh 252 (254) 63 Ind Cas 558, *Jai Jai Rani v Darshan Ram*
- 4 (1896) 1896 Pun Re No 66 *Kesar Singh v Punjab Singh*
- 5 (1909) 1 Ind Cas 91 (92) 1909 Pun Re No 6 *Dry Lal v Masson*
- 6 (1927) A I R 1927 All 787 (787) 102 Ind Cas 624 49 All 809, *Har Lal Singh v Indra Singh*

Where before the institution of the suit to enforce a right of pre-emption the vendee had transferred his rights to others, the pre-emptor, it was held, could not enforce his decree against the vendee's transferees who were not impleaded as parties in the suit against the vendee.⁷

15. Lis pendens.—The doctrine of *lis pendens* applies to pre-emption suits also.¹

Where, during the pendency of a pre-emption suit by a pre-emptor, the vendee enters into an agreement to sell the subject of sale to another pre-emptor with a preferential right, it has been held that the agreement is a dealing with property which offends Section 52 of the Transfer of Property Act and is therefore unenforceable.²

16. Value of the plea of limitation.—The plea of limitation in answer to a suit to enforce a right of pre-emption, which involves the dispossession of a perfectly lawful purchaser of property, is not a technical plea if by a technical plea is meant a plea which asserts rights which have no merits for their support.¹

17. Plea of right of pre-emption in defence.—A mortgaged his estate to B and subsequently sold the equity of redemption to C. B had a right of pre-emption in respect of the sale to C as a co-sharer but allowed his right to become barred. C thereafter filed a suit for redemption of the mortgage. B pleaded his right of pre-emption. It was held that he could not do so¹ on the ground that on the date of the suit B's right to sue for pre-emption having been barred B had no right of pre-emption at all which he could rely on. It is submitted the decision is correct, but not the grounds on which it is based. Limitation bars only the remedy and does not destroy the right except in cases coming under Section 28. In the above case even if the right is not barred, the plea of a right of pre-emption would not be a valid defence to a suit for redemption inasmuch as redemption cannot be refused because the mortgagee has a right of pre-emption. In this view the actual decision is correct.

7 (1907) 1907 Pun Re No 106 1908 Pun L R No 75 *Paushan v. Mahan*

Note 15

1 (1926) A I R 1926 All 180 (181) 90 Ind Cas 238 48 All 221 *Dachan Singh v. Bijai Singh*

2 (1917) A I R 1917 Oudh 193 (194) 38 Ind Cas 562 20 Oudh Cas 13 *Kubra Bibi v. Khudaya Bibi*

Note 16

1 (1921) A I R 1921 P C 50 (51) 48 Cal 110 47 Ind App 255 57 Ind Cas 606 (P C) *Charan Das v. Amir Khan*

Note 17

1 (1912) 16 Ind Cas 219 (220) (All), *Wajid Ali v. Safiqat Hussain*

Article 11

11. By a person, One year. The date of
 against whom any of the
 following orders has been
 made to establish the right
 which he claims to the pro-
 perty comprised in the
 order :

(1) Order under the Code
 of Civil Procedure,
 1908, on a claim pre-
 ferred to, or an ob-
 jection made to the
 attachment of, pro-
 perty attached in
 execution of a decree;

(2) Order under sec-
 tion 28 of the Presi-
 dency Small Cause
 Courts Act, 1882.

* Act of 1877.

11. By a person against whom an order is passed under Sec- tions 280, 281, 282 or 335 of the Code of Civil Procedure, to establish his right to, or to the present possession of, the property comprised in the order	One year	The date of the order.
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Act of 1871.

See Note 1, Legislative changes

Act of 1859, Section 1, Clause 5 and Clause 3.

*Limitation of one
 year, suits to set
 aside summary deci-
 sions, etc*

(5) To suits to alter or set aside summary decisions
 and orders of any of the Civil Courts not established by
 Royal Charter, when such suit is maintainable — the
 period of one year from the date of the final decision,
 award, or order in the case

*Limitation of one
 year, suits to set
 aside sales under
 decrees or for ar-
 rears of Govern-
 ment revenue, etc*

(3) To suits to set aside the sale of any property,
 moveable or immovable sold under an execution of a
 decree of any Civil Court

had been brought

Synopsis

Article 11

1. Legislative changes.
2. Scope of the Article.
- 2a. Article does not apply to suits on causes of action arising subsequent to date of order.
3. Third party cannot claim benefit of Article.
4. There must be an order against the plaintiff or his predecessor-in-interest.
5. Order against minor.
6. Withdrawal or removal of attachment subsequent to order disallowing claim — Effect of.
7. Withdrawal of attachment prior to enquiry into claim or objection — Effect of.
8. Suit must be to establish the right which the plaintiff claims.
9. Consequential relief, if should be asked.
10. "The property comprised in the order."
11. Clause 1 — General.
 12. Order dismissing claim or objection for default.
 13. Order dismissing a claim or objection on ground of delay.
 14. Order allowing withdrawal of claim or objection.
 15. Consent order in claim proceedings.
 16. Order in claim proceedings directing sale after notifying claim.
 17. Order rejecting a claim for want of jurisdiction.
18. Property must have been attached.
19. "Attached in execution of a decree."
20. Clause 2 — Order under Section 28 of the Presidency Small Cause Courts Act, 1882.
21. Starting point of limitation.

Other Topics

Article 29 and this Article — Distinction

Attachment before judgment

Attachment — If prevents running of time in favour of adverse possessor

Attachment — Withdrawal or raising of — If should take place within one year

Auction purchaser

Question of title and not merely of possession

Rights barred under other Article — This Article will not apply

See Note 10, Pt 4

See Note 19, Pts 2 to 4

See Note 2a, Pts 2, 3

See Note 6, Pts 5 to 6

See Note 4 F N (5)

See Note 8 Pts 4 to 6

See Note 2, Pt 2

Article 11 Note 1

1. Legislative changes. —

- 1 Clause 5 of Section 1 of the Act of 1859 corresponded to this Article and provided a period of one year for suits to *alter or set aside* summary decisions and orders of any of the Civil Courts not established by Royal Charter, when such suit was maintainable
- 2 Section 246 of the Civil Procedure Code, 8 of 1859, which corresponded to Order 21 Rules 58 to 63 of the present Code, also provided that the claim suit should be brought "at any time within one year from the date of the order"¹
- 3 The Act of 1871 repealed the words in quotation above referred to, but did not re enact the above provision in any of the Articles. It was consequently held that a claim suit filed after the date of the Act of 1871 need not be brought within one year of the date of the order but may be brought *within the ordinary period of limitation*²
- 4 The Act of 1877 introduced Article 11 corresponding to this Article. It, however, applied only to suits by persons against whom an order was passed under Sections 280, 281, 282 or 335 of the Civil Procedure Code of 1882 or to suits for the possession of property comprised in an order under Section 28 of the Presidency Small Cause Courts Act, 1882
- 5 The present Act has divided the subject matter of Article 11 of the Act of 1877 into two Articles 11 and 11A

Article 11 — Note 1

- 1 Section 246 of the Code of Civil Procedure (8 of 1859) ran as follows —
In the event of any claim being preferred to, or objection offered against the sale of lands or any other immovable or moveable property which may have been attached in execution of a decree or under any order for attachment passed before judgment, as not liable to be sold in execution

sought or of some other person in trust for him, or in the occupancy of raiyats or cultivators or other persons paying rent to him at the time when the property was attached or that being in the possession of the party himself at such time it was so in his possession not on his own account or as

2 (1880) 8 Cal L R 64 (55) *Joyraji Loot v Pans Ram Dhoba*
{See also (1898) 12 Mad 294 (296), *Narasimma v Applachariu*}

2. Scope of the Article.—This Article prescribes a period of one year from the date of the order referred to in it as the time within which a suit has to be brought to establish the right which the plaintiff claims to the property comprised in the order. "The policy of the Act evidently is," in the words of their Lordships of the Privy Council in *Sardhari Lal v Ambika Prasad*,¹ "to secure the speedy settlement of questions of title raised in execution sales and for that reason a year is fixed as the time within which the suit is to be brought."

The Article will not, however, enable a party to bring a suit when his right to do so is barred under some other Article of the Limitation Act. In other words, this Article will not extend the period of limitation in favour of the plaintiff, if, on the date of the suit, his rights are barred and extinguished by the operation of some other Article.²

2a. Article does not apply to suits on causes of action arising subsequent to date of order.—This Article does not apply to suits based on a cause of action which has arisen *subsequent* to the date of the order referred to in the Article. Thus, a Hindu reversioner whose right to the estate is contingent and accrues only after the death of the limited owner, is not bound to sue within one year by reason of his having preferred a claim unsuccessfully in execution of a decree against the limited owner. He is not debarred by reason of the claim order from filing a suit after the death of the widow.¹

A, who is in adverse possession of certain property attached in execution of a decree, but whose title thereto has not ripened into ownership, prefers a claim and his claim is allowed. The decree-holder files a suit to set aside the order allowing the claim, within one year of the date of the order, but by that time A's title by adverse possession has ripened into ownership. Is the suit barred? There is a difference of opinion on the point. According to the High Court of Madras the suit is not maintainable, inasmuch as the attachment does not prevent the running of time in favour of the adverse possessor.² According to the High Court of Bombay, such

Note 2

- 1 (1888) 15 Cal 521 (526) 15 Ind App 123 5 Sar 172 12 Ind Jur 210 (P C)
- 2 (1919) A I R 1919 Lah 151 (155) 50 I C 6 *Harnam Singh v Kishenchand* (1871) 8 Bom H C R A C 61 (63), *Gokalbhai Mulchand v Jhaver Chaturbhuj* (1936) A I R 1936 Lah 894 (400) 17 Lah 403 166 Ind Cas 157 *Dhiman Khan v Gurmukh Singh*

Note 2a

- 1 (1895) 20 Bom 801 (803), *Tai v Ladu* (1925) A I R 1925 Lah 84 (85) 75 Ind Cas 926, *Shib Deo Singh v Uttam Singh* (1932) A I R 1932 Lah 179 (180) 13 Lah 524 136 Ind Cas 265 *Natha v Ganesh Singh*
- 2 (1901) 11 Mad L Jour 344 (344) *Seetharam Reddi v Venku Pelli* [See also (1926) A I R 1926 Mad 42 (43) 90 Ind Cas 1037 *Ranga natha Iyer v Srinivasa Iyengar*]

Article 11
Notes
2—3

a suit is maintainable, the reason given being that the case must be decided on the rights of the parties *as they stood on the date of the order of the claim petition*. If, on that date, no title had been acquired by adverse possession by the defendant, the suit will lie.³

If in the illustration referred to in the above paragraph A's claim was dismissed and he brings a suit within one year of the date of the order against him can he rely upon the fact that subsequent to the date of the order his title by adverse possession has ripened into full ownership? It has been held that he cannot do so. The reason is that the Court must be deemed to have decided that A was not in possession on the date of the order or that his possession on such date was not on his own behalf. His possession prior to the date of the order cannot therefore be adverse and cannot be counted in computing the period of 12 years necessary to give a title by adverse possession.⁴

3. Third party cannot claim benefit of Article.—A person who is not a party to the claim proceedings cannot take advantage of the order passed therein and set it up as a bar to an action. Thus, where A makes a claim against the attachment of certain property in execution of B's decree and the claim is dismissed C another decree holder against the same judgment debtor, cannot take advantage of the order and contend that A ought to have filed a suit within one year of the order against him.¹ Similarly, an unsuccessful claimant even after the expiry of one year from the date of the order against him is not barred from defending a suit filed by a third person (i.e. a person other than the attaching decree holder).² Nor would he be barred from filing a suit against a third person.³ In the case cited below⁴ an order was passed allowing a claim and no suit was filed by the attaching decree holder within one year thereof. The judgment debtor was subsequently declared insolvent. The decree holder moved the Insolvency Court as representing the general body

3 (1894) 18 Bom 260 (262-263) *Harisankar Jebhai v Naran Karsan*
 (1910) 35 Bom 79 (88-89) 8 Ind Cas 639 *Vasudeo Atmarao v Eknath*

4 (1885) 8 Mad 506 (510) *Vela juthasi v Lakshmana*
 (1924) A I R 1924 Mad 111 (112) 47 Mad 160 77 Ind Cas 264 *Aisami a v Moideen Kunhi*

Notes 3

- 1 (1892) 15 Mad 477 (479) 2 Mad L Jour 219 *Gnanambal v Parvathi*
 (1896) 18 All 413 (414) 1896 All W N 129 *Jagan Nath v Ganesh*
 [See also (1869) 12 Suth W R 221 (222) 3 Beng L R App 122 *Chinta man; Sen v Isuar Ghandra*]
- 2 (1912) 16 Ind Cas 529 (529) (Mad) *Thiagaraya Mudahar v Sabapathy Mudahar*
 [See also (1868) 11 Suth W R 382 (384) *Booa Russoollee v The Nowab Nazim of Beigal*]
- 3 (1910) 8 Ind Case 157 (158) 34 Mad 533 *Sadaya Pellai v Amuttlachari*
 (1905) 3 Cal L Jour 381 (384) *Morshia Baroyal v Elai; Bux Khan* (In this case the claim of the attaching decree holder was settled by the claimant.)
- 4 (1935) A I R 1935 Mad 670 (671) 158 Ind Cas 175 *Rengammal v Varadappa Naidu*

of creditors, to annul under the provisions of Provincial Insolvency Act, the transfer which was the subject of the claim proceedings. It was held that he was not debarred from doing so, by virtue of the order in the claim proceedings against him not having been challenged within the prescribed period. The disability arising by reason of the claim order was held to be a personal one not affecting the right of the general body of creditors to re-agitate the matter in insolvency.

4. There must be an order against the plaintiff or his predecessor-in-interest.—The Article applies only where the plaintiff is a person *against whom* an order referred to in the Article has been made^{1a}. In objection proceedings the contest is really between the decree holder who asserts that the property is liable to attachment and the claimant who alleges that it is not in the actual or constructive possession of the judgment debtor and is therefore not liable to attachment. If the claim or objection is allowed, the decree holder is the person against whom there is an order such as that referred to in the Article, and he must sue within the period prescribed by this Article¹. If the claim or objection is disallowed, the *claimant* will be a person against whom an order has been passed within the meaning of this Article. Where on objection by a claimant the attachment is raised, the mere fact that adverse observations are made against the claimant will not make the order one against him^{1b}.

Where the *judgment debtor* is also actually a party to the claim proceedings, he would be bound by the order passed in such proceedings². If he was not in fact a party to the claim proceedings, he will not, in the eye of the law, become such by reason solely of

Note 4

1a (1909) 4 Ind Cas 144 (145) 32 All 83 *Haragawan Wagan v Dary Nath Das*

(1904) 1 All L Jour 531 (536), *Durga Prasad v Vansa Ram*

(1919) A I R 1919 Cal 117 (118) 53 Ind Cas 260, *Barkat Ali v Das Hazi*

(1881) 9 Cal L R 18 (20), *Kali Mohun Chukerbutty v Anandamoni Dabee*

(1873) 20 Suth W R 393 (394), *Kameswar Prasad v Kadir Khan*

(1887) 11 Bom 45 (47), *Payapa v Padmapa* (Third parties not bound by claim order)

[See also (1865) 4 Suth W R 35 (35) *Monohur Khan v Troyluckhonnath Ghose*]

1 (1898) 15 Cal 521 (525) 15 Ind App 123 12 Ind Jur 210 5 Sar 172 (P C), *Sardhars Lal v Ambika Pershad*

(1922) A I R 1922 All 403 (404) 44 All 607 66 Ind Cas 211 *Dhikhari Das v Abdullah*

1b (1915) A I R 1915 Mad 57 (57) 26 Ind Cas 532, *Balarani Reddi v Muhammad Abdul An-*

2 (1914) A I R 1914 Lah 447 (448) 22 Ind Cas 797 1914 Pun Re No 84, *Anant Ram v Damodar Das*

(1915) A I R 1915 Mad 463 (463) 23 Ind Cas 700, *Ayyanna v Ayyanna*

(1869) 4 Mad H C R 452 (475, 477) *Actetom Perengary Poni v Damodren Nambudry*

[See also (1891) 11 Bom 1 (13), *Burjorji Dorabji v Dhunbai*]

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his being the judgment-debtor.³ The question whether he is in fact a party to the claim proceedings is a question of fact depending upon the circumstances of each case.⁴

The person "against whom an order has been passed" would include his representative-in-interest such as transferee or purchaser in court sale.⁵

5. Order against minor. — Section 6 *ante* provides that in the case of a minor, a suit may be filed within the same period after the minority has ceased, as would otherwise have been allowed from the time prescribed therefor in the third column of the First Schedule. It follows that it is open to a minor against whom an order in a claim petition has been passed, to sue under Order 21 Rule 68 of the

- 3 (1924) A I R 1924 All 302 (303) 47 All 45 77 Ind Crs 82, *Rati Ram v Burhmajit* (Following 30 Mad 835)
 (1922) A I R 1922 All 411 (412) 77 Ind Cas 107, *Jethu Misr v Godawari Dutt* (Judgment debtor having no notice)
 (1881) 3 All 233 (235), *Mannu Lal v Harsukh Das*
 (1881) 1881 All W N 24 (24), *Husain Khan v Umar Khan*.
 (1911) 10 Ind Cas 421 (428) 35 Mad 168, *Kurriyil Farkum v Varanath Illath Ganapathi* (It must be shown that the judgment debtor had notice and was bound by claim order)
 (1902) 25 Mad 721 (723) 12 Mad L Jour 411, *Moidin Kutty v Kunhi Kutty*
 (1920) A I R 1920 Mad 187 (190) 54 Ind Cas 530, *Vedalingam Pillai v. Feerathal*
 (1928) 110 Ind Cas 511 (513) (Mad), *Lingama Naidu v. Official Receiver, Madura*.
 (1877) 1 Mad 391 (393) 2 Ind Jur 700, *Imbichi Koya v. Kakkunnat Upakki*
 (1873) 6 Mad H O R 416 (418), *Kunhi Kuttyali v Imbichi Ammah*
 (1883) 15 Cal 674 (681) 18 Ind Jur 101, *Kedar Nath v Rakhal Das*
 (1869) 2 Feng L R App 49 (50), *Nitta Kolita v Bishnuram v Kolita*
 (1929) A I R 1929 Pat 604 (605) 120 Ind Crs 762, *Mushi Lal v Bishun Prasad* (Judgment debtor not barred from defending a suit by successful claimant)
 [See also (1898) 22 Bom 875 (879), *Karsan v Ganapatram*]
 4 (1903) 13 Mad L Jour 367 (369), *Muthusamy Mudali v Ayyalu Bathadu*
 5 (1910) 8 Ind Cas 117 (118) 35 Mad 35, *Ramu Aiyar v Palaniappa Chetty*
 (1931) A I R 1931 All 133 (140) 52 All 1032 131 Ind Crs 674, *Kesho Ram v Churnu Singh* (Purchaser in court sale can question validity of claim allowing a mortgage within one year)
 (1928) A I R 1928 Cal 514 (516) 112 Ind Cas 642, *Sunith Sundari v. Srikrishna*
 (1927) A I R 1927 Lah 631 (633 634) 9 Lah 167 103 Ind Cas 763, *Tulsi Das v Shw Dat* (Held suit by defaulted claimant after court sale against auction purchaser competent)
 (1923) A I R 1923 Nag 282 (283) 82 Ind Cas 771 19 Nag L R 15, *Govind v. Dhekle*

(1830) 15 Bom 290 (292), *Vishwanathchardur v Subraya Shivappa* (Held auction purchaser not bound by order allowing claim)]

Civil Procedure Code within one year after he attains majority¹ A suit may also be filed on his behalf at any time before he attains majority.²

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Where a claim proceeding is instituted on behalf of a minor under the Court of Wards, without the necessary sanction, the order in such proceedings is not binding on the minor and consequently is not bound to be set aside by a suit. This Article will not apply if, after attaining majority, he sues to recover the property comprised in the order³

6. Withdrawal or removal of attachment subsequent to order disallowing claim — Effect of. — Where subsequent to an order disallowing a claim but prior to the expiry of the period of one year prescribed by this Article, the attachment is withdrawn by order of Court, either due to default on the part of the decree-holder or to the latter not pressing the execution application,¹ or to the supervening insolvency of the judgment-debtor,² or to some other cause,^{2a} the defeated claimant is not obliged to file a suit as contemplated by this Article. The reason is that the object of making a

Note 6

- 1 (1925) A I R 1925 Mad 379 (380) 80 Ind Cas 992, *Subbiah Pandaram v Arunachalla Pandaram*
- (1876) 1 Cal 226 (242) 3 Ind App 7 25 Suth W R 285 3 Sar 573 3 Suther 236 (F C), *Phoolbas Koonwar v Lalla Jogeshur Sahay*
- 2 See Note 83 to Section 6 ante
- 3 (1900) 27 Cal 212 (253) 4 Cal W N 405, *Ram Chandra v Rangit Singh*

Note 6

- 1 (1924) A I R 1924 Cal 744 (749) 51 Cal 548 83 Ind Cas 233 *Najimunnessa Bibi v Nacharadin Sardar* (Fresh execution will require fresh attachment and claimant can object again)
- (1926) 94 Ind Cas 120 (120) (Cal), *Satish Chandra Roy v Joy Chandra Roy*
- (1870) 14 Suth W R 367 (369) 7 Beng L R 233 (Note), *Luckhee Prea Debia v Khyroollah Kaze*
- (1872) 18 Suth W R 21 (21), *Ajuas Kooer v Mt Luteefa*
- (1930) A I R 1930 All 177 (179) 122 Ind Cas 865, *Onkar Prasad v Dhanu Ram* (Case of decree holder withdrawing attachment)
- (1934) A I R 1934 All 267 (270) 56 All 537 148 Ind Cas 676 (F B), *Habibullah v Mahmood*
- (1927) A I R 1927 Mad 893 (893) 104 Ind Cas 424, *Hanumiah v Sukhu moori Hanumiah*
- (1925) A I R 1925 Mad 1113 (1114) 87 Ind Cas 635, *Kumara Goundan v Theitaraya Reddi*
- (1918) A I R 1918 Mad 450 (451) 42 Ind Cas 683, *Subbayya v Sanlara Venkatarathnam*
- (1926) A I R 1926 Nag 423 (425) 22 Nag L R 91 97 Ind Cas 178, *Wamandhar v Kampla Prasad*
- [See also (1869) 11 Suth W R 184 (136) 2 Beng L R A C 254, *Durgaram Roy v Laja Narsing Deb*
- (1875) 1875 Pun Re No 43, *Hyder Bikhsh v Pir Bikhsh*
- (1929) A I R 1929 Rang 225 (228) 124 Ind Cas 261 F S *Arivar v Mannu Ngun* (Held defeated claimant can file a suit though attachment is withdrawn before suit)]
- 2 (1928) 110 Ind Cas 511 (513) (Mad), *Lingama Naidu v Official Receiver, Madura*
- 2a (1937) A I R 1937 Mad 41 (46) 106 Ind Cas 308, *Dharapuram Janopalara Nidhi Ltd v Lakshminarayana Chettiar*

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Note 6

claim in execution is to *remove the attachment*, and when the attachment is subsequently withdrawn, the object is gained and there is no longer any pending execution in which there is an *order against the claimant*, which can operate to his prejudice and consequently there is no cause of action for the suit contemplated by O 21 R 63 of the Code. In other words, by virtue of the withdrawal of the attachment, the claim order ceases to be operative. On the same principle, where subsequent to the order dismissing a claim the claim of the attaching decree-holder is settled and paid off and the attachment is consequently raised,³ or the decree in pursuance of which the attachment is effected is reversed in appeal,⁴ the same result follows, namely that the defeated claimant need not file a suit to vacate the claim order within the period of one year as required by this Article.

But the withdrawal or raising of the attachment or the satisfaction of the decree should, according to the High Courts of Calcutta⁵ and Madras⁶ and the Judicial Commissioners Court of Nagpur⁷ have taken place within the period of one year prescribed by this Article. The High Court of Lahore has, on the other hand, held that it makes no difference whether the attachment is raised within or beyond a year after the order.⁸ As pointed out by the High Court of Madras in *Chittamma v. Gavaramma*,⁹ "To hold that the right of an unsuccessful claimant to bring a suit remains in a state of suspended animation for an indefinite period after the expiration of a year from the date of the order against him liable to be revived at any moment by the payment off of the amount of the decree, would lead to great inconvenience."

Where however a claim is *allowed*, the decree holder against whom there is the claim order is entitled to maintain a suit against the successful claimant, notwithstanding the fact that he has allowed the execution proceedings to be withdrawn.⁹

3 (1921) A I R 1921 Bom 35 (36) 45 Bom 561 59 Ind Cas 774, *Manilal Girdhar v. Nathalal Mahasukhram*

(1893) 18 Bom 241 (243, 244), *Gopal Pursotham v. Bai Ditali*

(1904) 31 Cal 228 (231), *Krishna Prosad Roy v. Bipin Behary Roy*

(1882) 8 Cal 279 (281) 10 Cal L R 204, *Umesh Chandra Roy v. Raj Bullubh Sen*

(1889) 13 Bom 72 (74), *Ibrahim Bhai v. Kabulabhai* (Unsuccessful claimant can object to attachment in execution of another decree)

4 (1924) A I R 1924 Cal 744 (750) 51 Cal 548 83 Ind Cas 233, *Najimunnessa Bibi v. Nacharuddin Sardar*

(1925) A I R 1925 Cal 1147 (1148) 87 Ind Cas 756, *Satish Chandra Dutta v. Joy Chandra Roy*

5 (1924) A I R 1924 Cal 744 (751) 51 Cal 548 83 Ind Cas 233 *Najimunnessa Bibi v. Nacharuddin Sardar*

6 (1905) 29 Mad 225 (230) 16 Mad L Jour 136, *Chittamma v. Gavaramma*

7 (1926) A I R 1926 Nag 423 (425) 22 Nag L R 94 97 Ind Cas 178, *Waman-dhar v. Kampta Prasad*

8 (1931) A I R 1931 Lah 74 (76) 131 Ind Cas 225, *Chet Singh v. Gujar Singh*.

9 (1895) 21 Bom 58 (60), *Balaji Shamsi v. Moroba Nask*

7. **Withdrawal of attachment prior to enquiry into claim or objection—Effect of.**—Where before the date fixed for the disposal of the claim petition the execution application itself is struck off for want of prosecution, an order passed allowing the claim on the subsequent date to which it is posted is not an order against the decree holder which requires to be set aside under this Article. The reason is that the attachment having already come to an end under the first order, the subsequent order on the claim petition is unnecessary and the Court has no power to pass any order on the objection, as on that date it has become *functus officio*¹. There is consequently no valid order in force against any one which has to be set aside. The same principle applies to the case of a decree holder withdrawing the attachment before the disposal of the claim petition stating that he will bring a regular suit to have the property declared liable to attachment and sale.²

8. **Suit must be to establish the right which the plaintiff claims.**—The suit contemplated by Order 21 Rule 63 of the Civil Procedure Code and by this Article is a suit to *establish the right claimed in the enquiry*,¹ that is, the liability or non liability of the property attached to satisfy the decree under execution, and not the liability of third persons to satisfy the decree by the sale of their right, title and interest in the property.² The suit is, in essence, one to set aside the order in the claim proceedings^{3a} and is a continuation of the execution proceedings³ though the scope of the enquiry is much

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Note 7

- 1 (1922) A I R 1922 Lah 108 (111) 67 Ind Cas 543 3 Lah 7 *Firm Fateh Din v Qutob Din*
(1883) 7 Bom 408 (411) 8 Ind Jur 45, *Kashmath Morsheth v Rama Chandra*
[See also (1929) A I R 1929 Rang 123 (124, 125) 118 Ind Cas 634, *Maung Tun Hlaing v U Tha Aha*]
2 (1926) A I R 1926 Lah 343 (348) 7 Lah 235 93 Ind Cas 997, *Mulakh Paj v Firm Ralla Pama Rao Mal*

Note 8

- 1 (1928) A I R 1928 Mad 840 (841) 110 Ind Cas 554 *Venkatasubba Rao v Vigneswaradu*
(1868) 11 Suth W R 40 (41) 2 Beng L R A C 212, *Colon Colicte & Co v Mrs Varbarat Oten Julia Elias*
(1884) 7 Mad 295 (297) (T B) *Ramkrishna v Namastaya*
2 (1896) 23 Cal 302 (308), *Padha Prasad Singh v Ramkhelawan Singh*
(1915) A I R 1915 Cal 411 (411) 28 Ind Cas 576, *Jagat Chandra v Padha Nath*
(1904) 1 Cal L Jour 296 (300, 301), *Bibi Altman v Dhaleshuwar Pershad*
2a (1885) 8 All G (9) 12 I A 150 4 Sar 663 9 Ind Jur 442 (P C), *Alexander Mitchell v Mathura Das*
3 (1928) A I R 1928 Mad 1201 (1207) 82 Mad 465 116 Ind Cas 827, *Rajamier v Subramanyam Chettiar*
(1925) A I R 1925 Nag 62 (65) 80 Ind Cas 905 22 Nag L R 67 *Khairulla v Seth Dhanrajmal*
[But see (1919) A I R 1919 Lah 200 (201) 50 Ind Cas 645 1919 Pun Re No 70 *Blawaridankar v Industrial Lark of India Ltd*]

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wider. What is decided in the suit is the question of *title* and not merely the question of possession.⁴ The suits referred to are substantive suits⁵ and the claimant may thrash out his title in the fullest and most ultimate sense.⁶

In a suit by the decree holder under Order 21 Rule 63 of the Civil Procedure Code, he must establish that on the date of the attachment, the judgment-debtor had a subsisting right to the property and the suit must be tried as if it were a suit by the judgment-debtor himself for possession.⁷ In a suit by a defeated claimant, he must establish his title by a declaratory decree and then carry the decree to the Court by which the order of attachment was issued and such Court is bound to recognize the adjudication and govern itself accordingly.⁸

9. **Consequential relief, if should be asked.** — There is no limitation as regards the nature of the suit referred to in the Article. No particular prayer is excluded from its scope¹. The suit is of a comprehensive nature and the words "to establish the right" are wide enough to cover not only a mere declaratory suit but also one for consequential relief such as the recovery of the value of the property if it had been already sold,² or for possession,³ or for damages

- [illegible]

- (1922) A 1 R 1922 Lib 58 (59) 77 Ind Cas 116, *Molar v Kanhaya Lal*
(Defaulted claimant filing suit cannot, after dismissal of suit, ask for
stay of sale from the Appellate Court)
(1875) 24 Suth W R 70 (71), *Doorga Churn Chatterjee v Ashootosh Dutt*
(Sale ought to be stayed by executing Court)
6 (1924) A 1 R 1924 Cal 744 (746) 51 Cal 548 83 Ind Cas 233, *Nayimunnessa*
Bibi v Nacharaddin
(1933) A 1 R 1933 Mad 328 (329) 142 Ind Cas 305, *Pakirayya v Kamasastri*.
7 (1910) 8 Ind Cas 639 (642) 35 Bom 79, *Vasudeo Atmaram Joshi v Eknath*
Balkrishna
8 (1881) 4 Mad 131 (133), *Narayan v Nillandan Nambudri*

Note 9

- 1 (1918) A I R 1918 Nag 233 (233) 43 Ind Cas 960, *Dhondiram Magnumam v Ramgopal Kaniram*
 (1919) A I R 1919 Mad 257 (258) 42 Mad 143 51 Ind Cas 714, *Puthiya-
 purayil Pokler v Chandran Kandi Kunhamad*
 (1928) A I R 1928 Rang 34 (35) 5 Rang 699 105 Ind Cas 368, *U Po Thin
 v O A O K R M Firm*
 2 (1917) A I R 1917 Mad 393 (394) 40 Mad 733 36 Ind Cas 445, *Basuiredi
 v Rammayya*
 (1931) A I R 1931 Lah 483 (484) 13 Lah 143 132 Ind Cas 215, *IbduL Aziz
 v Alliance Bank of Simla Ltd*
 (1933) 17 Mad 339 (390), *Naranayyan v Nageswarayyan*
 3 (1874) 11 Bom H O R 174 (181), *Rango Futbal v Rikhwadas*

for wrongful attachment³³ In other words, the expression "to establish the right" means "to establish the right *effectively* by obtaining appropriate reliefs for the infringement of his rights"³⁴ But the plaintiff is not *bound* to ask for a consequential relief. He may ask for a mere declaration and the suit cannot be dismissed as offending the provisions of the proviso to Section 42 of the Specific Relief Act, 1877³⁵

10. "The property comprised in the order." — The order passed in the claim proceedings is *conclusive only* with reference to the specific property comprised in the order and not in respect of any other property.¹ Where a claim is preferred in respect of several items of properties attached but the Court acting under a

(1892) 16 Bom 608 (617), *Sadhu Raghu v Ram Govind*

31 (1897) 19 All 253 (254) 1897 All W N 60 (F B) *Lachminarain v H C Martindell*

(1886) 12 Cal 696 (705), *Aishori Mohun Rai v Hursook Dass*

4 (1892) 16 Bom 608 (615, 616), *Sadhu Paghu v Ram Govind*

(1917) A I R 1917 Mad 893 (394) 40 Mad 733 36 Ind Cas 445 *Basureddi v Rammayya*

5 (1906) 29 Mad 151 (152) (F B), *Kristnam Sooraya v Pathnia Bebee* (Over ruling 16 Mad 140)

(1934) A I R 1934 Rang 332 (333) 12 Rang 670 153 Ind Cas 94⁹ *Maung Tun Thein v Maung Sin*

(1891) 14 Mad 23 (25) 1 Mad L Jour 28 *Anub v Ketilamma*

(1909) 2 Ind Cas 980 (9-0) (Mad) *Veera Pannadi v Karuppa Pannadi*

(1930) A I R 1930 All 895 (396) 124 Ind Cas 713, *Mt Chito v Jhunn Lal*

(1880) 4 Bom 529 (535) (F B) *Narayanarao Damodar v Balakrishna Mahadei*

(1927) A I R 1927 Lah 631 (633) 103 Ind Cas 763 9 Lah 167, *Tulsi Das v Shri Dat*

(1919) A I R 1919 Lah 364 (366) 52 Ind Cas 157 *Waryam Singh v Narain Das*

(1900) 1900 Pun Re No 111 page 432, *Muran Balsh v Alra*

(1891) 1891 Pun Re No 29 page 168 *Ganpat Rai v Hira Singh*

(1923) A I R 1923 Pat 564 (572) 77 Ind Cas 1 *Bhaguan Lal v Payendra Prasad*

(1918) A I R 1918 Pat 217 (218) 43 Ind Cas 396, *Hari Lal Saku v Ranchi Ministerial Officers*

(1897) 1 Oudh Cas 272 (279) *Mt Tulsha v Mahadeo Prasad*

(1912) 14 Ind Cas 510 (511) 1912 Pun Re No 10 *Sahib Dial v Lajpat Rai*

(1916) A I R 1916 Low Bur 19 (20) 34 Ind Cas 125, *K F A M Chetty Firm v S N V P Chetty Firm*

(1931) A I R 1931 Rang 310 (311) 9 Rang 367 134 Ind Cas 746 *Maung Aung Myint v Maung Tha Hmat*

(1910) 8 Ind Cas 608 (609) (Low Bur) *Pitche Pillai v Maung Pet*

(1893 1900) 1893 1900 Low Bur Rul 281 *Sabapadi Chetty v Maung In*

(1907 1908) 4 Low Bur Rul 263 (264) *Alagappa Chetty v Naramat Ali Chowdhury*

(1907 1908) 4 Low Bur Rul 88 (88) *Kya Get v Bu Nye*

(1929) A I R 1929 Rang 104 (104) 115 Ind Cas 912 *Va T'ian Yen v Sena Mahomed* (Held that stated claimant is not entitled to file a suit under Section 47 of the Specific Relief Act)

(1926) A I R 1926 Rang 124 (125) 4 Rang 22 95 Ind Cas 95 *A F M A Firm v Maung Po T'um* (Do)

Note 10

1 (1889) 14 Bom 206 (209, 212) *Dinkar Ballal v Hars Stridhar*

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misapprehension orders a few items only to be released from attachment, it cannot be said that there is an order against the claimant with reference to the other properties not comprised in the order.² The property comprised in the order may be immovable or moveable property, as for instance a debt attached under the provisions of Order 21 Rule 46 of the Code of Civil Procedure. A claim can be preferred under Order 21 Rule 58 of the Code even with respect to a debt attached under Order 21 Rule 46.³

This Article deals with a suit by a person to establish his right to the property and should be distinguished from Article 29 which deals with a suit for compensation for wrongful seizure of moveable property under legal process.⁴

11. Clause 1—General.—The order referred to in clause 1 of the first column of the Article is one passed under Order 21 Rules 60, 61 or 62 of the Code of Civil Procedure, and not any other order passed in execution proceedings such as an order under Order 21 Rule 66 of the Code.¹ As to the classes of orders which may fall within the said Rules, see Notes 12 to 17, *infra*.

12. Order dismissing claim or objection for default.—An order dismissing a claim *for default* of appearance of parties¹ or for failure

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- (1917) A I R 1917 Cal 669 (670) 41 Cal 698 37 Ind Cas 887, *Ama Bibi v Jaigunnissa Bibi*
 (1890) 13 All 53 (62) 17 Ind App 150 5 Srr 600 (PC), *Radha Prasad Singh v Lal Sahab Rai*
 (1886) 12 Cal 453 (457), *Bukshi Ram Pergash Lall v Sheo Pergash Tewari*
 (1887) 8 Suth W R 27 (28), *Mt Imani Bandes Begam v Mirsa Mahomed Tulkee Khan*
 (1874) 21 Suth W R 230 (231), *Boohroonnissa Dibee v Kureemoonnissa Khatoon*
 (1909) 1 Ind Cas 742 (743) 1909 Pan Re No 42 *Bhagwant v Goman*
 2 (1909) 1 Ind Cas 742 (743) 1909 Pan Re No 42 *Bhagwant v Goman*
 3 (1904) 27 Mad 67 (70) 13 Mad L Jour 467 (F B) *Chidambara Pattar v Ramaswamy Pillar*
 (1924) A I R 1924 Lah 367 (367) 71 Ind Cas 45, *Pisara Ram v Ganga Ram* (Following A I R 1914 Bom 299)
 (1874) 22 Suth W R 36 (39), *Mt Rasibutty Koor v Kamessur Pershad*
 [But see (1900) 24 Mad 20 (22) *Basavayya v Sued Abbas Sahib* (No longer good law in view of the *Liber Pull Bench* case)]
 4 (1911) 9 Ind Cas 773 (773) (Low Bur), *Venkatachallam Chetty v Nagappa*

Note 11

- 1 (1926) A I R 1926 Nag 423 (425) 22 Nag L R 94 97 Ind Cas 178, *IVaman dhar v Kampla Prasad*
 (1913) 20 Ind Cas 182 (182) 35 All 257, *Jairaj Mal v Radha Krishen*
 (1906) 23 All 418 (420) 3 All L Jour 200 1906 All W N 68, *Shib Kunwar Singh v Sheo Parshad Singh*
 (1916) A I R 1916 Bom 179 (180) 36 Ind Cas 697 41 Bom 64, *Ganesh v Damoo*
 (1927) A I R 1927 Bom 934 (236) 101 Ind Cas 335 *Chunni Lal Jivan Lal v Pira Usayan*
 (1911) 10 Ind Cas 915 (914) 35 Bom 275 *Narayan Sadoba v Umbar Adam*

Note 12

- 1 (1922) A I R 1922 Cal 164 (164) (F B) *Haripada Maji v Surendra Nath Samantha*

to produce evidence² is nonetheless "an order passed against" the claimant within the meaning of this Article. It is also not necessary that the order should have been passed on investigation into the merits of the case³. The fact that the order was passed upon

(1922) A I R 1922 Cal 166 (167) 64 Ind Cas 713, *Satindra Nath Banerji v Shri Prasad Bhakat*

(1912) 15 Ind Cas 683 (684) (Cal), *Jugal Kishore Marwari v Bijoy Krishna Mukherjee*

(1874) 21 Suth W R 409 (409), *Sreemunta Hajrah v Syed Tajjooddeen*

(1871) 15 Suth W R 311 (311) 7 Beng L R 235, *Lala Gundar Lal v Habibunnissa*

(1919) A I R 1919 All 247 (248) 41 All 623 50 Ind Cas 748, *Gulab v Mutsaddi Lal*

(1897) 19 All 253 (255) 1897 All W N 60 (F B) *Lachmi Narain v C H Martindell*

(1910) 5 Ind Cas 890 (891) 1910 Pun Re No 29 *Jaswan v Nathu Mal* (Claim allowed *ex parte* due to default of decree holder)

(1927) A I R 1927 Lah 872 (872) 105 Ind Cas 693, *Kashen Parshad v Punjab National Bank*

(1924) A I R 1924 Mad 715 (715) 47 Mad 651 79 Ind Cas 818 *Ramappa Chettiar v Elambara Padayachi* (Order of dismissal for default can be set aside)

(1921) A I R 1921 Oudh 54 (54) 24 Oudh Cas 218 64 Ind Cas 209, *Kedar Nath v Sukh Nath*

(1908) 11 Oudh Cas 180 (182) *Gayadin v Mt Day Nath*

(1924) A I R 1924 Rang 42 (43) 1 Rang 481 76 Ind Cas 841, *Maung Pya On v Ma Hla Ayu* (Following A I R 1919 Mad 788 (F B))

[But see the following cases of claims arising under Civil Procedure Code, 1882, which are now not good law —

(1915) A I R 1915 Cal 121 (121 122) 26 Ind Cas 943 *Oomacharan Bhattacharjee v Hiranmoyee Debi*

(1904) 1904 Pao Re No 87 1904 Pun L R No 119, *Sajan Ram v Pam Rattan*

(1908) 31 Mad 5 (6 7) 17 Mad L Jour 554 3 Mad L Tim 106 *Saraba Subba Rao v Kamala Thirumayya*]

2 (1927) A I R 1927 All 593 (595 596) 49 All 903 102 Ind Cas 792 *Debi Das v Rupchand*

(1918) A I R 1918 All 72 (74) 40 All 325 41 Ind Cas 1005, *Gokul v Mohra Bibi*

(1883) 1883 All W N 19 (19) *Himayat Ali v Mansukh*

(1905) 32 Cal 537 (540) *Rahim Dux v Abdul Khader*

(1905) 1 Cal L Jour 296 (299 300) *Bibi Ahman v Dhakeshwar Pershad Narain Singh*

(1883) 12 Cal L R 43 (44) *Sadut Ali v Ram Dhona Musser*

(1878) 20 Suth W R 167 (168), *Kudomassuree Dassce v Enam Ali Vookhlear*

(1878) 20 Suth W R 345 (345), *Gooroo Doss Roy v Sona Monee Dossia*

(1874) 22 Suth W R 39 (39) *Kaminee Debi v Issur Chandra Roy Choudhury*

(1875) 24 Suth W R 411 (412) *Trispora Soondurce Debi v Ijjutloomissa Khaloon*

[But see (1897) 1 Cal W N 24 (29) *Kallar Singh v Toril Mahton* (Case under 1882 Civil Procedure Code not good law)]

(1880) 1880 Pun Re No 73 *Mt I am Koer v Rai Bhag Singh*]

3 (1920) A I R 1920 All 168 (168) 57 Ind Cas 5, *Pam Narayan Tewari v Khanu Rai*

(1919) A I R 1919 Cal 835 (836) 45 Cal 785 44 Ind Cas 265, *Nogendra Lal Choudhury v Fani Dhusan Das*

(1880) 5 Suth W R 213 (214) *Shank Khoda Bulsh v Furmonund Dutt*

(1927) A I R 1927 Lah 680 (681) 101 Ind Cas 2-9, *Dual Chand v Lachhman Singh*

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improper or insufficient investigation does not afford a ground for taking it outside the scope of this Article ⁴

13 Order dismissing a claim or objection on ground of delay.—An order summarily dismissing a claim or objection on the ground of *delay* under the proviso to Order 21 Rule 58 of the Code of Civil Procedure is an order passed against the claimant within the meaning of this Article ¹ Where the claimant does not file the suit to set aside the order within the period prescribed by

(1916) A I R 1916 Mad 443 (444) 27 Ind Cas 914, *Narasimha Chetti v. Vajjappa Nainar*

(1918) A I R 1918 Mad 1054 (1055) 38 Ind Cas 937, *Ponnusamy Pillai v Samu Immal*

(1923) A I R 1923 Nag 69 (69) 60 Ind Cas 522, *Gangadharrao v Syed Abdul Majid*

(1926) A I R 1926 Nag 423 (425) 22 Nag L R 91 97 Ind Cas 178, *Waman dhar v Kampta Prasad*

(1931) A I R 1931 Oudh 1 (4) 131 Ind Cas 77 6 Luck 461 (FB), *Ran Bahadur Singh v Salig Ram*

(1929) A I R 1929 Pat 116 (117) 115 Ind Cas 703 *Subedar Singh v Ram prti Pande* (Dismissal of claim without going into the merits on a preliminary point that S 170 Bengal Tenancy Act operated as a bar)

(1920) A I R 1920 Pat 123 (124) 58 Ind Cas 37 5 Pat L Jour 652, *Rasrud-din Hassan v Bundesri Prasad Singh*

The following cases under the Act 15 of 1877 are now no longer good law

(1905) 27 All 464 (465) 1905 All W N 49 2 All L Jour 178 *Udit Narain Singh v Murtaza Khan*

(1874) 6 N W P H O R 185 (188) *Mt Kamran v Neit Ram*

(1868) 8 Agra 397 (398), *Bhola Dul v Shah Ahmed*

(1885) 12 Cal 108 (109) *Chandra Bhusan Gangopadhyay v Ram Kanth Banerji*

(1872) 17 Suth W R 304 (305) 9 Beng L R App 28 *Amjud Ali v Kunkoo Shaw*

(1871) 16 Suth W R 22 (23 24) 8 Beng L R App 39, *Jagabhandu Bose v Srimati Sachyn Bibi*

(1865) 2 Suth W R 263 (263) *Syud Mahomed Afsul v Kanhya Lal*

(1915) A I R 1915 Lah 303 (305) 29 Ind Cas 731 *Mahomed Buksh v Bal Kishen*

(1916) A I R 1916 Mad 770 (773) 31 Ind Cas 250 *Subba Iyer v Subba Iyer*

Pradosham Reddi

Mallou and Lal v Naresa

Chandra

⁴ (1917) A I R 1917 Oudh 99 (101) 37 Ind Cas 92 19 Oudh Cas 357, *Bal Mahund v Maqsum Ali*

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¹ (1928) A I R 1928 All 327 (328) 116 Ind Cas 81, *Durag Das v Gori Mal*
(1923) A I R 1923 All 435 (436) 74 Ind Cas 1024 45 All 483, *Goberdhan Das v Makunda Lal*

(1931) 130 Ind Cas 200 (201) (All), *Damodar Das v Pearcey Lal*

(1933) A I R 1933 Bom 190 (190, 191) 57 Bom 213 144 Ind Cas 993, *Trimbak Tumdushet v Ziparu Chaturdas*

(1880) 4 Bom 21 (23) 4 Ind Jur 458 *Venkapa v Chenbasappa*

(1935) A I R 1935 Cal 500 (501 502) 157 Ind Cas 688, *Abdul Latiff v Aliu Mia*

this Article, the order becomes conclusive and he will be thereafter precluded from asserting his title to the property comprised in the claim either as plaintiff or as defendant¹

14. Order allowing withdrawal of claim or objection.—

Where the claimant under Order 21 Rule 58 of the Code of Civil Procedure withdraws his claim as not pressed, and the claim petition is consequently dismissed, it has been held that the order is not one against the claimant¹. The reason advanced for such a view is that where the claimant withdraws his claim, he is abandoning the same and wishes the Court to have it treated as if it never has been made, in other words, he asks the Court not to decide either for or against him. It has been pointed out that the proper order to be passed in such a case is to record on the petition the word "withdrawn" and not the word "dismissed", the fact that the order is one of dismissal does not in such a case make it an order against the claimant.

15. Consent order in claim petitions.—An order passed in claim proceedings by consent is according to the High Court of Madras¹ nonetheless "an order passed against" the claimant or the decree holder as the case may be, within the meaning of this

(1919) A I R 1919 Mad 738 (742 743) 41 Mad 985 48 Ind Cas 270 (F B), *Venkataratnam v Ranganayalam*

(1924) A I R 1924 Mad 111 (112) 47 Mad 160 77 Ind Cas 264 *Aisamma v Moidin Kunhi*

(1926) A I R 1926 Mad 593 (594) 93 Ind Cas 335, *Ramalingappa v Narayanappa*

(1928) A I R 1928 Mad 525 (526) 110 Ind Cas 567, *Dorayya v Narasimham*

(1916) A I R 1916 Lah 278 (274) 35 Ind Cas 821 1916 Pun Re No 66, *Gopal Singh v. Ganpat Rai*

(1923) A I R 1923 Nag 187 (188) 71 Ind Cas 404 10 Nag L R 34, *Narsayya v Laxminarayan*

(1935) A I R 1935 Pat 122 (123) 148 Ind Cas 334, *Rasananda Rath v Ratha Sahu*

[See however (1868) 10 Suth W R 306 (306), *Azzetunnissa v Moonshiee Rahmanollah* (Case under old Act—Submitted not good law)]

(1910) 5 Ind Cas 298 (300) (Cal) *Sankar Nath v Madan Mohan Das*

(1870) 14 Suth W R 364 (364) *Rahoonath Dass Mohapattur v Bydonath Dass Maharatha*]

2 (1935) A I R 1935 Cal 500 (501, 502) 157 Ind Cas 688, *Abdul Latiff v Aliu Mia*.

(1925) A I R 1925 Mad 368 (369) 82 Ind Cas 737, *Ramalingappa v Narayanappa* (Defeated claimant not filing suit cannot avail of suit by successful party by filing written statement within one year)

Note 14

1. (1925) A I R 1925 Mad 265 (266) 80 Ind Cas 233, *Lakshminarasamma v P Pydanna*

(1935) A I R 1935 Mad 544 (544) 156 Ind Cas 680, *In re Narayanappa* (Following 110 Ind Cas 511 (Mad))

(1935) A I R 1935 Mad 828 (829, 830) 156 Ind Cas 906, *Kandasamy Mudaliar v Sragurunatha Mudaliar*

(1925) A I R 1925 Nag 2 (6) 20 Nag L R 106 79 Ind Cas 1002, *Chitnaris v Nathu Sae*

Note 15

1. (1915) A I R 1915 Mad 1128 (1129) 28 Ind Cas 536, *Venkatarama Iyer v. Narayana Iyer*.

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Article The High Court of Calcutta has, however, taken a contrary view²

16. Order in claim proceedings directing sale after notifying claim. — An order passed on a claim petition that “the claim put forward by the petitioner will be noted in the sale proclamation” and that it does not require investigation, is not an order *against* the claimant, because it does not negative his claim and there is no dismissal of the claim¹ Where, however, the Court passes an order *dismissing the claim* under the proviso to Order 21 Rule 58, and the order further directs the claim to be notified in the sale proclamation, such an order is one against the claimant² The practice of notifying claims to intending bidders has been condemned by the Full Bench of the High Court of Madras in *Venkataratnam v. Ranganayakamma*³ as not being warranted by the provisions of the Code of Civil Procedure See also the undermentioned case⁴

17. Order rejecting a claim for want of jurisdiction. — Where the Court declines to investigate a claim on the ground that it has no jurisdiction¹ or the claim is withdrawn because the Court has no jurisdiction to entertain it² there is no order *against* the claimant within the meaning of this Article Where a claim petition was put in after sale, and was dismissed on the ground that the sale had already been concluded, it was held that the order was not one dismissing the claim on the ground of delay but really on

- 2 (1919) A I R 1919 Cal 126 (127) 50 Ind Cas 649 *Panchu Muchi v. Bhuto Muchi*

Note 16

- 1 (1923) A I R 1923 Mad 295 (296) 72 Ind Cas 857, *Parambil Saharab v. Ali*
(1920) A I R 1920 Mad 822 (823, 824) 52 Ind Cas 938, *Ayya Pattar v. Attupurath Manakkal*
(1867) 7 Suth W R 256 (257) Beng L R Supp Vol 643 (F B), *Jadoonath v. Radhomonee Dassee*
(1867) 7 Suth W R 252 (252), *Rutnessur Aundoo v. Majeda Debee*
[See also (1882) 11 Cal L R 352 (353, 354), *Adhicari Rash Behari Dass v. Gopinath Barapanda Mahapatra*]
2 (1925) A I R 1925 Mad 368 (369) 82 Ind Cas 737, *Ramalingappa v. Nara nappa*
(1919) A I R 1919 Mad 738 (742 743) 41 Mad 985 48 Ind Cas 270 (F B), *Venkataratnam v. Ranganayakamma*
3 (1919) A I R 1919 Mad 738 (743) 48 Ind Cas 270 41 Mad 985 (F B), *Venkataratnam v. Ranganayakamma*
4 (1935) A I R 1935 Mad 1015 (1016, 1017) 158 Ind Cas 863, *Manicha Mudali v. Abdul Karim Sahib*

Note 17

- 1 (1921) A I R 1921 Mad 488 (489) 63 Ind Cas 431, *Lakshmi Ammal v. Kaderasan Chethar*

Lalji. (The order was “Application is rejected as the execution is transferred to Collector” — Order is without jurisdiction)]

- 2 (1928) A I R 1928 Mad 878 (879) 112 Ind Cas 619, *Sita Sanhara v. Purakkal Kuppan*

the ground that the Court had no jurisdiction to hear it³ Where however the Court entertains the claim and enquires into it but eventually dismisses it because the claimant has no *locus standi* to make the claim, the order is one passed against the claimant within the meaning of this Article⁴ In the undermentioned case,⁵ where an objection was filed on the date of sale but was dismissed for default subsequent to the sale, the order was held to be without jurisdiction and a suit by the objector to establish title not governed by this Article

See also Note 5 to O 21 R 63 of the Authors' Commentaries on the Code of Civil Procedure

18. Property must have been attached.—In order to attract the provisions of this Article there must be a claim preferred to, or objection made to the attachment of, property attached in execution of a decree¹ The property to which a claim is made must be property which has been *de facto* attached No property can be declared to be attached unless *first* the order for attachment has been issued and *secondly* in execution of that order the other things prescribed by the rules in the Code of Civil Procedure have been done Thus, the mere fact that there is an order for attachment by the Court which is not however followed by the actual attachment of the property as prescribed by the Code will not constitute a valid attachment² Where in such a case a mortgagee prefers a claim under Order 21 Rule 63 of the Code, and the claim is disallowed, the defeated claimant is not bound to sue within one year as prescribed by this Article The reason is, as pointed out by the Judicial Committee, the order dismissing the claim of the mortgagee is not merely defective in form but *ab initio a nullity* In the words of their Lordships, "unless there has been attachment, there can be no order made on an objection lodged to it, nor can any claim be made to the property so attached, and without such an order, there is no *terminus a quo* for the running of limitation, and with

3 (1929) A I R 1923 Mad 76 (80) 70 Ind Cas 648 45 Mad 827, *Abdul Kadir v. Somasundaram Chettiar*

[See however (1880) 4 Bom 23 (24) (Note) 4 Ind Jur 459 (Note), *Jetti v. Sayad Hussain*]

4 (1935) A I R 1935 Pat 31 (32) 150 Ind Cas 40, *Sri Krishna Sahu v. Dhirja Mahi*

(1929) A I R 1929 Pat 116 (117) 115 Ind Cas 703 *Subedar Singh v. Rampriti Pande* (Claim dismissed upon a preliminary point that S 170, Bengal Tenancy Act barred the claim)

5 (1937) A I R 1937 Cal 930 (932) 172 Ind Cas 503, *Sasthi Charan v. Gopal Chandra*

Note 18

1 (1888) 10 All 479 (484) 1888 All W N 189 *Angan Lal v. Gudar Mal*

(1924) A I R 1924 Oudh 884 (885) 83 Ind Cas 869 *Disheshwar v. Chandrika Prasad* (Held that a claim by a possessory mortgagee was not an objection to attachment)

2 (1928) A I R 1928 P C 139 (141) 51 Mad 349 55 Ind App 256 109 Ind Cas 626 *Muthiah Chetty v. Palaniappa Chetty* (Reversing A I R 1922 Mad 447)

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this the limitation itself is non-existent. The first head of Article 11, in the opinion of their Lordships, can on its words mean nothing else.³ No attachment is necessary in the case of an execution of a mortgage decree, and this Article does not apply to claims arising out of execution of a mortgage decree.⁴ Where, however, a mortgagee decree holder erroneously proceeds to execute the mortgage decree as a simple money decree and attaches the hypotheca in execution and a claim or objection is made to the attachment and the same is allowed, the order allowing the claim is conclusive and binding on the mortgagee decree holder, unless he files a suit within one year of the order under this Article.⁵

19. "Attached in execution of a decree."—Clause 1 of this Article refers to orders passed on a claim or objection relating to property attached in execution of a decree. Where the property is attached before judgment and not in execution of a decree, and a claim or objection with reference to such attachment is allowed or disallowed, a suit to set aside that order is not governed by this Article¹ but by Article 120.² Where, however, there is an order in execution for the sale of the property attached before judgment,

- (1933) A I R 1933 Lah 449 (450) 144 Ind Cas 878 Qasim Ali v Kalyan Das
(1933) A I R 1933 Lah 75 (76) 141 Ind Cas 252, Mathra Das v Amin Chand
3 (1929) A I R 1929 P C 139 (141) 51 Mad 349 109 Ind Cas 676 55 Ind App 256 (P C) Muthiah Chetty v Palaniappa Chetty
4 (1933) A I R 1933 Lah 75 (76) 141 Ind Cas 252 Mathura Das v Amin Chand
(1893) 18 Bom 95 (100) Humatram v Khushal Jethram
(1890) 4 Bom 515 (524) (F B) Dayachand Nenchand v Hemchand Dharamchand
(1887) 14 Cal 631 (633) Deefholts v Peters
(1897) 1 Cal W N 701 (702) Joy Pralush Singh v Abhoy Kumar Chand
(1921) A I R 1921 Cal 479 (480) 68 Ind Cas 271, Mahabir Prasad Singh v Jogendra Nath Mandal
(1894) 17 Mad 17 (19) Krishnan v Chodayan Kutta
5 (1927) A I R 1927 P C 341 (344) 73 Ind Cas 682 (P C) Sarju Prasad v Mahsudan Choudhary
(1929) A I R 1929 Mad 525 (526 527) 110 Ind Cas 567, Dorayya v Govindarajulu Narasimham
(See however (1895) 12 Cal 453 (458) Dakhshinam Perigash Lal v Sita Perigash Thirari)

Note 19

- 1 (1918) A I R 1918 Mad 640 (641) 41 Mad 23 39 Ind Cas 863 Pamanamma v Bathula Kavaraju
(1921) A I R 1921 Mad 163 (167 168) 44 Mad 902 70 Ind Cas 439 (F B) Arunachalam Chetty v Periasamy Serrani
ad 68 60 Ind Cas
Bishanibar Salai v
Sundera J
2 (1921) A I R 1921 Mad 163 (167 168) 44 Mad 902 70 Ind Cas 439 (F B)
(1934) 29, M Babbar Kumari
1 R 1921 Mad 163 (F B),

the order proceeds on the footing that the property is to be considered as attached in execution by virtue of Order 38 Rule 11 of the Code of Civil Procedure and a claim put in *after that order* may properly be regarded as a claim to property attached in execution of a decree within the meaning of this Article³

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It has been held that a Provincial Small Cause Court has no power to order an attachment before judgment of immovable property, that a claim proceeding under Order 21 Rule 63 of the Code or order thereon with reference to such an attachment is a nullity, and that the defeated decree holder is not obliged to bring a suit within the period of limitation prescribed by this Article⁴

20. Clause 2: Order under Section 28 of the Presidency Small Cause Courts Act, 1882. — The provision corresponding to this clause was introduced into Article 11 of the Limitation Act of 1877 by Section 5 of Act IV of 1906

Section 28 of the Presidency Small Cause Courts Act, 1882, runs as follows

"When the judgment debtor, under any decree of Small Cause Court is a tenant of immovable property, anything attached to such property, and which he might before the termination of his tenancy, lawfully remove, without the permission of his landlord, shall, for the purpose of the execution of such decree *and for the purpose of deciding all questions arising in the execution of such decree*, be deemed to be moveable property and may, if sold in such execution, be severed by the purchaser, but shall not be removed by him from the property until he has done to the property whatever the judgment debtor would have been bound to do to it if he had removed such thing "

The Section does not seem to contemplate the passing of any order thereunder and it is difficult to understand what is meant by an "order under Section 28 of the Presidency Small Cause Courts Act " Under the provisions of that Act where a claim is preferred to the attachment in execution, the petition is dealt with as a suit and an order is passed thereon after inquiry¹ There does not seem

3 (1921) A I R 1921 Mad 163 (167 168) 44 Mad 902 70 Ind Cas 439 (F B), *Arunachallam Chetty v Periasamy Serrai*

(1925) A I R 1925 Mad 49 (49 50) 79 Ind Cas 917, *Vellayan Isari v Sitagnanam Isari*

(1929) A I R 1929 Nag 198 (125) 116 Ind Cas 79 *Gopal Balkrishna v Amrit Waman*

4 (1924) A I R 1924 Cal 193 (196) 60 Ind Cas 300 *Sadeh Ali v Saried Ali*

Note 20

1 See Section 61 of the Presidency Small Cause Courts Act 1882

(See also (1891) 18 Cal 296 (301) *Ismail S I men Bhamji v Muharrad Khan*

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to be any provision under the Act for any further suit being filed contesting the order passed in the claim proceedings²

21. Starting point of limitation.—Time, under this Article, begins to run from the *date of the order* in the claim proceedings,¹ although the order was passed *ex parte*,² and not from the date of the attachment or sale of the property³. In computing the period of limitation, the time spent in an unsuccessful *revison* petition to

(1899) 26 Cal 778 (783) 4 Cal W N 590, *Deno Nath v Auffer Chunder Nundy* (Reversed on another point in 4 Cal W N 470)]

2 See Section 37 of the Presidency Small Cause Courts Act to the effect that every decree or order in a suit shall be final and conclusive

[See also (1932) AIR 1932 Cal 661 (663) 59 Cal 827 139 Ind Cas 183, *Padamchand Pannalal v Dharamchand Chururia*]

Note 21

- 1 (1920) A I R 1920 All 168 (168) 57 Ind Cas 5, *Pain Anranjan Tewari v Kianu Rai*
- (1921) A I R 1921 All 81 (84) 43 All 272 60 Ind Cas 881, *Mahadeo Prasad v Durbhaji Singh*
- (1883) 9 Cal 888 (896) 12 Cal L R 574 8 Ind Jur 85, *Sitanath Koer v Land Mortgage Bank of India*
- (1881) 7 Cal 608 (612) 9 Cal L R 8, *Shiboo Narain Singh v Mudden Ally*
- (1867) 7 Suth W R 456 (457), *Juggoo Lal Upadhyay v Mt Ekbaloomissa*
- (1866) 6 Suth W R 21 (22), *Gobindanath Sandyal v Ram Coomar Ghose*
- (1867) 8 Suth W R 73 (75) *Bishan Perlash Narain Singh v Baboo Misser*
- (1867) 8 Suth W R 93 (94), *Bhyrub Lall Dhulnt v Meer Abdul Hussain*
- (1869) 12 Suth W R 38 (84), *Wuzeer Jamadar v Noor Ali*
- (1870) 14 Suth W R 192 (193), *Synd Abdoolah v Shohoor Ali*
- (1874) 21 Suth W R 133 (134), *Brija Kishore Nag v Ram Dyal Bhudra*
- (1876) 25 Suth W R 513 (515), *Mt Motanginy Dassee v Choudhry Junmunjooy Mulliel*
- (1927) A I R 1927 Lah 680 (681) 104 Ind Cas 299, *Dial Chand v Lachman*
- (1890) 1890 Pun Re No 51, *Dyal v Sunder Singh*
- (1878) 10 Bom II C R 19 (20), *Bapu v Lakshuman Bai* (The starting point is the date on which the order is signed and not the date on which it is verbally made)
- (1882) 8 Cal 395 (396, 397) 10 Cal L R 435, *Raj Chunder Chatterjee v Modhoosoodan Mookerjee* (Case under Act IV of 1871 which prescribed a longer period of one year)
- (1880) 8 Cal L R 54 (55), *Joyram Loot v Panu Ram Dhoba* (Do)
- (1883) 9 Cal 163 (165) 11 Cal L R 409, *Bessessur Bhugut v Murlu Sahu* (Case under Limitation Act, 1877)
- (1883) 9 Cal 230 (233, 234) 11 Cal L R 363 5 Shome L R 19, *Gopal Chunder Mitter v Mohesh Chunder Boral* (Do)
- (1883) 9 Cal 43 (47) 5 Shome L R 87, *Lachmi Narain v Assrup Koer* (Do)
- (1867) 2 Agra 198 (196) *Basit v Ihsan* (Case governed by Act IV of 1859)
- 2 (1927) A I R 1927 All 420 (421) 100 Ind Cas 763, *Ram Gopal v Mahanand*
- 3 (1880) 4 Bom 611 (618), *Krishna oji Futhal v Bhaskar Rangnath*
- (1917) A I R 1917 Mad 393 (394) 40 Mad 733 36 Ind Cas 445, *Basua*

the High Court cannot be deducted ⁴. But time may be extended under Section 14 of the Act in proper cases ^{4a}.

Article 11
Note 21

An order passed in claim proceedings by a single Judge of the High Court sitting on the Original Side is appealable under Clause 15 of the Letters Patent, and time begins to run from the date of the appellate order, in cases where there is an appeal ⁵. As to the computation of limitation in cases governed by the Deccan Agriculturists' Relief Act, see the undermentioned cases ⁶.

11 A. By a person against whom an order has been made under the Code of Civil Procedure, 1908, upon an application by the holder of a decree for the possession of immoveable property or by the purchaser of such property sold in execution of a decree, complaining of resistance or obstruction to the delivery of possession thereof, or upon an application by any person dispossessed of such property in the delivery of possession thereof to the decree-holder or purchaser, to establish the right which he claims to the present possession of the property comprised in the order

One year.

The date of the order.

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4 (1915) A I R 1915 Low Bur 145 (146) 8 Low Lur Rul 146 27 Ind Cas 629, *Mg Tun U v 1 P S P L Palaniappa Chetty*

[See also (1904) 29 Bom 453 (460) 6 Bom L R 469 *Dayaram Jagjivan v Govardhandas Dayaram* (In this case the claim order was erroneously appealed and then there was a revision)]

4a (1937) A I R 1937 Nag 1 (4) 107 Ind Cas 48 1 L R (1937) Nag 291 *Kasurchand v Mt Hazir Begam*

5 (1916) A I R 1916 Mad 883 (885) 33 Mad 1196 23 Ind Cas 367, *Venugopal Mudali v Venkatasubash Chetty*

6 (1912) 17 Ind Cas 67 (55) 30 Bom CR 4 *Fknath v Dayajuram* (Time taken in obtaining the conciliator's certificate should be deducted)

(1904) 8 Bom 411 (413) *Durgaram Mansaram v Shripati*

Article 11A
Note 1

Synopsis

1. Legislative changes.
2. Scope of the Article.
3. Article does not apply to cases falling under Section 47 of the Civil Procedure Code.
4. Article applies only to plaintiffs against whom order has been passed.
5. Suit must be against a person in whose favour the order is made.
6. Court declining to pass an order — Article does not apply.
7. Order without jurisdiction — Article does not apply.
8. Order not under Order 21, Rules 98, 99 or 101 of the Civil Procedure Code — Article does not apply.
9. "To establish the right which he claims to the present possession of the property."
10. Effect of not filing suit within one year.
11. Starting point.

Other Topics

Article 11 and this Article — Distinction	See Note 9, Pt 2
Civil Procedure Code, O 21, R 103 not applicable — This Article will not apply	See Note 2, Pt 1
Investigation restricted to possession and does not extend to title	See Note 8, Pt 8
Investigation — To be on application and not <i>suo motu</i>	See Note 8, Pt 0
Judgment debtor — Not person against whom order is passed	See Note 4
Mortgage lien — Suit to enforce — Not suit to enforce right to possession	See Note 9, Pt 5
Order without investigation	See Note 8, Pts 4 to 7
Possession as consequential relief — Article not applicable	See Note 9, Pts 6 to 9
Presidency Small Cause Courts Act — Order under Chapter 7	See Note 8, Pt 12

1. Legislative changes. — The history of the provisions of this Article and the various legislative changes that have taken place may be set out with reference to the following illustrations —

- (a) *A*, the holder of a decree for possession of property applies for delivery of possession thereof but is resisted or obstructed by *B*, a third party. *A* then applies for removal of obstruction, and an order is passed for or against him on such application.
- (b) In the above case possession is delivered to the decree holder but a third party is dispossessed thereby. The latter applies for re delivery and an order for or against him is passed on such application.
- (c) *A*, a court auction purchaser of property applies for delivery of possession thereof and is obstructed or resisted in such

delivery. A thereupon applies for removal of obstruction and an order for or against him is passed on such application

- (d) In the above case *possession is delivered*, but a third party is *dispossessed thereby*. The latter applies for re delivery, and an order for or against him is passed on such application

Under the Code of Civil Procedure, 1859, there was no right of suit for the party aggrieved by an order referred to in illustrations (a) and (b). He had only a right of *appeal*, as if the order was a decree¹. In the case of an order referred to in illustrations (c) and (d) the aggrieved party had only a *right of suit* and the suit had to be brought within one year of the date of the order, as provided in the Civil Procedure Code itself².

Under the Code of Civil Procedure, 1882, an order referred to in illustration (a) was *appealable as a decree* and there was no right of suit³. An order referred to in illustration (b) could however be

Article 11A Note 1

Article 11A — Note 1

- 1 See Sections 229, 230 and 231 of the Code of 1859

Section 229 ran as follows —

"If it shall appear to the satisfaction of the Court that the resistance or obstruction to the execution of the decree has been occasioned by any person other than the defendant, claiming *bona fide* to be in possession of the property on his own account or on account of some other person than the

the decree holder against the claimant under the provisions of this Act, and shall pass such order for staying execution of the decree, or executing the same, as it may deem proper in the circumstances of the case."

Section 230 provided for cases where possession was delivered to decree holder by dispossessing a third party

Section 231 ran as follows —

"The decision passed by the Court under either of the last two sections shall be of the same force as a decree in an ordinary suit and shall be subject under the rules applicable to appeals from decrees and no fresh suit shall be entertained in any Court between the same parties claiming under them in respect of the same cause of action

- 2 See Section 269 of the Code of 1859 which ran as follows —

"If it shall appear that the resistance or obstruction to the delivery of

the complaint of the purchaser or of such person claiming as aforesaid, if made within one month from the date of such resistance or obstruction or of such dispossession as the case may be shall enquire into the matter of

[See also (1886) 10 Bom 601 (603) *Lai Jamna v Bai Ichha*]

- 3 See Section 331 of the Code of 1882 which ran as follows —

"If the resistance or obstruction has been occasioned by any person other than the judgment debtor claiming in good faith to be in possession of the

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Note 1

questioned by a *suit*⁴ The Code did not provide any period of limitation for such suit nor did Article 11 of the Limitation Act 1877, apply to such an order⁵ Consequently, the suit could be brought within the ordinary period of limitation applicable to such suits⁶ In the case of an order referred to in illustrations (c) and (d) the aggrieved party had to file a suit to establish the right which he claimed subject to which suit the order was conclusive⁷ The

property on his own account or on account of some person other than the judgment debtor the claim shall be numbered and registered as a suit between the decree holder as plaintiff and the claimant as defendant

and the Court shall without prejudice to any proceedings to which the claimant may be liable under the Indian Penal Code or any other law for the punishment of such resistance or obstruction proceed to investigate the claim in the same manner and with like power as if a suit for the property had been instituted by the decree holder against the claimant under the provisions of Chapter V

and shall pass such order as it thinks fit for executing or staying execution of the decree

Every such order shall have the same force as a decree and shall be subject to the same conditions as to appeal or otherwise

4 See Section 332 of the Code of 1882 which ran as follows —

If any person other than the judgment debtor is dispossessed of any property in execution of a decree and such person disputes the right of the decree holder to dispossess him of such property under the decree on the ground that the property was *bona fide* in his possession on his own account or on account of some person other than the judgment debtor and that it was not comprised in the decree or that if it was comprised in the decree he was not a party to the suit in which the decree was passed he may apply to the Court

If after examining the applicant it appears to the Court that there is probable cause for making the application the Court shall proceed to investigate the matter in dispute and if it finds that the ground mentioned in the first paragraph of this section exists it shall make an order that the applicant recover possession of the property and if it does not find as aforesaid it shall dismiss the application

In hearing applications under this section the Court shall confine itself to the grounds of dispute above specified

The party against whom an order is passed under this section may institute a suit to establish the right which he claims to the present possession of the property but subject to the result of such suit if any the order shall be final

5 Article 11 of the Act of 1877 specifically referred to certain Sections of the Code of 1882 but Section 332 was not one of these

- 6** (1908) 10 Bom L R 749 (751) *Gownda Bala v Ganu Abaji*
(1917) A I R 1917 Cal 5 (6) 38 Ind Cas 216 *Bisen Ra v Satish Chandra*
(1894) 1894 Fun Re No 125 *Nihala Mal v Kivara*
(1884) 8 Mad 82 (83) *Ayyasamy v Samiya*
(1913) 19 Ind Cas 968 (970) (Cal) *Maula Baksh v Bhabasundari Dasja*
(1912) 14 Ind Cas 92 (93) (Cal) *Mamda Sardar v Akoor Chandra*

7 See Section 335 of the Code of 1882 which ran as follows —

If the purchaser of any such property is resisted or obstructed by any person other than the judgment debtor claiming in good faith a right to the present possession thereof or if in delivering possession thereof any complaint of the purchaser the matter of the resist be and pass such order

The party against whom such order is passed may institute a suit to establish the right which he claims to the present possession of the property, but, subject to the result of such suit if any, the order shall be final

limitation for such suit was provided by Article 11 of the Limitation Act, 1877.⁸

Under the present Civil Procedure Code, an order in every one of the above illustrations is conclusive subject to the result of a suit which may be brought to establish the right which the aggrieved party claims to the present possession of the property. The limitation applicable to all such cases is provided for by this Article.

2. Scope of the Article. — Where the holder of a decree for possession of property or the purchaser in execution of a decree is obstructed by any person in the delivery of possession of such property to him, and he applies for removal of such obstruction, the Court may pass an order under Order 21 Rule 98 directing the applicant to be put in possession, or an order under Order 21 Rule 99 dismissing the application. Again, where any person other than the judgment debtor is dispossessed by such decree holder or auction-purchaser, and he applies complaining of such dispossession, the Court may, under Order 21 Rule 101 of the Civil Procedure Code, direct the applicant to be put in possession of the property. Order 21 Rule 103 provides that any party, not being a judgment debtor against whom an order is made under Rules 98, 99 or 101, may institute a suit to establish the right which he claims to the present possession of the property, but that subject to the result of such suit, if any, the order shall be conclusive.

This Article provides the limitation for suits contemplated by Order 21 Rule 103. Where therefore that Rule does not apply to any particular case, this Article also will not apply.¹ See Notes to this Article *infra*.

The Article has fixed a short period of one year for the aggrieved party to establish his right to present possession by suit. "The policy of the Act" said their Lordships of the Privy Council in *Sardhari Lal v Ambika Prasad*,² "evidently is to secure the speedy settlement of questions of title raised at execution sales, and for that reason a year is fixed as the time within which the suit must be brought."

3. Article does not apply to cases falling under Section 47 of the Civil Procedure Code. — Where an order is passed in a proceeding in which the parties arranged on opposite sides are parties to the suit within Section 47 of the Civil Procedure Code,

8 (1886) 1886 All W N 68 (68), *Misra Lal v Anabab Begam*

Note 2

1 (1922) A I R 1922 Cal 229 (234) 68 Ind Cas 524, *Nirode Dorani Das v. Monindra Narayan*

(1924) A I R 1924 All 495 (500) 46 All 693 83 Ind Cas 923 (F B), *Sobha Pam v Tursi Ram*

(1929) A I R 1929 Pat 553 (554) 117 Ind Cas 634, *Satyannarain Mullick v Jinn Sah*

2 (1888) 15 Cal 521 (526) 15 Ind App 123 12 Ind Jur 210 5 Ear 172 (P C)

[See also (1920) A I R 1920 Lah 517 (520) 1 Lah 57 51 Ind Cas 767, *Chait Delari Lal v Asifur Nath*]

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neither Order 21 Rule 103 nor this Article will apply. The remedy of the person aggrieved by the order will be by way of *appeal* and not by way of suit¹

4. Article applies only to plaintiffs against whom order has been passed. — It is the party *against whom* an order has been passed such as is referred to in the Article that is bound to sue within one year of the date of such order. Thus, where an order referred to in Rules 98, 99 or 101 of Order 21 of the Code of Civil Procedure is passed against *A*, *A* is the person who is obliged to sue under Rule 103 of the said Order and who is governed by this Article. The fact that he is a *benamidar* for *B* will not affect the applicability of the Article and will not bar a suit instituted by *A* within time by reason of the fact that *B* is impleaded as a party after one year from the date of the order¹

The "person against whom" there may be an order such as is referred to in the Article may be a decree holder^{1a} or a third party, but the expression will not include the judgment debtor. The reason is that Rule 103 of Order 21 gives a right of suit only to persons *other* than the judgment debtor.

Where *A*, a decree holder entitled to possession, is resisted by *B* in the delivery of possession to him and on an application by *A*, his right to possession is affirmed, it is for *B* to establish his right by a regular suit within one year. *A* is not bound to turn out *B* within the same period, as the order is not *against* him but in his *favour*². Where a Hindu joint family manager applies under Order 21 Rule 100 for re delivery of a house of which he has been dispossessed and the petition is dismissed and no suit is brought within one year under Rule 103, the joint family loses all right to the possession of the house. Not only the right of the manager but the right of every member of the family for the possession of his share of the property would be equally barred³. The reason is that the manager represents the other members, who are therefore persons *against* whom the order passed against the manager operates.

5. Suit must be against a person to whose favour the order is made. — The suit that is governed by this Article is only against the person in whose *favour* the order is made. A suit against the

Nota 3

- 1 (1927) A I R 1927 Mad 952 (953) 105 Ind Cas 414, *Ahmadkutty v Moidutty*

Nota 4

- 1 (1910) 8 Ind Cas 264 (266) (Mad) *Venkatachalla Isari v Subramaniya Chetty*
 1a (1888) 15 Cal 521 (520) 15 Ind App 123 12 Ind Jur 210 5 Sar 172 (P C), *Sardharilal v Ambila Prasad*
 (1922) \ I R 1922 All 403 (404) 44 All 607 68 Ind Cas 241, *Bhikhari Das v Abdullah*
 2 (1879) 1879 Bom P J 35, *Bulshastr Gangadharbhai v Hari Sadashiv*
 3 (1937) \ I R 1937 Oudh 401 (402) 168 Ind Cas 925, *Nihal Chand v Khushal Chand*

other persons is not governed by this Article. Where, therefore, a suit is filed within the period prescribed by this Article against the person in whose favour the order is made, but on his representation other persons are added after the said period as being his benami-dars, the suit is not barred as against the latter under this Article¹

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6. Court declining to pass an order—Article does not apply.—Where a Court declines to pass an order at all, this Article does not apply¹

7. Order without jurisdiction—Article does not apply.—Where an order is passed without *jurisdiction*, it cannot be said that it is *against* any person. Such an order need not be set aside by any suit. This Article does not apply to a suit for reliefs refused to be granted by such an order¹

8. Order not under Order 21 Rules 98, 99 or 101 of the Civil Procedure Code—Article does not apply.—It has been said in Note 2 *ante* that this Article applies only to suits contemplated by Rule 103 of Order 21 of the Code of Civil Procedure. In other words, this Article applies only to a suit by a person (not being the judgment debtor) against whom an order has been made under Rules 98, 99 or 101 of Order 21 of the Civil Procedure Code¹. Where therefore the order that has been passed against the plaintiff is not one falling within the said Rules, this Article will not apply. Thus a suit by a person against whom an order under Order 21 Rule 95 of the Code has been made, is not governed by this Article²

An order under Rule 98 or Rule 99 of Order 21 of the Code presupposes an *actual overt act of resistance or obstruction* in the attempt by the Court to deliver possession, and an order under Rule 101 presupposes an actual *dispossession* of party. An order against a person where there has been no attempt at all by the Court to deliver possession^{2a} or where there has been no overt act of resistance or obstruction^{2b} is not one under Rule 98 or Rule 99, and

Note 5

- 1 (1903) 18 Mad L Jour 464 (464), *Ayyappa Chetty v Poongaralam*
[See also (1910) 6 Ind Cas 680 (680) (Mad), *Gurusappa Chetty v Srinivasa Rao*]

Note 6

- 1 (1903) 27 Mad 25 (26), *Meerudin Sub v Bahasa Bibi*.

Note 7

- 1 (1905) 2 Cal L Jour 63 (S N) *Tepra Pramank v Kebaratulla Karain*

Note 8

- 1 (1924) 4 I R 1924 All 493 (500) 46 All 693 83 Ind Cas 923 (F B), *Sobha Par v Tursi I am*
2 (1924) 4 I R 1924 All 493 (499) 46 All 693 83 Ind Cas 923 (F B) *Sobha Jam v Tursi I am*
2a (1933) 4 I R 1933 Cal 246 (250) 60 Cal 8 143 Ind Cas 3-1, *Amron Seshi Das v Official Assignee of Calcutta*
2b (1924) 4 I R 1924 Rang 261 (262) 82 Ind Cas 865, *T C B. v O R. Clendunry*

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consequently this Article will not apply to a suit by such person. Similarly an order against a person who has not been actually *dispossessed* is not one under Rule 101 and a suit by such person to enforce his rights is not governed by this Article ³

The order contemplated by Rules 98, 99 and 101 of the Code is an order passed after *investigation* into the merits of the case. An order therefore which has been passed without any *investigation* such as an order dismissing an application for default or non-prosecution is not an order such as requires to be set aside by suit under Rule 103 of Order 21 of the Code. A suit by a person against whom such an order is passed is not governed by this Article ⁴. The question whether there has been an investigation depends upon the facts of each case. Where parties are present but do not adduce evidence on the date fixed for hearing after notice, it cannot be said that the order drawn is for default of appearance without inquiry ⁵. Similarly where a party is present and adduces no evidence but the

3 (1929) A I R 1929 Pat 553 (555) 117 Ind Cas 634, *Satyannarain Mullick v Jains Sah*

(1923) A I R 1923 Cal 601 (602 603) 50 Cal 811 84 Ind Cas 876, *Atarnoyi Das v Ramananda Sen Choudhury*

(1924) A I R 1924 Cal 97 (98) 76 Ind Cas 407, *Pahal Ghorai v Farluddin Mahommed* (1 in possession made an application under O 21 R 100 and the application was dismissed—A was actually subsequently dispossessed and then he filed the suit. Held Art 11A did not apply)

(1914) A I R 1914 Mad 121 (123) 24 Ind Cas 771, *Ayyakutti Manikondan v Periasamy Koundan*

4 (1883) 12 Cal L R 550 (552), *Rash Behari Bysack v Budden Chunder Singh* (Case under the Code of 1859)

(1907) 6 Cal L Jour 362 (367) *Kunj Behari Lal v Khandh Prashad Narain Singh* (Dismissal for default)

(1907) 34 Cal 491 (493) 11 Cal W N 497, *Sarat Chandra v Tarini Prasad Pal* (Dismissal for default on petitioner applying for withdrawal)

(1917) A I R 1917 All 426 (427) 39 Ind Cas 797, *Ali Mahomed Shah v Ram*

, *Lakshmi*

(1917) A I R 1917 Nag 53 (54) 45 Ind Cas 102 14 Nag L R 66 *Bhumrao Patel v Martand* (Dismissal for default or for non prosecution is not an order within R 103)

(1918) A I R 1918 Mad 554 (554) 41 Ind Cas 640, *Venkatasubba Reddi v Chundi Linga Reddi*

(1933) Mad W N 924 (927) *Chinna Brahmayya v Chenu Venkannama*

(1922) A I R 1922 Cal 299 (233) 68 Ind Cas 524, *Nirode Borani Das v Monindra Narayan*

[See also (1926) A I R 1926 Nag 423 (424) 22 Nag L R 94 97 Ind Cas 178, *Wamandhar v Kampla Prasad*

(1881) 4 All 131 (133) 1881 All W N 145 *Beni Prasad v Lachman Prasad* (Case under the Code of 1859)]

[But see (1920) A I R 1920 Pat 123 (121) 58 Ind Cas 37 5 Pat L

(Submitted under R 103 investigation was

5 (1913) 20 Ind Cas 369 (369) (All) *Chand Prasad v Nand Kishore*

(1911) 10 Ind Cas 401 (402) (All), *Shagun Chand v. Mt Shiddi* (15 Cal 521 (P C), followed)

opposite party examines a witness and an order is passed, there is sufficient investigation to bring it within Order 21 Rule 98 or Rule 99 or Rule 101 as the case may be.⁶ An order made *without opposition* cannot be said to be an order without investigation.⁷

The investigation is however restricted to the question of possession only and does not extend to questions of title.⁸

It has been held in the undermentioned case⁹ that the investigation must be one made on an application and not *suo motu* by the Court. In that case the bailiff reported to the Court that the delivery of possession was obstructed by a third person. The Court thereupon issued notices to the parties, heard them and passed an order in favour of the decree holder. More than a year thereafter the obstructor brought a suit to recover possession. It was held that the order passed by the Court was not one under Order 21 Rule 99 of the Code and that therefore this Article did not bar the suit.

Rule 101 of Order 21 of the Civil Procedure Code speaks of an order directing an applicant under Rule 100, to be put in possession. An order dismissing such an application has, nevertheless, also been held to be an order under Rule 101 for the purposes of Rule 103 which would be conclusive if no suit is filed within the time limited by this Article.¹⁰

A purchased in court auction a half share of certain properties belonging to one G, and applied for actual possession thereof but was obstructed by B. He thereupon applied for being put in actual possession and the application was dismissed. More than one year thereafter he sued for possession of the said share. It was contended before their Lordships of the Privy Council that the purchaser of a share of a co owner was not entitled in the obstruction proceedings to claim actual possession of the share and that the order should therefore be considered not to be one under Rule 99. Their Lordships overruled the contention and held that the suit was barred observing as follows: "The question, however is not what the appellant might or ought to have asked but what he *did* ask. Now that he asked for actual possession and was refused under Rule 99, is certain."¹¹

An order passed under Chapter 7 of the Presidency Small Cause Courts Act, 1882, cannot be an order under Rules 98, 99 or 101 of the Civil Procedure Code and a suit to recover property after proceedings under Chapter 7 referred to above is not governed by

6 (1935) A I R 1935 Cal 267 (267) 155 Ind Cas 702 *Hari Saday Saha v Mahendra Narain Raj*

7 (1935) A I R 1935 Cal 267 (267) 155 Ind Cas 702 *Hari Saday Saha v Mahendra Narain Raj*

8 (1937) A I R 1937 Oudh 400 (401) 168 Ind Cas 919 *Dal Kishen v Mahomed Hajir*

9 (1931) A I R 1931 Lah 686 (687) 132 Ind Cas 844 *Mulki Ram v Dasant Singh*

10 (1917) A I R 1917 Bom 133 (134) 42 Bom 10 42 Ind Cas 73, *Zircoo Talho v Hari Supdu Jani*

11 (1920) 55 Ind Cas 21 (22) 16 Nag L R 103 (P C), *Daldeo v Karhalyalal*

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this Article. The reason is that the said Rules presuppose that there has to be a *decree* for possession or that immovable property has been sold in execution of a *decree*, while the proceedings under Chapter 7 of the said Act are not suits and the decisions therein are not consequently decrees.¹²

D. "To establish the right which he claims to the present possession of the property."—The suit contemplated by Order 21 Rule 101 and by this Article is not confined to a suit for possession,¹³ but is a suit to establish the right which the plaintiff claims to the present possession of the property comprised in the order referred to.¹ In this respect this Article differs from Article 11 *ante*, the suit contemplated by the latter being to establish the right of the plaintiff to full proprietorship.²

The right to present possession may, however, rest on complete proprietorship or on a mortgage with possession or on a lease or even on mere possession unexplained.³ It may be established without showing that, at the date of the summary order against him, the plaintiff was in actual possession of the property.⁴

A suit to enforce a mortgage lien is not one to enforce any right to possession at all, much less is it a right to present possession. It is therefore not governed by this Article.⁵

A right to possession which may come into existence as a consequence of some other right being established cannot be said to be a right to present possession.⁶ Thus, where A resisted the delivery of possession of property to B under a decree and on B's application the obstruction was removed and possession delivered and more than one year thereafter A sued to set aside the decree for fraud and for possession. It was held that this Article did not apply.⁷ The claim for possession was not a claim for present possession but only a

12 (1923) A I R 1929 Muz 69 (71) 115 Ind Cas 501 *Hylar v. Amrudan*

Note 9

1 (1923) A I R 1923 Bom 171 (181-182) 89 Bom CCs 120 Ind Cas 367
Palkar v. Palkar, Palkar v. Palkar

2 Under Section 9 of the C. L. Act (1853) the words 'to establish the right' were used but it was held in 11 B M R O R 174 (181) that they must be taken to mean 'to establish the right to present possession'. The present Order 21 Rule 101 of the C. L. Act and this Article have given effect to this view.

3 See Notes to Art. 11 *ante*.

4 (1874) 11 B M R O R 174 (181) 2 Ind 14th ed. 174 (181)
(1874) A I R 1874 Bom 171 (181-182) 53 Bom CCs 120 Ind Cas 367
Palkar v. Palkar, Palkar v. Palkar
(1880) A I R 1880 Lah 517 (180) 1 Lah 57 51 Ind Cas 787, *Chad F. v. F.*
F. v. F.

5 (1921) A I R 1921 Muz 117 (118) 41 Muz 117 40 Ind Cas 103 *U. v. U.*
U. v. U.

6 (1881) 10 C. L. 174 (181) 10 C. L. 174 (181)

7 (1877) A I R 1877 Bom 184 (187) 101 Ind Cas 40 51 Bom 184
Palkar v. Palkar, Palkar v. Palkar

8 (1877) A I R 1877 Bom 184 (187) 101 Ind Cas 40 51 Bom 184
Palkar v. Palkar, Palkar v. Palkar

consequential relief to the setting aside of the decree for fraud. The right to possession would arise only if the decree was set aside, otherwise not. Similarly, where *A* purchased in court auction a share of a member of a Mitakshara joint Hindu family in certain property but obtained possession of the whole of the property, but on the application of the other members it was re-delivered to them, whereupon *A* sued for partition and possession of the share purchased, it was held by the High Court of Madras that this Article did not apply.⁸ According to the Hindu law prevailing in Madras, the purchaser in court auction of a share of a co-parcener gets only an *equity* to obtain a partition and has no right to the *present* possession of any portion of the property purchased. The right to possession would arise only if partition is granted. A suit for partition and for possession as a consequential relief is not therefore a suit for *present* possession within the meaning of this Article. The case would be different in the Bombay Presidency where such purchaser becomes a tenant in common entitled to joint possession.⁹ The case would also be different where the purchase is of a share of a member of Muhammadan family. Where an order is made against such a purchaser in delivery proceedings and he sues more than one year after the date of the order for partition and possession, the suit would be governed by this Article.¹⁰ The reason is that the purchaser is entitled in such cases to *present* possession even though it be a joint possession independent of his right to obtain a partition, and his claim though for partition and possession is, in substance, one to establish a right to present possession.

The Article applies only to suits by or against decree-holders and auction purchasers *as such*, the cause of action being the adverse order passed in the obstruction or delivery proceedings. *A* obtained a rent decree against his tenant *B* and in execution thereof purchased and took possession of his holding and thereupon *C* applied and obtained an order for re-delivery. More than a year afterwards, *A* sued *C* for ejectment on the ground that *B* had transferred a non-transferable holding to *C* who was consequently liable to be ejected under the rent laws applicable to the case. It was held that this Article did not apply as the suit was not by the plaintiff in his character as auction-purchaser, and as the cause of action had nothing to do with the adverse order passed against him in the prior proceedings.¹¹ See

8 (1926) A I R 1926 Mad 683 (686) 49 Mad 596 95 Ind Cas 209 *Shunmugam Pillai v Panchali Ammal*

[See also (1926) A I R 1926 Mad 232 (232) 91 Ind Cas 961 *Muthu Pillai v Alagiriswami Pillai*]

9 See observations in (1926) A I R 1926 Mad 683 (685) 49 Mad 596 95 Ind Cas 209 *Shunmugam Pillai v Panchali Ammal*

[See also (1901) 26 Bom 140 (149) 3 Bom L R 591 *Bhimaappa v Irrappa* (Explained in A I R 1926 Mad 683)]

10 (1921) A I R 1921 All 92 (93) 60 Ind Cas 905 *Ganpat Pasi v Hussain Begum*

11 (1926) A I R 1926 Cal 377 (376) 90 Ind Cas 575, *Amrita Charan v Ram Prasad*.

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also the undermentioned case ¹³

10 Effect of not filing suit within one year. — An order passed under Rules 98, 99 or 101 of Order 21 of the Civil Procedure Code is, subject to a suit which may be brought under Rule 103, conclusive. Where no such suit is filed within the time limited by this Article, the order becomes finally conclusive with the result that the right of the party in whose favour it is made becomes conclusive ^{1a}. The party against whom the order has become conclusive cannot set up his right again to the property comprised in the order, either in a suit¹ or even by way of defence to a suit to enforce the rights in pursuance of the order². A suit by such party after one year from the date of the order will be barred if it is in substance one for establishing the right to the present possession of the particular property which was the subject of the order³.

11. Starting point — Time runs from the "date of the order" i.e. the order under Rules 98, 99 or 101 of Order 21 of the Code of Civil Procedure. Where a revision is taken against the order to the High Court and it is dismissed, time cannot be computed from the date of the order in revision¹. But the period during which the revision proceedings were pending may be excluded under Section 14 of the Limitation Act, if the conditions requisite for the applicability of that Section are satisfied².

- 12 (1929) A I R 1929 All 610 (612) 114 Ind Cas 725, *Zafaryar Hasan v Umar Daraz Ali Khan* (Following A I R 1926 Cal 377)

Note 10

- 1a (1920) A I R 1920 Lah 517 (520) 1 Lah 57 51 Ind Cas 787, *Chail Behari Lal v Kidar Nath*
- 1 (1924) A I R 1924 Bom 527 (528) 86 Ind Cas 503, *Lazman Sedashiv v. Govind Ganesh*
- (1927) A I R 1927 Cal 916 (917) 106 Ind Cas 371, *Devan Mandal v Dhurba Kumar.*
- 2 (1889) 1889 Bom P J 17 (17), *Miguel Antone Lopes v Waman Lakshman* (1887) 10 Mad 357 (361), *Achute v Mammaseg*
- 3 (1902) 26 Bom 730 (734 735) 4 Bom L R 513 *Mahadev Ram v Babu Chinnay;* (Assignee from minor must sue within one year of assignment)
- (1901) 26 Bom 146 (149) 3 Bom L R 594, *Bhimappa v Irappa*
- (1920) 58 Ind Cas 21 (22) 16 Nag L R 103 (P C) *Daldeo v Kankhailal.*
- (1925) 90 Ind Cas 827 (828) (Cal), *Kumud Charan Roy v Sambhu Chandra Ghose*
- (1920) A I R 1920 Cal 842 (843) 59 Ind Cas 772, *Motu Das v Behari Lal.*

Note 11

- 1 (1931) A I R 1931 Nag 17 (18) 130 Ind Cas 145 27 Nag L R 251, *Lakshmandas v Chunnulal*
- 2 (1931) A I R 1931 Nag 17 (18) 130 Ind Cas 145 27 Nag L R 251, *Lakshmandas v Chunnulal*

12. To set aside any of the following sales:—	One year.	When the sale is confirmed or would otherwise have become final and conclusive had no such suit been brought.
(a) sale in execution of a decree of a Civil Court;		
(b) sale in pursuance of a decree or order of a Collector or other officer of revenue;		
(c) sale for arrears of Government revenue, or for any demand recoverable as such arrears;		
(d) sale of a patni taluq sold for current arrears of rent.		

Explanation. — In this article "patni" includes any intermediate tenure saleable for current arrears of rent.

Synopsis

1. Scope of the Article.
2. Setting aside a sale, meaning of.
3. Article has no application to the defence set up by the defendant in possession.
4. Suit to set aside a sale on the ground of fraud.
5. Sale in execution of a decree of a Civil Court.
6. Effect of setting aside of, or reversal or modification of, decree after sale.
7. Sale in pursuance of a decree or order of Collector or other officer of revenue — Clause (b).
8. "Sale for arrears of Government revenue, or for any demand recoverable as such arrears" — Clause (c).
9. Sale of patni for arrears of rent — Clause (d).
10. Time from which period of limitation commences.

* Act of 1877, Art. 12 and Act of 1871, Art. 14.

Same as above

Article 12

Note 1

Other Topics

Minor—Not properly represented—Sale is nullity	See Note 7, Pt 4, Note 1 F N (2)
Minor represented—Guardian's negligence does not make sale void	See Note 5 F N (1)
Period runs from date of confirmation and not date of sale	See Note 10 Pt 1
Person not bound by sale—Article not applicable	See Note 1, Pts 1a, 1
Sale for arrears of land revenue and sale for recovering Crown debts — Difference	See Note 8 Pts 3 to 9
Sale within jurisdiction—Mere irregularities not to be raised	See Note 8 Pt 11
Special provision by local Act—Article does not apply	See Note 8 Pt 14
Substance of relief and not form to be considered	See Note 2, Pt 1
Voidable sale	See Note 2 Pt 2
Void sale	See Note 1, Pts 2 to 5

1. Scope of the Article — This Article applies only to suits to set aside the sales referred to therein. A sale can be set aside by a person only when it can be said that it is binding on him unless and until it is set aside. This Article will not therefore apply to cases where the plaintiff would not be bound by the sale even if it were not set aside^{1a}. It will apply only where the plaintiff seeks to set aside the sale as one who would be bound by the sale if no such suit is brought¹.

Act of 1859, Section 1, Clause 3

To suits to set aside the sale of any property moveable or immoveable sold under an execution of a decree of any Civil Court not established by Royal Charter when such suit is maintainable to suits to set aside the sale of any property moveable or immoveable for arrears of Government revenue or other demand recoverable in like manner to suits by a putnedar or the proprietor of any other intermediate

talook or such the sale of a decree or order of a Collector or other Officer of Revenue — the period of one year from the date at which such sale was confirmed or would otherwise have become final and conclusive if no such suit had been brought

Article 12 — Note 1

1a See the cases cited in Foot Notes (1) (2) and (3) below

[See also (1893) 25 Cal 179 (186) 24 Ind App 170 1 Cal W N 639 7 Sar 222 (P O) *Moti Lal v Karrabulun* (Where there are two sales in execution of the same property and after the first

1 (1887) 11 Bom 119 (123) *Parekh Ranchor v Rasalal*

(1837) 11 Bom 130 (182) *Vishnu Keshav v Ranul andra Bhasar*

v Pitaribardhar

Ambaras v Sakharam

Now a person may not be bound by a sale —

- 1 either because he is not a party to the decree or proceeding in which the sale is held, or
- 2 because the sale itself is null and void and without jurisdiction

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In the first case, the sale cannot in fact be set aside by the third party because as *between the parties* to the decree or other proceeding the sale will be valid and binding. In the latter case there is nothing to be set aside. The plaintiff can, in such cases, get a declaration that his interests are not affected by the sale,² and even if he sues to

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- (1876) 1876 Bom P J 75, *Vishwanath v Vinayak*
 (1877) 1877 Bom P J 236 *Shurudhrappa v Shidlingappa*
 (1883) 7 Bom 168 (190, 191), *Trimbak Bawa v Narayan Dawa* (Where

- (1883) 5 All 614 (615) 1883 All W N 165, *Nathu v Badridas*
 (1897) 19 All 808 (809) 1897 All W N 71, *Nazar Ali v Kedar Nath*
 (1904) 26 All 346 (352, 353) 1904 All W N 35 1 All L Jour 53, *Juala Sahai v Usnat Khan*
 (1928) A I R 1928 All 363 (365) 50 All 686 113 Ind Cas 725 *Bulaki Das v Kesri* (Sale null and void—No need to set aside)
 (1864) 1864 Suth W R (Cap) 822 (823), *Debee Athuroomissa v Rughoonath Danerjee*
 (1865) 2 Suth W R 55 (56) *Debee Suboorun v Golam Nujee*
 (1866) 6 Suth W R 296 (296), *Muddun Mohun Tewari v Joykoomari Bibi*
 (1867) 7 Suth W R 252 (255), *Futnessur Kundoo v Majeda Debee*
 (1867) 7 Suth W R 256 (257) Beng L R Sup Vol 643 (F B) *Baboo Jodoo-nath v Radhamonee Dossee*
 (1872) 17 Suth W R 429 (429 430) *Bheem Goyallee v Khoobun Sahoo*
 (1873) 20 Suth W R 165 (165), *Gedroo Sircar v Beharee Lall*

- (1933) A I R 1933 Lah 10 (11) 140 Ind Cas 534 *Mulik Ray v Nanak*.
 (1882) 4 Mad 178 (179), *Venkata Naranah v Subbamma*
 (1883) 5 Mad 54 (58), *Sadagopa v Jamuna Bhai Ammal*
 (1885) 7 Mad 512 (514) *Haji v Atharaman* (Where karnayan is not sued in a representative capacity, a suit by the other members to set aside the sale is not governed by this Article as the sale is not binding on them)
 (1887) 9 Mad 460 (463) *Nila Kandan v Thandamma*
 (1893) 18 Mad 478 (479), *Narasimha Naidu v Ramasami*
 (1897) 20 Mad 118 (120) 7 Mad L Jour 52 (F B) *Kader Hussain v Hussain*
 (But see (1924) A I R 1924 Mad 137 (139) 77 Ind Cas 631 47 Mad 525, *Paramasiva Thevar v Pulukaruppa Thevar* (Observations casual and obiter)
 (1926) A I R 1926 Oudh 501 (502) 91 Ind Cas 927, *Lachmi Narain v Mt Nazeer Fatima*
 (1916) A I R 1916 Pat 315 (316) 95 Ind Cas 691 *Ram Khelawan Pande v Asgar Ali*)
 2 (1896) 18 All 141 (145) 1896 All W N 9, *Shirazi Begum v Agha Ali Khan*
 (1887) 11 Bom 429 (432), *Shirazi Yesji Chawan v Collect v of Ratnagiri*

Article 12 Note 1

set aside such a sale it will be regarded as being in effect a suit for

- (1919) A I R 1919 Bom 61 (62) 43 Bom 412 51 Ind Cas 18, *Mir Kha Imamkha v Bhagirathi Mahadei*
- (1914) A I R 1914 All 551 (552) . 24 Ind Cas 695, *Sita Ram v Subheda Kuar*.
- (1887) 11 Bom 130 (132), *Vishnu Keshai v Ramchandra Bhaskar*
- (1888) 12 Bom 18 (22) 12 Ind Jur 189, *Daji Humat v Dhirajram Saduram*
- (1918) A I R 1918 Lah 330 (332) 48 Ind Cas 399 1918 Pun Re No 113, *Hira Singh v Ghulam Qadir* (Minor not properly represented in suit—Decree is not valid—Court has no power to execute decree by sale of minor's property—Suit by minor to set aside sale—Art 144 and not Art. 12 applies)
- (1917) A I R 1917 Mad 616 (619) 34 Ind Cas 429 *Mootheluth Kanari v Hari Shenoy* (Where a person of unsound mind is not properly represented)
- (1916) A I R 1916 Mad 33 (35) 33 Mad 1076 29 Ind Cas 314, *Pasumarti Payudanna v G Lakshminarasamma* (The fact that the decree is valid is no ground of distinction If in execution proceedings the minor as legal representative is not properly represented the sale is a nullity and need not be set aside under this Article)
- (1922) A I R 1922 Lah 447 (448) 67 Ind Cas 547, *Alam Din v Allah Dad* (Do)
- (1893) 15 All 324 (326) 1893 All W N 140, *Baluant Rao v Muhammad Husain*
- (1922) A I R 1922 Pat 445 (445, 446) 70 Ind Cas 714, *Mohammad Wahed v Mt Sunder Basi Koer* (Revenue sale without jurisdiction — Real owner is not affected)
- (1924) A I R 1924 Pat 504 (505) 78 Ind Cas 803, *Mohammad Idris v Lachumandas*
- (1869) 12 Suth W R 276 (277), *Sreemunt Lall Ghose v Shama Soondaree Dassee*
- (1869) 12 Suth W R 311 (311, 312) 3 Beng L R App 144, *Munzima Khatook v Collector of Jessore*
- (1898) 25 Cal 876 (879, 880) 2 Cal W N 360, *Harkhoo Singh v Bunsidhur Singh*
- (1923) A I R 1923 Cal 428 (429) 70 Ind Cas 869, *Dhirendra Krishna v. Mohendra Nath*
- (1916) A I R 1916 Cal 582 (587, 592) 31 Ind Cas 965, *Krishen Doyal Gur v Irshad Ali Khan*
- (1928) A I R 1923 Cal 722 (727) . 117 Ind Cas 552, *Krishna Chandra v Pabna Dhan Dhandar Co Ltd*
- (1870) 13 Suth W R 381 (385, 386, 390) 5 Beng L R 135, *Baboo Har Gopal Doss v Ram Gopal Sahoe*
- (1924) A I R 1924 Cal 839 (844) 51 Cal 776 78 Ind Cas 661, *Bilas Chandra v Rajendra Chandra* (Sale is nullity if there are no arrears of revenue Section 33, Bengal Land Revenue Sales Act has no application to such cases)
- (1907) 5 Cal L Jour 633 (640, 641), *Elokeshi Dasi v Abinash Chandra Bose*
- (1907) 34 Cal 241 (245, 247) 5 Cal L Jour 385, *Sham Lal Mandal v Nilmani Das*
- (1907) 34 Cal 811 (820, 821) 5 Cal L Jour 696 11 Cal W N 756 2 Mad L Tim 371 (F B), *Purna Chandra v Dinabandhu*
- (1923) A I R 1923 Cal 13 (16) . 72 Ind Cas 693, *Lalit Mohan Sen v Manoranjan Ghose*
- (1914) A I R 1914 Cal 554 (555) 23 Ind Cas 95, *Bepin Behary Bera v Sashi Bushan*
- (1907) 5 Cal L Jour 686 (686, 687), *Sookan Sahu v Lala Dadri Narayan* (Article 120 applies to such a case)
- (1897) 1 Cal W N 516 (518) *Saroda Charan Dandopadhyaya v Aista Mohun Bhattacharjee* (Do)
- (1913) 18 Ind Cas 331 (382) (Bom), *Premraj v Jatarmal* (Where the real heir is not made a party to a suit brought by a creditor against deceased's estate, the decree and sale are nullities)

such a declaration³ Further, in such cases the plaintiff can ignore the sale⁴ Where he is dispossessed by the purchaser he may bring a suit for possession disregarding the sale altogether and his suit would be governed by Article 142, or some other Article and not by Article 12⁵

- (1929) A I R 1929 Cal 454 (456) 56 Cal 180 117 Ind Cas 534 *Garibala Dasu v Kedar Nath* (Where the transfer of a tenure is complete before issue of the certificate under the Public Demands Recovery Act and the transferee is not named in it the sale is a nullity)
- (1921) 60 Ind Cas 529 (531) (Pat) *Ghanshyam Chaudhury v Basdeb Jha* (Where sale is in contravention of S 158 Bengal Tenancy Act the sale is void Suit to declare such sale void is governed by Art 120)
- (1903) 5 Bom L R 952 (953), *Datto v Ganesh*
[But see (1907) 34 Cal 787 (812) 11 Cal W N 745, *Haris Charan Singh v Chundra Kumar Dey*]
- 3 (1895) 25 Cal 179 (186) 24 Ind App 170 1 Cal W N 639 7 Sar 222 (P C) *Moti Lal v Kharabuddin*
- (1907) 34 Cal 811 (819) 5 Cal L Jour 696 11 Cal W N 756 2 Mad L Tim 371 (F B), *Purna Chandra v Dinabandhu*
- (1868) 9 Suth W R 193 (199, 200), *Radha Koonwar v Jankee Koonwar*
- (1887) 11 Bom 119 (123) *Parekh Ranchor v Rai Fakhat*
- (1913) 86 Mad 383 (384) 13 Ind Cas 96 *Anantarasuguru v Narayana Rasuguru* (Article 120 was held applicable to such a declaration)
- (1871) 22 Suth W R 196 (198), *Banee Madhub Buxhee v Radha Madhub Mosoomdar*
- (1925) A I R 1925 Cal 1149 (1149) 90 Ind Cas 40 *Ahmad Far Khan v Dina Nath Sadhu Khan* (When the sale under the Bengal Land Revenue Sales Act is a nullity there is no need to set it aside and S 33 of the Act and Article 12 of the Limitation Act are not applicable to such a sale)
- (1929) A I R 1929 All 673 (673) 119 Ind Cas 552, *Natha Ram v Pam Gur* (Sale null and void)
- (1910) 8 Ind Cas 374 (375) 18 Oudh Cas 297, *Chauharya Baksh v Mt Kaniz Fatima Dibi* (Do)
- (1897) 19 All 308 (309) 1897 All W N 71, *Azhar Ali v Kedar Nath* (Do)
- (1891) 18 Cal 526 (533), *Dakhina Churn v Dilash Chunder Roy* (Sale void for want of jurisdiction)
- [See (1921) A I R 1921 Pat 193 (199) 6 Pat L Jour 373 62 Ind Cas 962 (F B) *Hare Krishna Sen v Umeshchandra Dutt* (Do)]
- (1887) 11 Bom 429 (432 433) *Shiraji Yesji Chavan v Collector of Ratnagiri* (Do)
- (1894) 16 All 5 (9) 1893 All W N 141 *Chinnu v Lala Ram* (Do)
- (1916) A I R 1916 Pat 375 (381) 35 Ind Cas 404 *Jahnari Prasad Singh v Gharbaran Dubey* (Do)
- (1907) A I R 1907 Cal 781 (782) 54 Cal 624 105 Ind Cas 193, *Uramotee Dasg v Jatan Dewa* (Do)
- (1865) 12 Cal 807 (811) *Iam Lall Motra v Dama Sundari* (Do))
- 4 (1905) 32 Cal 296 (312) 32 Ind App 23 9 Cal W N 201 2 All L Jour 71 7 Bom L R 1 1 Cal L Jour 554 8 Sar 734 (P C) *Akharajpal v Daim*
- 5 (1911) 11 Ind Cas 76 (76) (Lab) *Saif un din v Hari ray*
- (1907) 34 Cal 711 (717) 34 Ind App 135 4 All L Jour 467 9 Bom L R 743 6 Cal L Jour 17 11 Cal W N 817 17 Mad L Jour 359 2 Mad L Tim 397 (P C) *Ananda Pershad v Iramamoyi Dasi*
Cal L Jour 696 2 Mad L Tim 371
Vol 643 (F B) *Endoo Jado v a'h*
- (1867) 7 Suth W R 252 (255) *Istnesur Kundoo v Majedji Debe*
- (1868) 9 Suth W R 193 (199, 200), *Radha Koonwar v Jankee Koonwar*

Article 12 Note 2

2. Setting aside a sale, meaning of. — Whether a suit instituted is for setting aside a sale or not is to be decided not from the *form* of the relief but from a consideration of the *substance* of the relief sought by the plaintiff¹ It has been seen already that if the sale is a nullity which the plaintiff may disregard, this Article will have no application even if the plaintiff in terms seeks to set aside the sale, as there is in reality nothing to set aside If however the sale is only voidable at the instance of the plaintiff, he cannot avoid the application of this Article by seeking reliefs which though different are inconsistent with the validity of the sale² The Limitation Act protects *bona fide* purchasers at judicial sales by providing a short limit of time within which suits may be brought to set them aside If the protection is to be confined to suits which seek no other relief than a declaration that the sale ought to be set aside and is to vanish directly some other relief consequential on the annulment of the sale is sought, the protection is exceedingly small both the letter and the spirit of the Limitation Act require that this suit, when looked on as a suit to set aside the sale, should

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- (1875) 24 Suth W R 302 (302) *Tonoo Ram Gossain v Mohessur Gossain*
 (1881) 1881 All W N 109 (110) *Yar Khan v Kadam Singh* (Where the suit is by a Hindu son for possession of his share of ancestral property from a purchaser of his father's interest in execution of a decree against the latter alone Art 12 is not applicable)
 (1904) 20 All 346 (352 353) 1904 All W N 35 1 All L Jour 53 *Jwala Sahai v Masrat Khan*
 (1924) A I R 1924 Lah 396 (397) 71 Ind Cas 822 *Azim Khan v Karim*
 (1897) 20 Mad 118 (120) 7 Mad L Jour 52 (F D) *Kadar Husain v Husain Sahib*
 (1929) A I R 1929 All 673 (673) 119 Ind Cas 852 *Natha Ram v Pam Gir*
 (1928) A I R 1928 All 863 (865) 50 All 686 113 Ind Cas 725 *Bulahi Dat v Aesri*
 (1871) 15 Suth W R 311 (311, 312) 7 Beng L R 235 *Lalla Goondur Lal v Hubeedoomissa*
 (1931) A I R 1931 Mad 724 (725) 134 Ind Cas 184 *Kootoorlingam Pillai v Sennappa Reddiar* (Want of notice as required by S 112 of the Madras Estates Land Act makes the sale a nullity)
 (1935) A I R 1935 P C 139 (143) 14 Pat 611 62 Ind App 224 157 Ind Cas 485 (P C) *Kedar Nath Goenka v Ram Narain Lal*

Note 2

- 1 (1886) 9 Mad 57 (60) 9 Ind Jur 385 *Snarama v Subramanya* (Where the plaintiff admits the validity of the sale but only claims a portion of sale proceeds this Article has no application)
 2 (1901) 25 Bom 337 (352) 27 Ind App 216 5 Cal W N 10 2 Bom L R 927 10 Mad L Jour 368 7 Sar 739 (P C) *Malkarjun v Narhari*
 (1926) A I R 1926 Mad 1190 (1192) 93 Ind Cas 31 *Narayana Narayan v Venkatasami Narayan*
 (1866) 5 Suth W R 123 (124) *Sreemutty Dossee v Sheebance Dabra*
 (1874) 22 Suth W R 84 (86, 87) *Ram Kanth Choudhry v Kallee Mohun Unkerjee*
 (1883) 5 All 573 (576) 1883 All W N 158 *Parshadi Lal v Muhammad Zain ul abdin* (Plaintiff cannot obtain possession of the properties sold at the sale without getting the sale itself set aside which relief is barred under this Article)
 (See also (1919) A I R 1919 Pat 574 (575 576) 74 Ind Cas 202, *Baldeo Singh v Meghu Singh*)

fall within the prohibition of the Article."³ Thus, if the representatives of a deceased mortgagor, bound by a sale, bring a suit for redemption, it will be considered in effect to be a suit to set aside the sale.⁴ Similarly, where a minor impeaches a sale on the ground of fraud or collusion on the part of his guardian who represented him in the execution proceedings, but brings a suit for possession, such a suit would be a suit really to set aside the sale.⁵ Where the plaintiff prays for possession of the property purchased by him or in the alternative for refund of the purchase money, the suit is in effect one to set aside the sale.⁶

3. Article has no application to the defence set up by the defendant in possession. — The Limitation Act applies only to the institution of suits, and has no application to the defence set up by the defendant.¹ Thus, where the defendant was in possession on the date of the suit and the plaintiff filed the suit to enforce his rights under a sale held by the Court, the defendant was held not barred by virtue of this Article from contending that the sale was invalid² even though a suit by him to set aside the sale had been

(1928) A I R 1928 Pat 615 (617, 618) 8 Pat 122 113 Ind Cas 681, *Baldeo Das Durla v Lal Nilmans Nath* (A suit for a declaration that a rent sale was not so in fact and did not pass the tenure is in effect one to set aside the sale and this Article is applicable.)

3 (1901) 25 Bom 337 (352) 27 Ind App 216 2 Bom L R 927 5 Cal W N 10 10 Mad L Jour 808 7 Sar 733 (P C), *Malharajun v Narhari*

(1916) A I R 1916 Pat 815 (316) 36 Ind Cas 681, *Itam Akhelaan v Asgar Ali* (If in order to restore a property to plaintiff it is necessary to set aside the sale, the Court will, subject to this Article, set aside the sale even if there is no prayer to set aside the sale.)

4 (1929) A I R 1929 Pat 823 (324) 116 Ind Cas 543, *Bhan Prasad v Dhirgu Nath*

(1908) 6 Cal L Jour 719 (726) 11 Cal W N 1078, *Ram Taran Goswami v Remesuar Malia*

(1917) A I R 1917 Pat 352 (353) 27 Ind Cas 833, *Ranjit Prasad v Ram-jathan Pandey*

(1917) A I R 1917 Pat 693 (694) 84 Ind Cas 268 1 Pat L Jour 180, *Bhola Jha v Kali Prasad*

(1902) 12 Mad L Jour 398 (392), *Kuttach Sivar v Krishnan Muralidhar*

5 (1920) A I R 1920 Lah 417 (418) 1 Lah 27 55 Ind Cas 833, *Imam Din v Puran Chand*

6. (1886) 10 Bom 214 (217), *Mohamed Sayed Phaki v Nooraji Bala Bhai*

Note 3

1. (1921) A I R 1921 Bom 257 (258, 259) 45 Bom 45 59 Ind Cas 118, *Mahadev Narayan v Sadashiv Keshao*

(1922) 67 Ind Cas 891 (898) (Lah), *Tara Chand v Abdul Ibad*

(1916) A I R 1916 Lah 221 (223) 32 Ind Cas 493 1916 Pua Re No 1, *Gohal Chand v Nisadar Mal*

[See also (1926) A I R 1926 Bom 33 (34) 91 Ind Cas 426, *Dadbasappa Dharimappa v Pradhimappa Lenkappa*]

[But see (1911) 10 Ind Cas 90 (93) (Cal), *Ramona Choudharani v Nabakumar Sinha*]

2 (1921) A I R 1921 Bom 257 (258) 59 Ind Cas 118 45 Bom 45, *Mahadev Narayan v Sadashiv Keshao*

(1907) 30 Mad 444 (445) 17 Mad L Jour 291, *Venkaiahalingam Pillai v. Robert Fischer*

Article 12
Notes
3-5

dismissed as time-barred³

4. Suit to set aside a sale on the ground of fraud. — See also Section 18 *ante* and Article 95 *infra*

According to the general principle of law, this Article will not apply where another more specific Article is applicable to the case. Where a sale is sought to be set aside on the ground of fraud, the suit will be governed by Article 95 *infra* and not this Article¹. It has been held that this Article is intended to protect only *bona fide* purchasers at judicial sales by providing a short limit of time within which suits may be brought to set them aside².

5. Sale in execution of a decree of a Civil Court. — In what cases does a suit lie to set aside a sale in execution of the decree of a Civil Court? In order to answer this question it is necessary to refer to the following provisions of the Code of Civil Procedure —

Section 47 of the Code provides that "all questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit"¹

[See also (1907) 30 Mad 218 (249), *Ramanasami v. Muthusami Nair*]
[But :

- 3 (1916) A I R 1916 Lah 229 (229) 82 Ind Cas 485 1916 Pun Re No 1, *Gokal Chand v. Nadar Mal*.

Note 4

- 1 (1886) 9 Mad 457 (460), *Venkatapathi v. Subramanya*
(1911) 34 Mad 143 (150) 7 Ind Cas 60, *Venkatasuryanarayana Jagapathi Raju v. Guluguri Bapiraju*
(1884) 6 All 406 (414) 1884 All W N 140, *Natha Singh v. Jodha Singh*
(1887) 11 Bom 119 (123, 125), *Parekh Ranchor v. Ras Vakkat*
(1878) 3 Cal 300 (302, 303), *Dhoban Chunder Sen v. Ramsoonder Surma*
(1907) 84 Cal 241 (245) 5 Cal L J 385, *Shamlal Mandal v. Nilmany Das*
(1909) 4 Ind Cas 70 (71) (Cal), *Panch Kour Chosh v. Prangopal Mukerjee*
(1926) A I R 1926 Pat 401 (403) 96 Ind Cas 529 5 Pat 759, *Ramishwar Narain Singh v. Mahabir Prasad*
(1926) A I R 1926 Pat 47 (48) 90 Ind Cas 325, *Rameswar Narayan Singh v. Mahabir Prasad*
(1933) A I R 1933 Pat 473 (480) 149 I C 129, *Madho Saran v. Manna Lal*
(1870) 2 N W P H C R 180 (181), *Sheo Sahae Pandey v. Mt Ratta Beebee* (Where there is no fraud this Article will apply)
(1881) 1881 All W N 88 (39), *Ram Sarup v. Raghunandan* (Do)
2. (1886) 9 Mad 457 (460), *Venkatapathi v. Subramanya*
(1901) 25 Bom 337 (352) 27 Ind App 216 5 Cal W N 10 10 Mad L Jour 368 2 Bom L R 927 7 Bar 739 (P O) *Malkarjun v. Narhari*
(1907) 34 Cal 241 (245) 5 Cal L Jour 385, *Shamlal Mandal v. Nilmany Das*

Note 5

- 1 Suit was held barred in the following cases as being by a party to the previous suit —
(1926) A I R 1926 Lah 490 (493) 97 Ind Cas 181, *Bansi Dhar v. Muhammad Suleman*

Order 21 Rule 92 of the Code provides as follows :

Article 12
Note 5

"1. Where no application is made under Rule 89 or Rule 90 or Rule 91, or where such application is made and disallowed, the Court shall make an order confirming the sale, and thereupon the sale shall become absolute

"2 Where such application is made and allowed, and where, in the case of an application under Rule 89 the deposit required by that Rule is made within thirty days from the date of the sale, the Court shall make an order setting aside the sale

"Provided that no order shall be made unless notice of the application has been given to all persons affected thereby

"3 No suit to set aside an order made under this Rule shall be brought by any person against whom such order is made "

- (1926) A I R 1926 Nag 267 (270) 92 Ind Cas 241, *Sadasheo v Karun* (But where minor is represented, the fact that the guardian was negligent does not render the sale void Hence a suit to set aside the sale is barred by S 47)
- (1894) 16 All 5 (9) 1693 All W N 141, *Chunni v Lala Ram*
- (1917) A I R 1917 P C 121 (123) 41 Mad 403 45 Ind App 54 44 Ind Cas 855 (P C), *Ganapathi Mudaliar v Krishnamachariar*
- (1918) A I R 1918 Lah 182 (183) 43 Ind Cas 712, *Pala Singh v Harnama* (1882) 5 Mad 217 (219), *Viraraghata Ayyangar v Venkatacharyar*.
- (1921) A I R 1921 Bom 285 (288, 289) 45 Bom 174 53 Ind Cas 231, *Bhaichand Kirparam v Ranchhodas*
- (1905) 82 Cal 691 (696) 1 Cal L Jour 360, *Barhamdeo Narayan Singh v Bibi Rasul Dandi* (Section 47 will bar a suit to set aside a sale under the Bengal Public Demands Recovery Act)
- (1926) A I R 1926 Cal 107 (108, 109) 91 Ind Cas 796, *Basanta Kumar v Herendra Nath* (Under the Bengal Public Demands Recovery Act a suit to set aside the sale on any of the grounds, which could be taken in an application to set aside the sale under S 22 of the Act, is barred)
- (1899) 22 Mad 847 (849) 9 Mad L Jour 98, *Mayan Pathani v Pakuran*.
- (1908) 20 All 146 (148) 1908 All W N 49 5 All L Jour 121, *Kishan v Umrao*.
- (1904) 1 All L Jour 300 (363), *Mangli Prasad v Pati Ram*.
- (1905) 2 All L Jour 123 (124), *Madan Valund Lal v Jamna Kaulapuri*
- (1915) A I R 1915 All 70 (72) 37 All 165 27 Ind Cas 795 (F B), *Lal Bahadur Singh v Abharan Singh*
- (1912) 14 Ind Cas 780 (781) (Bom), *Sahadu Wanaji v Deviya Jaba Mahar*
- (1906) 23 All 691 (682) 3 All L Jour 456 1906 All W N 206, *Gaya Prasad Misir v Jandhar Singh*
- (1903) 85 Cal 61 (66) 6 Cal L Jour 320 11 Cal W N 1011 (F B), *Ashutosh Sikdar v Bihari Lal*
- (1916) A I R 1916 Lah 196 (198) 33 Ind Cas 602 1916 Pun Be No 18, *Mehr Bish v Sanjhe Khan*
- (1907) 30 Mad 313 (315) 17 Mad L Jour 163 2 Mad L Tim 181, *Muthu v Karuppan* (Though the property may have been purchased by a stranger)
- (1903) 30 Cal 142 (147) 7 Cal W N 305, *Golam Ahad v Judhister Chandra* (But see (1917) A I R 1917 Mad 315 (320) 39 Mad 1031 32 Ind Cas 991, *Seshagiri Rao v Tiruguturi Jagganadham* (Suit assumed to lie and Article 12 applied—Submitted not correct)
- (1920) A I R 1920 Lah 417 (418) 55 Ind Cas 633 1 Lah 27, *Imam Din v Puran Chand* (Do))
- 2 (1907) 29 All 196 (202) 34 Ind App 37 9 Ind L R 63 5 Cal L Jour 133 11 Cal W N 393 17 Mad L Jour 112 2 Mad L Tim 47 (P C), *Gajrajmati Teerain v Akbar Hussain*

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Notes
3-5

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5. Sale in execution of a decree of a Civil Court. — In what cases does a suit lie to set aside a sale in execution of the decree of a Civil Court? In order to answer this question it is necessary to refer to the following provisions of the Code of Civil Procedure —

Section 47 of the Code provides that "all questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and *not by a separate suit*"¹

[See also (1907) 30 Mad 248 (249), *Ramanasari v Vuthuswami Nall*]
[But :

8 (1910) A I R 1916 Lah 229 (229) 32 Ind Cas 485 1916 Pun Re No 1, *Gokal Chand v Niadar Mal*.

Note 4

- 1 (1886) 9 Mad 457 (460), *Venkatapathi v Subramanya*
(1911) 84 Mad 143 (150) 7 Ind Cas 60, *Venkatasuryanarayana Jagapathi-
raju v Guluguri Bapiraju*.
(1884) 6 All 406 (414) 1884 All W N 140, *Natha Singh v Jodha Singh*
(1887) 11 Bom 119 (123, 125), *Parekh Ranchor v Rai Vakkhat*
(1878) 8 Cal 300 (302, 303), *Bhooban Chunder Sen v Ramsoonder Surma*
(1907) 84 Cal 241 (245) 5 Cal L J 385, *Shamlal Mandal v Nilmany Das*
(1909) 4 Ind Cas 70 (71) (Cal) *Panch Louri Ghosh v Prangopal Mukerjee*
(1926) A I R 1926 Pat 401 (403) 96 Ind Cas 529 5 Pat 759, *Ramishwar
Narain Singh v Mahabir Prasad*
(1926) A I R 1926 Pat 47 (48) 90 Ind Cas 325 *Rameswar Narayan Singh
v Mahabir Prasad*
(1933) A I R 1933 Pat 473 (480) 149 I C 129, *Madho Saran v Manna Lal*
(1870) 2 N W P H C R 180 (181) *Sheo Sahae Pandey v Mt Ratta
Beebee* (Where there is no fraud this Article will apply)
(1881) 1881 All W N 38 (39), *Ram Sarup v. Raghunandan* (Do)

2. (1886) ' '
(1901) ' '

Jour

(1907) 34 Cal 241 (245) 5 Cal L Jour 385, *Shamlal Mandal v Nilmany Das*

Note 5

- 1 *Suit was held barred in the following cases as being by a party to the
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(1926) A I R 1926 Lah 490 (493) 97 Ind Cas 181, *Dansi Dhar v Muham-
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"Provided that no order shall be made unless notice of the application has been given to all persons affected thereby

"3 No suit to set aside an order made under this Rule shall be brought by any person against whom such order is made"

- (1926) A I R 1926 Nag 267 (270) 92 Ind Cas 241 *Sadasheo v Karsin*
(But where minor is represented the fact that the guardian was negligent does not render the sale void Hence a suit to set aside the sale is barred by S 47)
- (1894) 16 All 5 (9) 1893 All W N 141 *Chunni v Lala Ram*
- (1917) A I R 1917 P C 121 (123) 41 Mad 403 45 Ind App 54 44 Ind Cas 855 (P C) *Ganapathi Mudaliar v Krishnamachariar*
- (1918) A I R 1918 Lah 182 (183) 43 Ind Cas 712 *Pala Singh v Harnama*
- (1882) 5 Mad 217 (219) *Viraraghava Ayyangar v Venkatacharyar*
- (1921) A I R 1921 Bom 285 (288, 289) 45 Bom 174 53 Ind Cas 231, *Bhaichand Kirparam v Ranchhodas*
- (1905) 82 Cal 691 (696) 1 Cal L Jour 360 *Barhamdeo Narayan Singh v Dibi Rasul Bando* (Section 47 will bar a suit to set aside a sale under the Bengal Public Demands Recovery Act)
- (1926) A I R 1926 Cal 107 (108 109) 91 Ind Cas 796 *Basanta Kumar v Herendra Nath* (Under the Bengal Public Demands Recovery Act a suit to set aside the sale on any of the grounds which could be taken in an application to set aside the sale under S 22 of the Act, is barred)
- (1899) 22 Mad 847 (849) 9 Mad L Jour 98, *Wayan Pathuli v Pakuran*
- (1908) 20 All 146 (148) 1908 All W N 49 5 All L Jour 121 *Akshan v Umrao*.
- (1904) 1 All L Jour 360 (863), *Manghi Prasad v Pati Ram*.
- (1905) 2 All L Jour 123 (124) *Madan Mahund Lal v Jamna Kaulapuri*
- (1915) A I R 1915 All 70 (72) 37 All 165 27 Ind Cas 795 (F B) *Lal Bahadur Singh v Adharan Singh*
- (1912) 14 Ind Cas 780 (781) (Bom) *Sahadu Manaji v Deilja Jaba Mahar*
- (1906) 29 All 681 (682) 3 All L Jour 456 1906 All W N 206 *Gaya Prasad Misra v Randhar Singh*
- (1903) 35 Cal 61 (66) 6 Cal L Jour 320 11 Cal W N 1011 (F B), *Ashutosh Sirdar v Bihari Lal*
- (1916) A I R 1916 Lah 196 (198) 33 Ind Cas 602 1916 Pun Re No 18 *Mehr Bikh v Sanjhe Khan*
- (1907) 30 Mad 313 (315) 17 Mad L Jour 163 2 Mad L Tim 181, *Muthu v Karuppan* (Though the property may have been purchased by a stranger)
- (1903) 30 Cal 142 (147) 7 Cal W N 305 *Golam Ahad v Judhister Chandra*
(But --
- (1920) A I R 1920 Lah 417 (418) 55 Ind Cas 633 1 Lah 27, *Imam Din v Puran Chand* (Do))
- 2 (1907) 29 All 106 (202) 34 Ind App 37 9 Bom L R 63 5 Cal L Jour 133 11 Cal W N 393 17 Mad L Jour 112 2 Mad L Tim 47 (P C), *Gajrajmati Teerain v Akbar Hussain*

Article 12
Note 5

It follows that it is only in cases not falling within the prohibitions referred to above that a suit may lie to set aside a sale in execution of a decree^{2a}

Illustrations

- 1 A obtained a money decree against B, a Hindu father, and, in execution of the decree brought the properties belonging to the joint family of B and his sons to sale. C purchased the properties in court auction. B's son D filed a suit for getting the sale set aside on the ground that he was not a party to the suit against B and that the sale is not binding on the family property. It was held that the suit was maintainable and that it was governed for purposes of limitation by this Article. The prohibition under Section 47 does not apply as D was not a party to the suit against A. The auction sale of family property in execution of a decree against the father of a Hindu family will cover not only the father's share but the sons' shares as well and the sons who

(1930) A I R 1930 All 556 (557) 123 Ind Cas 231 *Ut Indar Koer v Shah Dharam Narain*

(1930) A I R 1930 All 578 (579) 123 Ind Cas 755 *Chravangji Lal v Ishwar Das*

(1902) 20 Bom 40 (42) 3 Bom L R 463 *Damodar Bhaushet v Trimbak Vinaya*

(1919) A I R 1919 Cal 411 (413) 51 Ind Cas 972 *Jagdish Bhattacharya v Bama Sundari Dasya*

(1915) A I R 1915 Mad 150 (155) 26 Ind Cas 369 *Grace Rosamund Rhodes v Padmanabha Chettiar*

(1928) A I R 1928 Mad 1183 (1139) 113 Ind Cas 873 *Veenakshi v Palaniappa Thevar*

(1929) A I R 1929 Lah 618 (619) 119 Ind Cas 431 *Radhi v Buta Mal*

(1929) A I R 1929 Nag 130 (131) 25 Nag L R 58 118 Ind Cas 49 *Tula Ram v Sakharansa*

Once the sale is confirmed the purchaser gets a good title to the property and is not liable to be redeemed subsequently by the mortgagor

(1907) 30 Mad 313 (315) 17 Mad L Jour 163 2 Mad L Tim 181 *Muthu v Karuppan*

(1896) 18 All 325 (397 328) 1896 All W N 91 *Tara Chand v Imdad Husain*

(1915) A I R 1915 All 70 (72) 37 All 165 27 Ind Cas 790 (F B) *Lal Bahadur Singh v Abharan Singh*

(1914) A I R 1914 All 343 (316) 36 All 516 24 Ind Cas 619 *Sirdar Singh v Ratan Lal*

(1927) A I R 1927 Mad 1135 (1136) 101 Ind Cas 89 *Chinnakannu Pada yachi v Paranasua Mudahar*

(1923) A I R 1923 Cal 121 (126) 76 Ind Cas 241, *Jagadish Chandra Deo v Bhuvaneshwar Utra*

(1917) A I R 1917 Mad 592 (593) 32 Ind Cas 611 *Irjuna Reddi v Venkata chala Asari*

2a (1885) 11 Cal 287 (992) *Mahomed Hossein v Purundur Mahto* (Suit against stranger purchaser in court auction)

(1923) A I R 1923 Bom 62 (63) 67 Ind Cas 837 46 Bom 914 *Nagabhalla v Nagappa (Do)*

(1877) 2 Cal 98 (101, 102) *Ibdool Munsoor v Ibdul Hamid (Do)*

(1912) 14 Ind Cas 780 (781) (Bom) *Shahu Nanaji v Deviya Jaba Mahar* (Suit against stranger purchaser of property not saleable under decree)

would thus be bound by the sale cannot claim their shares unless they get the sale set aside³

- 2 A obtains a decree against B and in execution thereof brings the properties of B to sale. A has no permission to bid at the sale but purchases the properties benami in the name of C. B sues C for setting aside the sale on the ground that the purchase is invalid on the ground of want of permission to bid. It has been held that such a suit will be governed by this Article⁴. The reason is that for the purposes of procedure C must be regarded as a stranger even though he is a benamidar for A, and that therefore Section 47 does not apply⁵. Nor will sub rule 3 of Order 21 Rule 92 apply to the grounds on which the sale is sought to be set aside.

6. Effect of setting aside of, or reversal or modification of decree after sale.—Where a decree in execution of which a sale is held is modified or reversed in appeal or set aside in other proceedings, the question arises as to what the effect of it is on the rights of the auction purchaser. The answer would depend on whether the purchaser is a *bona fide* stranger or whether he is a party to the decree or the proceedings such as the decree holder himself. There is always a great difference between decree holders who purchase under their own decrees and who have notice of and are bound by the proceedings in which the decree is varied, or set aside, and *bona fide* purchasers who purchase at a court sale at a time when the decree was a valid decree and when the order for sale was a valid order¹. In the former case the decree holder or a party to the decree always purchases at a sale subject to the result of any proceedings to set aside or modify the decree². The remedy of the judgment debtor

3 (1926) A I R 1926 Mad 1190 (1192) 98 Ind Cas 31, *Narayana Naicken v Venkatasami Naicken*

(1875) 25 Suth W R 148 (150) *Mt Anooragee Koorer v Mt Bhugobutty Koorer*

4 (1927) A I R 1927 Mad 1195 (1136) 101 Ind Cas 69 *Chinnakannu Padayachy v Paramasiva Mudaliar* (Suit against benamidar as well as a decree holder)

(1922) A I R 1922 P C 836 (338) 67 Ind Cas 914 49 Ind App 312 1 Pat 733 (P C) *Radha Krishna v Bisheshwar Saha* (Decree holder had in this case purchased back the property from the benamidar and stood for the purposes of procedure in the benamidar's shoes)
[See also (1916) A I R 1916 Bom 61 (63) 39 Ind Cas 3 41 Bom 357, *Ganesh Narayan v Gopal Vishnu*]

5 (1920) A I R 1920 Bom 90 (93) 44 Bom 352 56 Ind Cas 349, *Ramchandra Lal v Gajanan Narayan*

Note 6

1 (1884) 10 All 100 (172) 15 Ind App 12 5 Sir 129 (P C), *Zain ul Abidin v Muhammad Ali*

(1888) 10 Suth W R 154 (155) 1 Rang L R A C 56 *Jan Ali v Jan Ali Chowdhry*

(1897) 1897 All W N 28 (29) *Said un nissa v Manju Lal*

(1927) A I R 1927 Mad 78 (80 81) 48 Mad 767 91 Ind Cas 16 *Vayanan v Chelluajja Chellu*

(1900) 27 Cal 610 (613 614) 4 Cal W N 602, *Set Umed Mal v Srinath Ray*

2 (1897) 1897 All W N 28 (29) *Said un nissa v Manju Lal*

Article 12
Notes
6—7

is by way of restitution under Section 144, or an application under Section 47 of the Civil Procedure Code. But a stranger purchaser acquires, however, a good title to the properties purchased by him, and the sale in his favour cannot be set aside on the ground of any subsequent variation or cancellation of the decree, as he is not bound to inquire into the correctness of the decree in execution of which the sale is held.³ Thus, the mere fact that the judgment-debtor had a cross-decree against the decree holder at the time of the sale⁴ or that it is found that the decree had been satisfied on the date of sale⁵ will not render the sale invalid as the purchaser is no more bound to inquire into the correctness of an order for execution than he is as to the correctness of the judgment upon which the execution issues.⁶ In such cases, if the judgment debtor files a suit to set aside the sale, it will be governed by this Article.⁷

7. Sale in pursuance of a decree or order of Collector or other officer of revenue — Clause (b). — The word "order" occurring in clause (b) of this Article refers only to judicial and not to administrative orders.¹ In *Sakharam Vithal Adhikari v The Collector of Ratnagiri*,² Westropp, C J, observed as follows —

"Each branch of the clause contemplates a deliberate proceeding taken upon due notice to the person affected, and with an opportunity to him to take steps to avert the evil of an unauthorized sale before it is consummated. In the case of sales under a decree of a Civil Court this is too plain to require any exposition. In the case of revenue defaulters, or of debtors to Government standing in the same position, ample provisions for notice and for opportunity to prevent needless injury are made in the laws authorizing distraint and sale. This being evidently the general principle of the clause that a deliberate and public proceeding of a judicial, or at least of a quasi-judicial character, shall be held a justification for refusing further inquiry after the lapse of so short a period as a year, we

(1808) 10 Suth W R 154 (155) 1 Beng L R A C 56, *Jan Ali v Jan Ali Chondhry*

(1900) 27 Cal 810 (813-814) 4 Cal W N 592, *Set Umedmal v Srinath Ray* (Remedy of judgment debtor is by way of application under S. 47.)

3 (1917) A I R 1917 Mad 250 (253) 34 Ind Cas 760, *Raghavachari v Mahomed Bowther*

(1922) 64 Ind Cas 611 (611) (Cal), *Gopal Porai v Swarna Bena*

4 (1867) 14 Cal 18 (25) 13 Ind App 106 4 Sar 746 10 Ind Jur 428 (P C), *Pera Mahton v Pamkishan Singh*

5 (1888) 15 Cal 557 (563) *Mothura Mohun Ghose v Akhoy Kumar Mitter* (1891) 21 Bom 463 (464) *Yellappa v Ramchandra*

6 (1887) 14 Cal 18 (25) 13 Ind App 106 4 Sar 746 10 Ind Jur 428 (P C), *Pera Mahton v Ram Kishan Singh*

(1891) 21 Bom 463 (464) *Yellappa v Ramchandra*

7 (1883) 5 All 573 (576) 1883 All W N 156, *Parshad Lal v Muhammad Zain ul abdin*

Note 7

1 (1871) 8 Bom H C R A C 219 (225, 226) (F B), *Sakharam Vithal Adhikari v The Collector of Ratnagiri*

2 (1871) 6 Bom H C R A C 219 (225, 226) (F B)

cannot reasonably suppose that a case was intended to be included in which, as in the one before us, there may have been none of those preliminary proceedings which afford a *prima facie* safeguard against wrong to an owner of property. Taken where it stands in the clause, the branch of it which we are especially considering seems not intended to apply to orders of the administrative kind issued at the mere discretion or caprice of a revenue officer "

A suit to set aside a sale of property in pursuance of a certificate issued under the Bengal Public Demands Recovery Act is governed by clause (b) of this Article³ The certificate under that Act is equivalent to a decree of a Civil Court (Section 15) and therefore at the sale only the right, title and interest of the defaulter is sold. Hence, where a person is not a party to the certificate or where minor certificate debtors are not properly represented, the sale is a nullity as far as they are concerned this Article therefore does not oblige them to bring a suit to set aside the sale within the prescribed period⁴

See Note 1 *ante*.

A sale held by the Collector under the Rent Recovery Act (Madras Act VIII of 1865) is a sale of the tenant's interest in the property and is governed by Article 12 (b)⁵ But it has been held that a sale held by the Collector under Section 118 of the Madras Estates Land Act is not a sale in pursuance of any decree or order of the Collector or other officer of revenue and consequently that this sub-clause has no application to a suit to set aside such sale⁶

8. "Sale for arrears of Government revenue, or for any demand recoverable as such arrears" — Clause (c). — Under Sections 3 and 4 of the Madras Revenue Recovery Act, 1861, "if the whole or any portion of a kist or instalment of any month of the era according to which the settlement and kistbundi of any Mahal have been regulated, be unpaid on the first of the following month of such era, the sum so remaining unpaid shall be considered as an arrear of revenue"¹

3 (1929) A I R 1929 Cal 679 (681) 57 Cal 642 125 Ind Cas 313 *Kalipada Roy v Mukunda Lal*

(1907) 5 Cal W N 86 (89) *Gopal Das v Ardeo Das* (Art. 12 has no application to a suit to cancel certificate under S. 15 of the Act)

4 (1929) A I R 1929 Cal 679 (691) 57 Cal 642 125 Ind Cas 313, *Kalipada Roy v Mukunda Lal Roy*

5 (1897) 20 Mad 83 (35) 6 Mad L Jour 278, *Ragatendra Aiyar v Karuppa Goundan*

6 (1931) A I R 1931 Mad 724 (726) 134 Ind Cas 184, *Kootoorlingam Pillai v. Sennappa Reddiar*

(1927) A I R 1927 Mad 489 (488, 489) 100 Ind Cas 1007, *Subbaya v Narayana Krishnayya*

[But see (1924) A I R 1924 Mad 278 (278) 76 Ind Cas 840, *Ammalimmal v Chockalinga Aiyar*]

Note 8

1 (1912) 16 Ind Cas 821 (821) 39 Ind App 177 39 Cal 901 (P C), *Dukhshilahi v Durlivchandra*

Article 12
Note 8

Where a property is sold for arrears of land revenue, the occupant or the owner of the property is bound by the sale, and has therefore to bring a suit to set it aside within the time provided by this Article.² There is a substantial difference between cases where the property is sold for arrears of land revenue and cases where only the interest of the defaulter is sold, as in sales for the recovery of Crown debts which are recoverable "as if they were arrears of land revenue".³

Since an arrear of land revenue is a first security on the land by the statutory declaration, a purchaser at a sale held to recover arrears of land revenue takes the land free of all encumbrances on the property even though such encumbrances had been created long prior to the date on which the arrears had accrued.⁴ The remedy of the encumbrancer is only to set aside the sale by a suit or by an application within the period provided by law.^{4b} Where, however, a debt is due to the Crown and it is made recoverable as if it is an arrear of land revenue, as in the case of arrears of road cess under the Madras Local Boards Act,⁵ or of arrears due by an abkari renter,⁶ or of dues under the Land Improvement Loans Act,⁷ or of arrears of tax under the Indian Income tax Act,⁸ the property is not sold free of encumbrances, the purchaser purchases only the interest of the defaulter as on the date of the sale. The reason is that such debts are not first charge on any specific property, and the words that they are recoverable "as if they were arrears of land revenue" indicate that only the same procedure as for recovery of land revenue should be followed.⁹

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- 2 (1880) 13 Bom 221 (223), *Basaji Krishna v Pichand Budharam*
(1867) 8 Suth W R 439 (441, 442) *Womesh Chunder Chatterji v The Collector of the 24 Pergunnahs*
(1886) 6 Mad 148 (149-150) 7 Ind Jur 13, *Karuppa Thevan v Vasudeva Sastri*
[See also (1887) 7 Mad 258 (261, 262) 8 Ind Jur 134 *Suryanna v Durgi*]
- 3 (1884) 7 Mad 434 (435, 436), *Ramachandra v Pichai Kannu*
- 4 (1884) 7 Mad 434 (435), *Ramachandra v Pichai Kannu*
Madras Revenue Recovery Act (Act 2 of 1864), S 42.
(1898) 1899 Bom P J 97, *Allama Garsumiya v Murari* (Where owing to the mortgagee's default, the lands are sold for arrears of revenue, the mortgagee is a trustee for the mortgagor who can at any time redeem the properties. But if a third person becomes *bona fide* transferee from the mortgagee without notice of the trust, he will not be affected by any suit.)
- 41 (1905) 28 Mad 420 (422), *Ibrahim Khan Sahib v Pangasami Naicken*
- 5 (1916) A I R 1916 Mad 332 (333) 38 Mad 356 (368) 19 Ind Cas 691, *Muthusamiyer v Sri Methanthisamiyer*
- 6 (1884) 7 Mad 434 (435, 436) *Ramachandra v Pichai Kannu*
(1905) 28 Mad 420 (422) *Ibrahim Khan v Pangasami Naicken*
[But see (1892) 15 Mad 219 (220), *Raman v Chandan*]
- 7 (1902) 25 Mad 572 (575, 576), *Chinnasami Mudali v Tirumalai Pillai*
- 8 (1903) 26 Mad 230 (234) 12 Mad L Jour 363, *Kadir Mohideen v Muthu Krishna Appay*
- 9 (1894) 7 Mad 434 (435), *Ramachandra v Pichai Kannu*

If the sale held by the officer of revenue is *without jurisdiction*, as has been seen already in Note 1 *ante*, the sale is a nullity and the owner may disregard it, and if he is dispossessed by the auction purchaser, he may sue to recover the property within 12 years of such dispossession (Article 142) without having to set aside the sale within the time provided by this Article. But "purchasers in sales held by revenue officers for the realisation of public taxes should not have their title remaining in jeopardy for long and public policy requires that when such sales are attacked long afterwards on the ground of want of jurisdiction in the officer conducting the sale, such ground should be strictly established by cogent evidence" ¹⁰

Where, however, a sale is within jurisdiction, mere irregularities in procedure cannot be allowed to be raised to set it aside after the period of limitation provided by this Article ¹¹. A sale is a sale within the meaning of this clause when it is a sale for arrears of Government revenue held by the Collector or other officer authorised to hold a sale, although it may be contrary to the provisions of the Act either by reason of some irregularity in publishing or conducting the sale or in consequence of some express provision for exemption having been directly contravened ¹².

A suit to set aside a sale for arrears of revenue held under the Madras Revenue Recovery Act is governed by Section 59 of the Act which provides a period of six months from the date of accrual of the cause of action and not by this Article ¹³. Where there is a special provision made by the local Act, such provision will apply and not the one made by this Article ¹⁴.

9. Sale of patni for arrears of rent—Clause (d).—A suit to set aside a sale as provided by Section 14 of the Bengal Patni

- (1916) A I R 1916 Mad 332 (333) 38 Mad 356 (367 368) 19 Ind Cas 694, *Muthusami v Sri Methanithiswami*
- 10 (1916) A I R 1916 Mad 332 (338) 38 Mad 356 19 Ind Cas 694 *Muthusami v Sri Methanithiswami*
- 11 (1916) A I R 1916 Mad 332 (338) 38 Mad 356 19 Ind Cas 694 *Muthusami v Sri Methanithiswami*
- [See also (1926) A I R 1926 Cal 866 (868 871) 53 Cal 886 93 Ind Cas 353 *Lal Behary v Rajendra Nath*]
- 12 (1912) 18 Ind Cas 403 (403 404) (Cal) *Gangadhar Das v Bhikari Charan*
- [See also (1927) A I R 1927 Cal 315 (318) 100 Ind Cas 997 *Hara Prasad v Gopal Chandra*]
- 13 (1916) A I R 1916 Mad 1093 (1095) 38 Mad 92 (100) 18 Ind Cas 617, *Srinivasu Iyengar v Secretary of State*
- (1921) A I R 1921 Mad 318 (319) 63 Ind Cas 135, *Muthia Chettiar v Karuthamada Pillai*
- (1919) A I R 1919 Mad 1059 (1061 1062) 41 Mad 733 45 Ind Cas 595 (F B) *Subbinaatha Iyer v Sundarasa Iyengar*
- (1919) A I R 1919 Mad 657 (658) 45 Ind Cas 844 *Bhanureddi Venkateswara Rao v Secretary of State*
- (1903) 26 Mad 638 (639) *Laman Naidu v Bhasswa Sanyal*
- 14 (1936) A I R 1936 Cal 715 (718) 108 Ind Cas 368 I L R (1937) 1 Cal 437, *Siddaram Aiyer v Kunja Lakshmi Iyerjee* (Provision as to limitation made by the Assam Land and Revenue Regulation (1 of 1887))

Article 12
Notes
9—10

Regulation, 1819, is governed by clause (d) of this Article ¹

10. Time from which period of limitation commences.—

In cases where there is a specific provision for confirmation of sales, the period will commence only from the date of such *confirmation* and not from the date of the sale itself ¹ Similarly, where the sale is confirmed, but proceedings by way of revision disputing the validity of the sale had been instituted, the period will nevertheless run from the date of the confirmation and not the date of the order in such proceedings holding the sale to be valid ² Where, however, the parties were litigating as to whether a sale should be confirmed or not the period of limitation will commence only from the last order finally confirming the sale ³ In the case of a person under disability such as a minor, the period of limitation commences from the time he attains majority, under Section *fi ante* ⁴

In cases where there is no provision for confirmation of sales, the period will commence from the time "when the sale would have become final had no suit to set aside the sale been brought" ⁵ If however the sale is confirmed as a *fact*, the period will commence from such confirmation ⁶ Ordinarily in other cases the sale will be deemed to have become final on payment of the full purchase money ⁷ In deciding the time from which the period is to be

Note 9

- 1 (1927) A I R 1927 Cal 733 (736) 104 Ind Cas 151, *Nahnakha Sinha v Ram Taran Pal*

Note 10

- 1 (1903) 26 Mad 495 (496, 497) 18 Mad L Jour 225, *Sabapathy Chetty v Rangappa Naicken*
(1869) 11 Suth W R 261 (262), *Enaet Ali Khan v Kumola Koonuar*
2 (1919) A I R 1919 Lah 79 (80) 49 Ind Cas 858 1919 Pan Re No 15 *Sunder Singh v Dhan Singh*
(1907) 30 Mad 367 (368) 2 Mad L Tum 328, *Chinnammal Achi v Saminatha Malatoroyan*
3 (1896) 23 Cal 775 (785 786) 23 Ind App 45 7 S W 1 (P C), *Barj Nath Saha v Ramgut Singh*
(1927) A I R 1927 Cal 315 (320) 100 Ind Cas 997 *Hara Prasad v Gopal Chandra*
(1870) 14 Suth W R 284 (285) *Prannath Roy v Troyluckhonath*

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- 5 (1911) 10 Ind Cas 87 (89) (Cal), *Bhuban Mohan Maistra v Girish Narain Moonshi*
(1882) 8 Cal 929 (930), *Rajchundra Chukerbuly v Kinsoo Khan*
(1870) 14 Suth W R 284 (285), *Prannath Roy v Troyluckhonath*
(1875) 24 Suth W R 476 (476) *Bhagbut Debey v Moorad Ali Khan* (In a suit to set aside a sale on ground of pre-emption time commenced from the time the purchaser took possession of the property in pursuance of the sale)
(1883) 6 Mad 148 (149) 7 Ind Jur 13, *Karuppa Thevan v Vasudeva Sastri*
6 (1911) 10 Ind Cas 87 (89) (Cal) *Bhuban Mohan Maistra v Girish Narain*
7 (1893) 6 Mad 148 (149) 7 Ind Jur 13, *Karuppa Thevan v Vasudeva Sastri*.
(1911) 10 Ind Cas 87 (89) (Cal), *Bhuban Mohan v Girish Narain*

calculated for the purposes of limitation, the Courts should always adopt a liberal construction ⁸

Article 12
Note 10

13.* To alter or set aside a decision or order of a Civil Court in any proceeding other than a suit.

One year.

The date of the final decision or order in the case by a Court competent to determine it finally.

Article 13

Synopsis

1. Scope of the Article.
2. "Proceeding other than a suit."
3. Civil Court.
4. Starting point.

Other Topics

Execution proceedings

See Note 2 Pts 3, 3a

Presidency Small Cause Courts Act—Proceeding under Chapter 7 is not suit

See Note 2 Pt 4

Suit on title — Not barred

See Note 1, Pts 3, 4

1. Scope of the Article.—This Article applies only where the suit is to *alter or set aside* a decision or order of a Civil Court. As has been seen in Note 1 to Article 12 *ante*, a decision or order need not be altered or set aside by any person unless it is *binding* on him until so altered or set aside. Where, therefore, a person can seek the relief he wants without altering or setting aside the order or decision of a Civil Court, a suit for such relief is not governed by this Article ¹. Thus, where an order merely made a declaration that *there*

* Act of 1877, Article 13 and Act of 1871, Article 15.

Same as above

Act of 1859 — Section 1 Clause 5

Limitation of one year. Suits to set aside summary decisions etc

To suits to alter or set aside summary decisions and orders of any of the Civil Courts not established by the Royal Charter when such suit is maintainable—the period of one year from the date of the final decision, award or order in the case

8 (1911) 10 Ind Cas 87 (89) (Cal) *Bhuban Mohun Maistra v Girish Narain Moenshi*

(1911) 10 Ind Cas 90 (92) (Cal) *Lamona v Naba Kumar Sinha*

Article 13 — Note 1

1 (1875) 7 N W P H C R 174 (177) *Debi Das v Nur Ahmed*

(1913) 19 Ind Cas 98 (97) (Cal) *Maula Bala v Dhabasundari Dasra*

(1867) 7 South W R 199 (200) 1 King L R Sup Vol 633 2 Ind Jur (N 6) 191, *Lalnarain Singh v Laree Manloer*

Article 13

Note 1

was no jurisdiction to decide a particular question, it was held that there was no order which was to the prejudice of the plaintiff which need be set aside by him, and that therefore this Article had no application². Again, where an order of the Insolvency Court for sale of certain properties left open the question of title to those properties, it was held that a suit for a declaration of title to the properties was not barred by this Article³. Similarly, an order passed by the Presidency Small Cause Court under Chapter 7 of the Presidency Small Cause Courts Act, 1882, is not a decision or order on a question of title and need not be set aside. A suit on title is not therefore barred by this Article⁴. Where the plaintiff sued the defendant (who had obtained a certificate of heirship on the strength of an alleged will) for recovery of the property of the deceased on the ground that he was the intestate heir of the said deceased person, it was held that he was not bound to have the order granting the certificate set aside and that the suit was not governed by Article 13⁵.

Article 15 of the Limitation Act of 1871 corresponded to this Article. But there was no Article corresponding to Articles 11 and 11A of the present Act. In cases arising under that Act, there was a difference of opinion as to whether a suit to *establish a right* which was denied by an order on a claim petition under Section 246 of the Code of Civil Procedure, 1859 (corresponding to Order 21 Rule 58 of the present Code) was a suit to *set aside* an order within the meaning of Article 15 of the Act of 1871⁶. Article 11 now

(1866)

(1866)

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(1890) 15 Bom 438 (440) *Vishnu Dhikarj Phadke v Achut Jagannath Ghate*(1886) 10 Bom 449 (451) *Das Kashi v Das Jamna*(1898) 1898 Bom P J 220 (220) *Haralchand Dechraj v Ganesh Gound Tal sale*(1921) A I R 1921 Pat 1 (3) 6 Pat L Jour 85 60 Ind Cas 849 (F B) *Lal Shaha v Kado Vahio*(1894) 1894 All W N 78 (78) *Debi Chara v Bari Bahu*(1918) A I R 1918 Mad 640 (641) 41 Mad 23 39 Ind Cas 863 *Ramanamma v Kamaraju*[See also (1890) 5 Cal 86 (96) 4 Cal L R 434 *Dhuronidhar Sen v Agra Bank*]2 (1881) 6 Cal 142 (145) 7 Cal L R 396 *Aristodass Lundoos v Ramkanti Roy Choudhry*(1864) 1 Suth W R 39 (40) *Mt Moucedunnissa v Muhammad Ali*[See also (1869) 1 N W P H O R 150 (151) *Ramlall v Jeevum Pam* (Order without jurisdiction)]3 (1933) A I R 1933 Cal 263 (264) 143 Ind Cas 475 *Abdul Majid v Abdul Haq*4 (1929) A I R 1929 Mad 69 (72) 115 Ind Cas 504 *Hyder Ali Sahib v Amiruddin Sahib*5 (1886) 10 Bom 449 (451) *Das Kashi v Das Jamna*(1867) 8 Suth W R 126 (127) *Kalee Prasanno Moolerjee v Sreemutty Kulan Monce Debia* (12 years rule applies to this case)6 (1875) 25 Suth W R 513 (515) *Matongny Dassee v Clouthury Junmunjoy Mullic* (No)

specifically provides for such suits which are therefore not governed by this Article

Whether a suit is one to *set aside* an order or not is to be determined not from the *form* of the plaint but from the *substance* of the claim. Where A was appointed as a member of a Temple Committee under Act 20 of 1863 by an order of the District Judge, and the plaintiffs worshippers filed a suit for a *declaration* that the appointment is invalid and for an *injunction* restraining A from performing the duties of a committee member, it was observed by the High Court of Madras as follows

"The suit is no doubt in form one for a declaration and consequential relief by way of injunction, but it is very clear that an injunction such as is asked for restraining defendant from performing any of the functions devolving on the committee of the Devasthanam can only issue if his appointment as a member of such committee is cancelled. Moreover the declaration sought is that defendant's appointment as a member of the committee 'is illegal and invalid and consequently null and void'. Such a declaration would be tantamount to setting aside the order of appointment. There can be no doubt that the suit is in reality one to have the order of appointment set aside, and such a suit should have been brought within one year from the date of the order sought to be impeached. See Article 13 of Schedule 2 of the Limitation Act."

2. "Proceeding other than a suit." — It has been held by the High Court of Madras that this Article relates to orders passed in disputes which did not begin with the filing of a *plaint* in a suit but to orders in disputes initiated by applications such as those under the Guardians and Wards Act, the Succession Certificate Act and so on, and that such applications and the proceedings connected with such applications are not proceedings in suits.¹ An order passed by the Court on an application by the Official Receiver to release certain properties which had been attached before judgment in a suit has accordingly been held not to be an order in a 'proceeding other than a suit'.² An order in *execution* proceedings in a suit is not an

(1879) 4 Cal 610 (611) 3 Cal L R 25 *Kojosh Chunder Paul Chowdary v Preonath Ray Chowdary* (No)

(1883) 9 Cal 43 (47) 5 Shome L R 87 *Luchma Narain Singh v Asrup Aker* (Do)

(1885) 11 Cal 673 (677) *Cenilall Tewari v Denonath Ram Tewari* (No)

(1899) 12 Mad 294 (296) *Narasimma v Appalachariu* (No)

(1885) 1885 All W N 305 (306) *Gokul Das v Debi Prasad* (Yes relying on 4 Bom 611)

7 (1893) 3 Mad L Jour 125 (130) *Subramania Sastri v Manabai Naidu*

Note 2

1 (1922) A I R 1922 Mad 189 (192) 45 Mad "O 69 Ind Cas 32 *Official Receiver of South Malabar v Veeraraghavan Pillai*

2 (1922) A I R 1922 Mad 189 (191) 45 Mad "O 69 Ind Cas 32 *Official Receiver of South Malabar v Veeraraghavan Pillai*

Article 13
Notes
2-4

order in a proceeding other than a suit.³ It has however been held in the undermentioned case^{3a} by the High Court of Allahabad that a suit does not include an "application" and that an order on an application under Order 21 Rule 59 of the Civil Procedure Code is an order in a proceeding other than a suit within the meaning of this Article.

A proceeding instituted under Chapter 7 of the Presidency Small Cause Courts Act is not a "suit".⁴

3. Civil Court — A Mamlatdar's Court is a Civil Court.¹

4. Starting point — The starting point of limitation is the date of the final decision or order in the case by a Court competent to determine it finally.

The words in quotation were for the first time introduced by Act IX of 1871 and have been reproduced in subsequent Limitation Acts.¹ The object of the addition was to give effect to the decision of the Calcutta High Court in *Mt Ole Oari Dassy v Balder Narair Singh*^{1a} where Sir Barnes Peacock, C J and Bayley, J interpreting the language of clause 5, Section 1 of the Limitation Act XIV of 1859 held that the formal decision or order referred to in

3 (1901) 23 All 313 (373) 25 Ind App 203 3 Bom L R 113 2 Sar 72 5 Cal W N 649 (PC) *Shankar Sarup v Lax Phuleland* (Order under S 73 of the Civil Pro Code)

(1899) 1 Bom L R 793 (9) *Haji Ibrahim v Amolal Keralchand* (Do)

(1901) 15 Bom 400 (400) *Vishnu Bhalaji Fadke v Anant Jagannath Ghate* (Do)

(1900) 17 Cal 493 (503) *Taperaji Herdarund v Vaidhura Lal* (Do)

(1915) 4 I R 1915 Mad 405 (405) 39 Mad 62 26 Ind Cas 219 *Bairnath Lal v Ramadoss* (Do)

(1895) 1-95 Pen Re No 65 *Sohan Lal v Baldev Sahni* (Do)

(1904) 194 All W N 72 (72) *Debi Charan v Brij Bhai* (Suit by auction purchasers to recover property purchased at a sale subsequently set aside)

(1901) 10 Bom L R 749 (751) *Geornda Das v Chinubhai* (Order under O 21 R 101 of the Civil Pro Code)

(1917) 14 Ind Ca 200 (93) (Cal) *Mairat Sarwar v Alor Chandra* (Do)

(1900) 8 Mad 200 (7) 4 Asiat v Sarwar (Do)

(1918) 19 Ind Cas 200 (209) (Cal) *Manu Bhat v Bhatramani Durga* (Do)

(1895) 4 Mad 184 (18) *Venka chelaia v Appalarat* (Order under O 21 R 22 of the Civil Pro Code)

(1900) 9 Mad 57 (60) 9 Ind Jn 305 *Srinivasa v Subramani*

(1900) 3 Or 24 Cas 84 (87) *Sital Prasad v Mekan Lal*

[But see (1900) 13 Cal 159 (161) *Chitra Prasad Khatu v Purni* *Fl. in S rear* (Not good law after the decision in 23 All 313 (PC))]

3a (1910) 7 Ind Cas 503 (505) 33 All 93 *Kasim Lal v Kibber Sarup*

4 (1902) 4 I P 1909 Mad 69 (71) 115 Ind Cas 504 *Hader Ali v Amari Dain*

Note 3

1 (1903) 10 Bom H C R 49 (400) *Babji v Anna*

Note 4

1 (1902) 4 I R 1909 Mad 69 (73) 115 Ind Cas 504 *Hader Ali Sarup v Amari Dain*

1a (1907) 7 S 24 W P 151 (151)

the above clause was a final decision of the Court which had competent jurisdiction to determine the case finally, and not the order of a Court superior to such Court dismissing an appeal from the decision of such Court for want of jurisdiction². Where the order sought to be set aside is not made by a competent Court, this Article does not apply,³ nor does it apply to an order made by a Receiver, for he is not a Court⁴ nor to an order made by a Court which had no jurisdiction to make that order⁵. When the order sought to be set aside is made by a Court which was competent to make it, this Article applies⁶.

Article 18 Note 4

<p>14.* To set aside any act or order of an officer of Government in his official capacity, not herein otherwise expressly provided for.</p>	<p>One year.</p>	<p>The date of the act or order.</p>
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Article 14

Synopsis

1. Legislative changes.
2. "To set aside any act or order."
3. "Any act or order."
4. "Order" of an officer.
5. "Officer of Government."
6. Starting point of limitation

Other Topics

Date of order is date of communication	See Note 6 Pt 6
Executive order—Article not applicable	See Note 4 Pts 1, 2
Judge exercising judicial functions is not officer of Government	See Note 5 Pt 4
Order or act illegal or <i>ultra vires</i>	See Note 3 Pts 1 to 26
Order requiring subsequent act to complete it—Limitation runs from date of act	See Note 6 Pt 5
Order without jurisdiction is nullity	See Note 2 Pt 9

* Act of 1877

Same as above

Act of 1871, Article 16

Same as above except for the slight change. See Note 1

Act of 1859

No corresponding provision

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- 2 (1929) A 1 R 1929 Mad 63 (69) 115 Ind Cas 501 *Huler Ali Sahib v Amiruddin Sahib*
- 3 (1876) 1 All 333 (335) (F B) *Liam Aiden v Blawant Das*
(1880) 3 All 40 (44) *Debi Prasid v Jafar Ali*
- 4 (1917) A 1 R 1917 Nag 149 (152) 42 Ind Cas 99 13 Nag L R 210 *Laxodai v Iala Mahanand Lax*
- 5 (1880) 5 Cal 86 (96) 4 Cal L R 434 *D. wronidur Sen v The 17ra Land*
(1871) 16 South W R 11 (13), *Wama Moyee v Lam Bulah*
6. (1872) 17 South W R 227 (227) *Durakalanath Juras v L. y Dhunput Singh*

Article 14
Notes
1—2

1. Legislative changes. — The words "or order" did not occur in the Limitation Act of 1871¹ They were introduced for the first time by the Act of 1877

2. "To set aside any act or order." — This Article also, like Articles 12 and 13 *ante* has reference to suits to *set aside* an act or order specified therein The words 'set aside' imply, as has been seen in the Notes to Articles 12 and 13, that the act or order is *binding* upon the plaintiff unless and until it is set aside Where it is not necessary for the plaintiff to set aside the act or order, in order to obtain the relief which he claims, this Article will not apply¹ Thus, where after the death of the original recipient of a *toda giras hak* allowance, the allowance was continued to *A* and *B*, his sons, and after the death of *B* and his widow the allowance was settled by order of the Commissioner on his eldest grandson *C*, and thereupon *D* who was the son of *A* brought a suit claiming the whole allowance, it was held that the order of the Commissioner did not in any way affect *D*'s rights which were independent of the order and that Article 14 did not apply² See also the undermentioned case³

It is not necessary for the plaintiff to set aside an act or order—

- 1 *Where the act or order complained of does not affect his rights* This may be so either because the plaintiff is not a party to the proceeding⁴ or because the act or order leaves open or does not refer to or decide the rights claimed by the plaintiff in the suit

Illustrations

- (a) *A* claimed a certain sum of money from the Government which it held as trustee for *C*, one of whose heirs was *A* The Government on objections by other heirs of *C* passed an order that a certificate of heirship should be produced before money was paid *A* subsequently filed a suit for recovery of the money It was held that Article 14 did not apply apparently on the ground that the order for a

Article 14 — Note 1

- 1 (1912) 15 Ind Cas 517 (518) 36 Bom 325, *Mall ajeppa v Secretary of State*

Note 2

- 1 (1927) A I R 1927 Nag 159 (160) 100 Ind Cas 4 *Bala v Girdhar*
(1903) 30 Cal 20 (27) 7 Cal W N 314, *Agin Bindh Upadhya v Mohan Biskram Shah*
(1881) 1881 All W N 91 (91), *Sheo Das v Bhandhu*
2 (1931) A I R 1931 Bom 473 (478) 133 Ind Cas 851 *Dolat Singh Hamir Singh v Jorawarsing*
3 (1921) A I R 1921 Pat 259 (260) 63 Ind Cas 361 6 Pat L Jur 689, *Jeta Ban dhan Singh v Sudha Kuer* (Order under S 82 of the Bengal Estates Partition Act, 1897, does not affect right to partition under general law)
4 (1936) A I R 1936 Mad 318 (315) 162 Ind Cas 661 58 Mad 141, *Partha sarathy Appa Iao v Secretary of State*

certificate of heirship could not be said to finally decide against plaintiff's rights.⁵

- (b) A purchased certain lands and applied to the revenue officer that his name should be registered as owner. On objections by other parties, the officer disallowed the petition of A. A thereupon filed a suit for a declaration of his rights. It was held that Article 14 did not apply inasmuch as Section 89 of the Land Registration Act provided that nothing in the Act precluded any person from bringing a suit for a declaration of his rights.⁶

- (c) A applied to the revenue officer for partition of *shamilat* but the officer rejected the application. A then filed a suit for a declaration of his right to a proportionate share of the *shamilat* area. It was held that Article 14 did not apply on the ground that the revenue officer's order was not and could not be one deciding the plaintiff's title to the area.⁷

See also the undermentioned cases⁸ decided on the same principle

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- 5 (1915) A I R 1915 Bom 282 (283) 39 Bom 572 31 Ind Cas 277, *Secretary of State v. Bapuji Mahadeo*
- 6 (1884) 10 Cal 525 (527) *Luchmon Sahai Chowdhry v. Kanchan Ojha*.
(1909) 8 Ind Cas 693 (694) (Cal), *Shyama Sundari Dasya v. Md. Zariq*
7. (1916) A I R 1916 Lah 161 (161) 31 Ind Cas 546 1916 Pun Re No 47, *Kalu Khan v. Umda*
- (1905) 32 Cal 716 (719), *Raj Chandra Ray v. Fazajuddin Hossein*
[See also (1867) 8 Suth W R 291 (291), *Prosunno Moyee v. Ram Komul Sein*
- (1866) 4 Suth W R Act X Rul 21 (22), *Sreemutty Jonokee v. Tulhun Singh*]
- 8 (1926) A I R 1926 Pat 421 (422) 96 Ind Cas 632 6 Pat 73, *Ajhdya Prasad v. Ranikhelawan Singh* (No adjudication of rights of plaintiff)
- (1930) A I R 1930 Lah 506 (507) 123 Ind Cas 273, *Rahmat v. Muhammad Ali* (Order of Collector dispossessing a person as a mortgagee is not an order dispossessing him as an occupancy tenant and a suit for possession as occupancy tenant is not governed by Art. 14)
- (1931) A I R 1931 Cal 29 (32) 130 Ind Cas 232 *Kedar Nath v. Naresh Chandra* (Order of Collector under Bengal Estates Partition Act—Suit for declaration filed in Civil Court—No bar)
- (1921) A I R 1921 Mad 47 (49) 62 Ind Cas 276, *Fannissamy Thevar v. Chellaisamy Thevar* (Order in Revenue Case—S. 3 (5) of the Madras Estates Land Act suggests that the order of the Collector is a temporary one. No finality is given to the order in case a Civil Court does not settle the question. The Collector's decision will be *ipso facto* vacated whenever a Civil Court pronounces on the respective rights of the contending parties.)

Article 14
Note 2

2 Where the act or order is a nullity as made without jurisdiction² In this case it can be disregarded and need not be set aside in any proceeding

Illustrations

- (a) Under a *sanad* of 1701 granted by the Maharajah of Satara to an ancestor of *P*, the latter had a right to collect the revenue of certain villages on a remuneration of *two per cent of the Government assessment*. The British Government acquired the territory in 1817 and the ancestors of *P* continued in the enjoyment of their right as before. The Government subsequently substituted, without any authority to do so, a *fixed annual sum* for the percentage payments. *P* sued the Government claiming his right to percentage payments. It was held by the Privy Council that the substitution was an "act" of the Government, that it was *ultra vires* and that the suit was not governed by this Article.¹⁰
- (b) Where the Subdivisional Officer ordered the demolition of a certain building in the possession of *A* as being an encroachment on Government land and *A* sued for a declaration that the land is not Government land but his own, it was held that Article 14 did not apply as the Subdivisional Officer had no jurisdiction in a dispute as to the title to certain land between *A* and the Government and that the title to the land was in the Government.¹¹

See also the undermentioned cases decided on the same principle ¹²

- (1937) A I R 1937 Pesh 94 (95) 171 Ind Cas 267, *Ahbarulla v Hasan Ali Khan* (Oral lease for 33 years—Mutation entry showed 20 years—Proceedings by lessee before revenue authorities not favourable to him—Subsequent suit for declaration in terms of original lease—Art 120 held applied and not Art 14)
(1907) 11 Cal W N 48 (50), *Ramgulam Singh v Bishnu Pargash Narain Singh*

Das

- (1878) 2 Mad 806 (307) 4 Ind Jour 284, *Krishnamma v Achayya*
9 (1928) A I R 1928 Bom 180 (181) 109 Ind Cas 545, *Sulleman v Secretary of State*

Gobinda Lalal

30m 30G 148 Ind Cas

* *admiral* (On appeal)

11044 A 1 14 1964 Bonn 319

- 11 (1927) A I R 1927 Nag 10 (12, 18) 22 Nag L R 147 98 Ind Cas 22, *Secretary of State v Bhaamal*

1

Act 1

The mere fact that a plaintiff prays for setting aside an act or order will not make this Article applicable if it is not necessary for him to seek to set it aside or if the act or order is one which cannot be set aside by a Civil Court.¹³ In such cases the suit will be regarded as only asking for a declaration that the order or act does not affect his rights.¹⁴ On the other hand where the plaintiff cannot seek the relief which he wants unless he sets aside the order or act, the mere fact that he frames the suit in a different manner will not take the case out of the operation of the Article.

Illustrations

- (a) *A* obtained a decree against *B* and got the decree transferred to the Collector for execution and the Collector sold certain immovable property in auction. *C* became the purchaser in auction. On the application of *B* however, the sale was set aside and with the permission of the Collector *B* then mortgaged the property to *D*, and satisfied the decree of *A* with money so obtained. *C* then filed a suit for confirmation of the sale in his favour, for a declaration that the order of the Revenue Court setting aside the sale was ineffectual and for possession of the properties. It was held that before he can get possession or a confirmation of sale, he was bound to set aside the order of the Collector setting aside the sale, that the suit was in substance one to set aside such order and that it was governed by this Article.¹⁵
- (b) An application by a mortgagor to redeem a mortgage under the Punjab Redemption of Mortgages Act (2 of 1913) was dismissed by the Collector on the ground of limitation and he filed a suit under Section 12 of the said Act to redeem the mortgage. It was held that the suit was governed by this Article as it was necessary to set aside the order of the Collector before redemption of the mortgage in suit could be effected.¹⁶

- (1912) 17 Ind Cas 504 (506) (Cal) *Nagendra Lal v. Raja Dibi*
 13 (1884) 10 Cal 525 (527) *Luchmon Salas Chowdhry v. Kanchan Ojha*
 (1912) 14 I C 50 (50) (Cal) *Dayanath Janda v. Salayaba Kanthia* (A suit for amendment or cancellation of certain entries in the Record of Rights is not a suit to set aside any act or order of a Government officer.)
 (1921) A I R 1921 Nag 142 (144) "8 Ind Cas 98" *Mt. Munna v. Suklal*
 (1905) 29 Bom 480 (489) "Bom L R 497" *Basant v. Secretary of State*
 (1916) A I R 1916 Cal 594 (595) 30 Ind Cas 61 *Naboghan Bhatia v. Jagjivanath* (Settlement entries made under the Central Provinces Land Revenue Act cannot be set aside by the Civil Court—A suit under S. 63 of the Act is therefore not a suit governed by Art. 14—A contrary view has been taken in A I R 1922 Nag 76 ("8) Also 57 Ind Cas 319 (320).)
 14 See Note 1 to Article 12 ante
 15 (1902) 24 All 467 (169) 1902 All W N 116 *Engunath Prasad v. Kanis Rasul*
 16 (1934) A I R 1934 Lah 381 (385) 15 Lah 3 9 149 Ind Cas 661 (F B), *Gangu v. Mahanraj Chand*
 (1927) A I R 1927 Lah 461 (461) 102 Ind Cas 415 *Darba Val v. Aslam*
 (1925) A I R 1925 Lah 385 (387) C Lah 206 85 Ind Cas 945 *Kaura v. Jagan Chand* (Confirming on Letters Patent Appeal A I R 1924 Lah 600)
 (1921) A I R 1921 Lah 600 (602) 73 Ind Cas 685 *Jagan Chand v. Faura*

Articles 14
Notes
2—3

See also the undermentioned case ¹⁷

Where relief is asked for *on the strength of and in conformity* with an act or order, of course the Article has no application ¹⁸

3. "Any act or order." — Where the order of an officer of Government is in excess of authority, it is a nullity ¹ If the act or order is illegal or *ultra vires*, it does not require to be set aside and this Article has no application ² An act which is *ultra vires* and an

17 (1893) 1893 Pnn Re No 25 *Nawab Ghulam Mahbub Subhani v Prem Narain*

18 (1926) A I R 1926 P O 60 (64) 5 Pat 735 53 Ind App 176 97 Ind Cas 217 (P C), *Dhakeshwar Prasad Narain Singh v Mt Gulab Kuar*

Note 3

1 (1934) A I R 1934 Bom 431 (441) 154 Ind Cas 278, *Secretary of State v Faredoon*

2 (1927) A I R 1927 P O 217 (223) 54 Ind App 880 51 Bom 830 105 Ind Cas 694 (P C) *Laxmanrao Madhavrao v Shrinivas Linga* (On appeal from A I R 1922 Bom 18)

(1928) A I R 1928 Bom 180 (181) 109 Ind Cas 545, *Sulleman v Secy of State (Obiter dictum)*

(1915) A I R 1915 Bom 72 (73) 39 Bom 494 29 Ind Cas 490 *Rasul Khan Hamadkhan v Secy of State* (An order evicting plaintiff from land without any jurisdiction under Bombay Land Revenue Code)

(1916) A I R 1916 Bom 296 (297) 34 Ind Cas 535 40 Bom 892 *Secy of State v Gulam Rasul* (An order under S 202, Bombay Land Revenue Code was made admittedly without jurisdiction)

(1920) A I R 1920 Bom 235 (236) 55 Ind Cas 501, *Chhotubhai Govindji v Secy of State*

(1921) A I R 1921 Bom 881 (883) 45 Bom 920 61 Ind Cas 347, *Dhanji Jaiaram v Secy of State*

(1923) A I R 1923 Bom 478 (480) 77 Ind Cas 146, *Dhondji Subham v Secy of State*

(1924) A I R 1924 Bom 273 (277) 48 Bom 61 82 Ind Cas 577, *Patdaya v Secy of State*

(1926) A I R 1926 Bom 467 (470) 95 Ind Cas 950, *Surajlal v Secy of State*

(1927) A I R 1927 Bom 55 (59) 51 Bom 105 100 Ind Cas 93, *Manibhai v Nadiad City Municipality*

(1928) A I R 1928 Bom 201 (202) 111 Ind Cas 278, *Linga Raoji Kulkarni v Secy of State*

(1912) 15 Ind Cas 517 (519) 36 Bom 325, *Malhazeppa v Secy of State*

(1905) 29 Bom 480 (491) 7 Bom L R 497, *Dalwant v Secy of State*

(1919) A I R 1919 Cal 215 (216) 49 Ind Cas 965 *Jitendra Gopal v Natangini* (A void order of the Collector under S 83 of the Bengal Estates Partition Act of 1897)

(1906) 33 Cal 693 (699), *Alimuddin v Ishan Chandra Dey*

(1909) 1 Ind Cas 549 (551) 36 Cal 726, *Ananda Ashore Choudhry v Dazji Thakurani*

(1911) 9 Ind Cas 688 (693, 697) (Cal), *Hari Chandan v Secy of State*

(1911) 11 Ind Cas 899 (902) (Cal), *Birbar Narayan v Secy of State*

(1912) 17 Ind Cas 881 (883) (Cal) *Rajani Kant Mukerji v Ram Dulal Das*

(1894) 21 Cal 626 (632), *Bejoy Chund Mahalab Bahadur v Kristo Mohini Das*

(1924) A I R 1924 Cal 913 (915) 83 Ind Cas 446, *Peary Lal Ray Chaudhuri v Secy of State* (An order assessing permanently settled land to revenue purporting to be under S 6 of Bengal Act IX of 1917, *ultra vires*)

(1925) A I R 1925 Cal 953 (954) 89 Ind Cas 193, *Wasif Ali v Saradindu Naram Rai*

order which is *ultra vires* stand on the same footing³ The reason for this rule is thus stated by Crump J "The order is in fact (in such cases) not one made by a public officer in his official capacity"⁴

Before therefore deciding on the applicability or otherwise of Article 14 to a suit, it is necessary to decide the question, whether an order or act of Government to which the suit seems to relate, is *ultra vires* or *intra vires*⁵ It was however, observed by the High Court of Madras in the undermentioned case⁶ as follows "It is not necessary for us to decide the more difficult and important question of the legality of the action of the revenue officers in imposing the so called prohibitory assessment on lands. If by legality their Lordships meant that a question of jurisdiction to pass the order need not be gone into in order to consider the applicability of the Article it is submitted that it is not correct

The following is a list of orders which have been held to be *ultra vires* —

- 1 Where the British Government granted by a *sanad* a village, part in *inam* and the remainder in permanent *khots*, that is, lease subject to certain conditions stated in the *sanad* and

(1931) A I R 1931 Cal 29 (32) 130 Ind Cas 232 *Kedar Nath Sanjal v Aarsh Chandra Ghosh* (The order of the Deputy Collector under S 57 of the I states Partition Act was invalid the same having been made without inquiry of the kind contemplated by that Section)

(1907) 30 Mad 280 (231) 17 Mad L Jour 147 2 Mad L Tim 195 *Maharajah of Vizianagram v Somaschara*

(1916) A I R 1915 Mad 479 (480) 25 Ind Cas 878 *Veeraladra Surya narayana Raju v Secy of State*

(1934) A I R 1934 Mad 147 (151) 57 Mad 501 154 Ind Cas 990 *Thiru Venkatacharyulu v Secy of State*

(1920) A I R 1920 Mad 895 (889) 51 Ind Cas 366 42 Mad 673 *Secy of State v Gulam Malboob Khan*

(1920) A I R 1920 Mad 1013 (1019) 53 Ind Cas 332 *Vasi Reddi v Secy of State*

(1928) A I R 1928 Mad 1246 (1254) 114 Ind Cas 626 *Secy of State v Abdul Rahim*

(1927) A I R 1927 Nag 10 (12) 22 Nag L R 147 93 Ind Cas 22 *Secy of State v Bagmal*

(1919) 19 Ind Cas 565 (571) 6 Sind L R 210 *Fakir Shah Puldin v Secy of State*

(1913) 24 Ind Cas 813 (815) 7 S nd L R 169 *Secy of State v Mushtak Singh*

(1881) 3 All 40 (45) *Debi Pershad v Jafar Ali*

(1920) A I R 1920 Pat 182 (185) 5 Pat L Jour 321 56 Ind Cas 507 21 Cri L Jour 475 *Secy of State v Lowa Karan Marwari*

(1891) 1891 Bom P J 26 *Oghad v Vaj*

[But see (1890) 1890 All W N 195 (195) *Dajas Mair v Gobind Car*]

3 (1934) A I R 1934 Mad 147 (160) 57 Mad 501 154 Ind Cas 990 *Thiru Venkatacharyulu v Secy of State*

4 (1921) A I R 1921 Bom 3-1 (3-3) 45 Bom 920 61 Ind Cas 347 *Dhanji Jaisram Mali v Secy of State*

(1912) 15 Ind Cas 517 (519) 90 Bom 3 5 *Malakajappa v Secy of State*

5 (1910) A I R 1910 Mad 10 (11) 173 Ind Cas 311 *Prasanna Chidambara Pillai v Nagummal*

(1920) A I R 1920 Mad 1013 (1019) 53 Ind Cas 332 *Vanreddi v Secy of State*

6 (1903) 13 Mad L J ur 209 (211) *Mahammad Meera Mohideen v Secy of State*

Article 14
Note 3

the Government later levied enhanced assessment in respect of some land in the village, which was against the conditions contained in the sanad ⁷

- 2 Where a Collector passed an order disposing of land adjacent to that of the plaintiff, who claimed it as alluvial land adjoining his own, under Section 63 of the Bombay Land Revenue Code ⁸
- 3 Where in the absence of the conditions necessary for the exercise of power of summary eviction conferred on a Collector by Section 66 of the Bombay Land Revenue Code the District Deputy Collector passed an order evicting the plaintiff ⁹
- 4 Where a Collector purporting to act under Section 37 of the Bombay Land Revenue Code disposed of the land which was the property of a private individual ¹⁰
- 5 Where a Collector passed an order reserving land given under a sanad as emoluments of the hereditary officer of a Jangam, and which land was situated in the territories to which Bombay Act XI of 1852 applied ¹¹
- 6 Where the Government of Bengal directed a Collector to act in a particular way in regard to certain land, and in disregard of that order the Collector acted in a different way ¹²
- 7 Where a Collector reserved land under Chaukidari Chakran Act (Bengal Act VI of 1870) and made an order of transfer in respect of that land, purporting to act under Section 50 of

7 (1934) A I R 1934 Bom 434 (444) 154 Ind Cas 278 *Secretary of State v Faredoon J. Jibhai*

8 (1931) A I R 1931 Bom 369 (369) 55 Bom 447 134 Ind Cas 716, *Dattodar Narayan v Secretary of State*

(1887) 11 Bom 429 (433) *Shitaji Yesaji Chavan v Collector of Ratnagiri*

9 (1915) A I R 1915 Bom 72 (73) 39 Bom 494 29 Ind Cas 490 *Rasul Khan v Secretary of State*

(1921) A I R 1921 Bom 381 (383) 61 Ind Cas 317 46 Bom 920 *Dhanja Jangam v Secretary of State*

10 (1900) 24 Bom 435 (445) 2 Bom L R 261 *Soorannana v Secretary of State*
(1912) 15 Ind Cas 517 (519) 36 Bom 325 *Malkajepi v Secretary of State*
(An order under S 37 Bombay Land Revenue Code)

(1911) 10 Ind Cas 223 (223) 5 Sind L R 46 *Agha Sultan Muhammad Shah v Secretary of State*

(1913) 19 Ind Cas 565 (571) 6 Sind L R 210 *Fakir Shah Buldin v Secretary of State* (An order under S 37 of the Bombay Land Revenue Code)

(1914) 24 Ind Cas 813 (815 819) 7 Sind L R 169 *Secretary of State v Mustaq Sing* (An order under S 37, Bombay Land Revenue Code)

11 (1924) A I R 1924 Bom 273 (275) 48 Bom 61 82 Ind Cas 577, *Patdaya Muppayya v Secretary of State*

(1927) A I R 1927 P C 217 (223) 105 Ind Cas 694 51 Bom 830 54 Ind App 380 (P C) *Laxman Rao Madhavarao v Shrinivas Linga* (On appeal from A I R 1922 Bom 18)

12 (1919) A I R 1919 Cal 1035 (1036) 46 Ind Cas 883 *Ighors Nath Bannerjee v Kalyaneswari Das*

that Act, but actually in contravention of the terms of that Section ¹³

Article 14
Note 3

- 8 Where an order was passed by a Collector excluding the disputed land from partition in contravention of the terms of Section 116 of Bengal Estates Partition Act (Act VIII of 1876) ¹⁴
- 9 Where a private partition of an estate had taken place, and the Collector passed an order for partition of the same estate, overruling an objection taken under Section 12 of Bengal Estates Partition Act (Act VIII of 1876) ¹⁵
- 10 Where the Collector was authorized under Section 14 of the Putni Regulation to make a summary investigation if the talukdar contested the zamindar a demand for any arrears of rent, and the Collector by his order determined the rent payable to the zamindar in future ¹⁶
- 11 Where a Collector purported to decide under the Bengal Regulation, VII of 1822, a dispute between rival tenants, claiming the same land under the same nature of tenure ¹⁷
- 12 Where under Section 48 of the Bengal Act VI of 1870 a Collector settled chakudari hakran land with a person other than the zamindar in whose zamindari it was situated ¹⁸
- 13 Where a Collector passed an order refusing to put a party in possession of the land allotted to him under the Bengal Estates Partition Act ¹⁹
- 14 Where an order is passed by which land granted to plaintiff in inam is resumed and enhanced assessment is levied thereon ²⁰
- 15 Where the Government resumed service inam land without the existence of those contingencies on the existence of which alone the Government were, under the conditions of the inam, entitled to resume ²¹

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- 13 (1905) 32 Cal 1107 (1126) 2 Cal L Jour 107 *Narendra Lal Khan v Joga Hari*
 - (1911) 11 Inl Cas 899 (902-901) (Cal) *Burbar Narayan Chandra v Secretary of State*
 - (1911) 9 Ind Cas 684 (697) (Cal) *Hari Chandan v Secretary of State*
 - 14 (1906) 33 Cal 693 (699) *Alimuddin v Ishan Chandra*
 - 15 (1909) 1 Ind Cas 549 (551) 36 Cal 726 *Anand Kishore v Datta Thakurani*
 - 16 (1912) 17 Ind Cas 504 (506) (Cal) *Nagendra Lal v Fajr Bibi*
 - 17 (1912) 17 Ind Cas 881 (884) (Cal) *Rajani Kant Mukerjee v Ram Dilal Das*
 - 18 (1894) 21 Cal 626 (632) *Tejoy Chand Mahatab v Kasto Mohini Das*
 - 19 (1925) A I R 1925 Cal 933 (954) 89 Ind Cas 193 *Hassif Ali Mirza v Sirhindu Narain Low*
 - 20 (1934) A I R 1934 Mad 147 (159) 57 Mad 501 154 Ind Cas 900 *Thiruvankatacharuvu v Secretary of State*
 - (1915) A I R 1915 Mad 479 (480) 25 Inl Cas 878 *Surmanaravina Iyys v Secretary of State*
 - 21 (1925) A I R 1925 Mad 1246 (1254) 114 Ind Cas 67 *Secretary of State v Abdul Wahim* (Distinguishing A I R 1925 Mad 2-2)
 - (1920) A I R 1920 Mad 885 (891) 42 Mad 673 51 Ind Cas 397 *Secretary of State v Gulam Mahomed Khan*

Article 14
Note 3

- 16 An order resuming lands which formed part of the assets of a zamindari at the time of Permanent Settlement ²²
17. Where in executing an order of His Majesty in Council the Collector by mistake put the plaintiff in possession of a village other than the one he was entitled to, under the said order of His Majesty in Council ²³
- 18 Where a Magistrate directed certain property seized under Section 524 of the Criminal Procedure Code to be forfeited to Government, though the property was claimed by the plaintiffs as theirs when the Magistrate heard the claims invited by a proclamation issued under Section 523 of the Criminal Procedure Code ²⁴
- 19 An order passed behind the back of the plaintiff by the Inam Commissioner by which he enfranchised certain service inams in some villages belonging to the plaintiff, which were included in the assets of the zamindari at the time of Permanent Settlement ²⁵
- 20 An order of a revenue officer under S 59, Cl (8) of the Berar Land Revenue Code summarily ejecting the plaintiff from the land which he claimed as owner and in respect of which he disputed the ownership of Government ²⁶

But if the order of an officer of Government is *intra vires* and valid, a suit to set it aside must be brought within one year from that order ²⁷ Where Government in ordering resumption of certain inam land purport to act under powers reserved to them under the

22 (1920) A I R 1920 Mad 1018 (1013) 53 Ind Cas 332, *Vasireddi v Secretary of State*

23 (1907) 30 Mad 230 (232) 2 Mad L Tim 195 17 Mad L Jour 147, *Maharajah of Vizianagram v Somasekhara*

24 (1920) A I R 1920 Pat 182 (185) 5 Pat L Jour 321 56 Ind Cas 507 21 Cri L Jour 475 *Secretary of State v Lowen Karan Waruani*
(1888) 1888 Pun Re No 59 *Kashi Ram v Secretary of State*

25 (1936) A I R 1936 Mad 313 (315) 58 Mad 141 162 Ind Cas 661, *Parthasarathi Appa Rao v Secretary of State*

26 (1927) A I R 1927 Nag 10 (12) 93 Ind Cas 22 22 Nag L R 147 *Secretary of State v Bagmal Kisandayal*

27 (1916) A I R 1916 Mad 984 (984) 31 Ind Cas 267, *Subbanna v Secretary of State*

(1928) A I R 1928 Mad 232 (290) 106 Ind Cas 891, *Tripura Sundaramma v Secretary of State* (An order resuming service inam lands, on non performance of service)

(1891) 15 Bom 424 (426) *Nagu v Salu*

(1928) A I R 1928 Bom 201 (203) 111 Ind Cas 278, *Lango Raoji v Secretary of State* (An order under S 15 of the Bombay Hereditary Offices Act of 1874, by a Collector commuting service rights)

(1927) A I R 1927 Bom 55 (59) 100 Ind Cas 98 51 Bom 105, *Manibhai Govindbhai v Nadiad City Municipality* (An order by a Commissioner under S 178 of the Bombay District Municipalities Act)

(1926) A I R 1926 Bom 467 (470) 95 Ind Cas 950 *Surajlal Munshilal v Secretary of State* (An order under S 37 of the Bombay Land Revenue Code)

(1923) A I R 1923 Bom 478 (480) 25 Bom L R 785 77 Ind Cas 146 *Diondi Subhane v Secretary of State* (An order under S 11 of the Bombay

terms of the grant, the order is not *ultra vires*, on the ground that Government have acted erroneously in interpreting the terms of the grant, or in finding on facts relating to the grant²⁸

Article 14
Notes
3—5

4. "Order" of an officer. — This Article does not apply to all orders, it can apply only to orders and proceedings to which the law has given a particular effect. In order to attract the application of this Article the order must be an order of at least *quasi judicial* character and not a mere executive order.¹ Where the Government ordered certain alterations in the physical arrangement of an ancient to be made which had the effect of diminishing the plaintiff's right to receive a certain quantity of water to his tank from a certain river, the order of the Government was held to be one not satisfying the above tests.

5. "Officer of Government." — A Mamlatdar making an order in respect of immovable property under the Mamlatdars Courts Act (Bombay Act 2 of 1906) is a Court and not an officer of Government for the purposes of this Article, so, this Article does not apply to such orders.¹ The manager under the Sind Encumbered Estates Act is an officer of Government within the meaning of this Article.² A Collector to whom a decree is transferred for execution is an

Hereditary Offices Act (3 of 1874) declaring alienation of vatan land void and resumption of the land.)

(1920) A I R 1920 Bom 235 (236) 55 Ind Cas 591 *Chhotubhan Goindiy v Secy of State* (An order under S 31 of the Bombay Land Revenue Code.)

(1916) A I R 1916 Sind 82 (83) 9 Sind L R 167 32 Ind Cas 616 *Gelimal v Manager Encumbered Estates Sind* (An order passed by the manager under Sind Encumbered Estates Act 20 of 1896 for sale of the lease hold land to recover arrears of rent.)

(1930) A I R 1930 Sind 150 (151) 124 Ind Cas 369, *Sufan v Ahemchand* (An order by the manager under Sind Encumbered Estates Act 20 of 1896.)

29 (1928) A I R 1928 Mad 282 (290) 106 Ind Cas 891 *Tripura Sundaramma v Secy of State*

Note 4

1 (1927) A I R 1927 Ma 1 1167 (1179) 101 Ind Cas 781 *Rameswaram Desa sathanam v Secy of State*

(1905) 32 Cal 1107 (1123) 2 Cal L Jour 107, *Varendra Lal Khan v Jogi Har* (Per Woodroffe J.)

(1887) 11 Bom 479 (432) *Shivaji Tappa Chawan v Collector of Patnagiri*

[See (1974) A I R 1974 Nag 256 (257) 20 Nag L R 70 "8 Ind Cas 872 *Lari Bir v Moh* (No question of limitation arises where the only order passed by the revenue authorities was one declining to interfere.)]

[See also (1936) A I R 1936 Lah 692 (694) 165 Ind Cas 739 *Ab Muhammad v Shah Tamaz Khan* (No order on merits passed — Subsequent suit for redemption is not barred than one year after Collector's order — Art 14 Limitation Act held 3 not app'ly)]

2 (1927) A I R 1927 Ma 1 1167 (1179) 101 Ind Cas 781 *Rameswaram Desa sathanam v Secy of State*

Note 5

1 (1931) A I R 1931 Bom 256 (256) 135 Ind Cas 477 *Isappa Bhimappa v Tq parganah Basingwada*

2 (1930) A I R 1930 Sind 150 (151) 124 Ind Cas 369, *Sufan v Ahemchand*

Article 14
Notes
8—6

officer of Government when he sets aside a sale held by his order in execution of the decree³ A Judge exercising his judicial functions is a Court within the meaning of the Limitation Act and is not an officer of Government within the meaning of this Article⁴

6. Starting point of limitation. — The starting point of limitation is the *date of the act or order* which the plaintiff seeks to have set aside by a Civil Court Dealing with a case under the Bombay Land Revenue Code, Macleod, C J, observed that if the plaintiff appeals from such order or act to the revenue authorities, he is disentitled, by Section 11 of the Bombay Revenue Jurisdiction Act, 10 of 1876, to exclude the time occupied in proceedings before revenue authorities in the calculation of the period of limitation under this Article¹ But in an early Calcutta case, where the plaintiff sued the defendant for recovery of rent of land in a Revenue Court, and an adverse decision having been passed against him he appealed to the superior Revenue Court, it was held, in a suit instituted by the plaintiff for declaration of his title to the same land, that limitation ran from the date of decision of the Appellate Court, as an appeal was provided for from the decision originally given²

Where the order which the plaintiff seeks to have set aside is illegal, he is entitled to wait until it is enforced, and the attempt to enforce it gives him a good cause of action That is to say, limitation would run in such cases from the date of enforcement of the order and not from the date of the order³ Where the act and the order of an officer of Government are not contemporaneous, and the suit is in essence one to set aside the act rather than the order, the starting point of limitation is the date of the act, not the date of the order⁴ Where an administrative order is passed which requires a subsequent act not merely to complete it, but to give force to it, limitation runs from the date of the act⁵

3 (1902) 24 All 467 (470) 1902 All W N 116, *Raghunath Prasad v Kanis Rasul*

4 (1908) 10 Bom L R 749 (751) *Gowinda Bala v Ganu Abaji*
 (1913) 19 Ind Cas 968 (970) (Cal) *Maula Baksh v Bhabasundari Dasya*

Note 6

1 (1920) A I R 1920 Bom 105 (105) 44 Bom 451 57 Ind Cas 587, *Ganesh Shesho v Secy of State*

(1920) A I R 1920 Bom 235 (235) 55 Ind Cas 591, *Chhotubhai Govindji v Secy of State*

2 (1865) 4 Suth W R Act & Rul 21 (22), *Sreemutty Jonokee v Tukbun Singh*

3 (1927) A I R 1927 P C 217 (223) 54 Ind App 380 51 Bom 830 105 Ind Cas 694 (P C), *Laxmanrao Madhavarao v Shrinivas Linga*

(1905) 32 Cal 1107 (1126) 2 Cal L Jour 107, *Narendra Lal Khan v Jogji Hari*

(1897) 24 Cal 149 (152), *Laloo Singh v Purna Chander Banerjee*

4 (1922) A I R 1922 Nag 76 (78) 65 Ind Cas 970 *Onkarlal v Shahgram Lala*

5 (1871) 3 N W P F I C R 329 (331) *Deo Karun v Muhammad Ali Shah*
 (1900) 24 Bom 435 (435) 2 Bom L R 261, *Soorannana v Secy of State*

Though there is no direct authority under this Article to support the view that the date of an order is the date when it is communicated, or is in some way brought to the notice of the parties affected thereby, yet it has been so held in cases decided under analogous provisions in other Acts. See the undermentioned cases ⁶

Article 14
Note 6

15.* Against Govern- ment to set aside any at- tachment, lease or transfer of immoveable property by the revenue authorities for arrears of Government revenue.	One year.	When the attachment, lease or transfer is made.
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Article 15

1. Scope of the Article. — The words "immoveable property" have been substituted for the words "any land or interest in land" which occurred in clause 4 Section 1 of the Act of 1859, corresponding to this Article. Immoveable property has been defined by the General Clauses Act, 1897, as including "land, benefits to arise out of land and things attached to the earth or permanently fastened to anything attached to the earth. The present Article is therefore wider in scope than the corresponding Section of the Act of 1859.

In order that this Article may apply, there must have been an attachment, lease or transfer of immoveable property by the *revenue authorities for arrears of Government revenue* and the suit must be directed against the *Government to set aside such attachment, lease or transfer*. A suit under the proviso to sub section 6 D to Section 88 of the Criminal Procedure Code is not one to set aside an attachment by the *revenue authorities for arrears of Government revenue* and is not therefore within this Article. Where *A's* lands

* Act of 1877, Article 15 and Act of 1871, Article 17

Same as above

Act of 1859, Section 1, Clause 4

To suits to set aside any attachment lease or transfer of any land or interest in land by the revenue authorities for arrears of Government revenue one year from the date of such attachment lease or transfer

- c (1901) 28 Bom 8 (11) 5 Bom L R 222 *Abdul Ali Abdul Husen v Marja Khan Abdul Husen* (Decision under S 7 of the Registration Act)
 (1900) 24 Bom 426 (435) 2 Bom L R 228 *Mahipat Rane v Lakshman* (Decision under Bombay Khotsi Act)
 (1901) 9 Bom L R 420 (421) Civil Jaybhunath v Arishna (Decision under S 21 of Bombay Act I of 1880)
 (1883) 6 Mad 180 (190) *Annamalai Chett v J G Chett* (A case under Madras Act 25 of 1860)
 (1889) 12 Mad 11 (4) *Seshumay Sundara* (A case under S 25 of Madras Act 25 of 1860)
 (1910) 8 Ind Cas 998 (999) 34 Mad 151 *Secy of Soc v Gopi Setti Narayanasami* (Decision under S 25 of Madras Act 25 of 1860)

Article 15
Note 1

were attached for arrears of land revenue under the Bombay Land Revenue Code, 5 of 1879, and A had under that Act 12 years within which he could apply for restoration of the lands, but before the expiry of such period the Government illegally forfeited the said lands and A thereupon filed a suit for a declaration that the forfeiture was illegal, it was held that the suit was not one to "set aside an attachment for arrears of land revenue" governed by this Article, but was a suit for a declaration governed by Article 120 of the Limitation Act¹ Where a ghatwal became a defaulter in the payment of revenue and the Government acting under Regulation 29 of 1814 transferred his tenure to another person, it was held that a suit to set aside the transfer was governed by Section 1 clause 4 of the Act of 1859, corresponding to this Article²

For further instances in which Revenue Authorities have power to attach, lease or transfer immovable property for arrears of Government revenue, see the undermentioned Acts and cases³

Article 16

16.* Against Government to recover money paid under protest in satisfaction of a claim made by the revenue authorities on account of arrears of revenue or on account of demands recoverable as such arrears.	One year.	When the payment is made.
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Synopsis

1. Legislative changes.
2. Scope of the Article.
- 2a Money recoverable as arrears of revenue.
3. "Money paid under protest."
4. Starting point.
5. Article 16 and Section 59, Madras Revenue Recovery Act.

* Act of 1877, Article 16 and Act of 1871, Article 18

Same as above

Act of 1859, Section 1, Portion of Clause 4

Same as above except the slight change noted in Note 1

Article 15 — Note 1

- 1 (1892) 16 Bom 455 (467) *Samaldas v Secy of State*
- 2 (1870) 14 Suth W R 203 (203) *Chitra Narain Singh Telait v Assistant Commissioner of the Sonthal Pergunnahs*
- 3 Madras Revenue Recovery Act (2 of 1864) Ss 26 and 27
(1902) 26 Mad 591 (524) 13 Mad L Jour 139, *Narayan Raja v Ramchandraraja*
(1905) 28 All 291 (292) 1905 All W N 282 3 All L Jour 16 *Madho Singh v Surjan Kunwar* (Attachment of patti or mahal under the North Western Provinces Land Revenue Act, 19 of 1873)

1. **Legislative changes.**—The words "against Government" did not occur in the latter part of clause 4 of Section 1 of the Act of 1859 corresponding to this Article

2. **Scope of the Article.**—In order that this Article may apply —

- 1 the money for the recovery of which the suit is instituted must have been *paid under protest*, and
- 2 such payment must have been in satisfaction of a claim made by the revenue authorities *on account of arrears of revenue* or on account of *demands recoverable as such arrears*. As examples of demands falling within the latter class may be mentioned the duties, penalties and other sums payable under the Indian Stamp Act, 1899,¹ the sums due to the Government by a society registered under the Co operative Societies Act, 1912² and loans made under the Agriculturists Loans Act, 1884³

2a. **Money recoverable as arrears of revenue.** — Where the sums claimed by the Government were claimed as rents payable by tenure holders for lands held by them being the rents settled by the Settlement Officer under Section 104 of the Bengal Tenancy Act, it was held by their Lordships of the Privy Council that such rents were not arrears of revenue or recoverable as such arrears and that Article 16 had no application to a suit to recover such sums. It was observed that merely to show that such sums were recoverable by the Government as a public demand was not to show that it was recoverable as arrears of revenue.¹

3. **"Money paid under protest"** — Payment of revenue made to the Government by a co sharer on account of a clear and admitted liability in order to save the whole estate from sale cannot be considered to be a payment made under protest.¹ Where a revenue assessment was paid after an objection to the Collector followed by an appeal to the Commissioner and pending these proceedings subsequent payments were made without further objection it was held by Seton Carr, J., that the objection and appeal amounted to a 'protest' not only in respect of the payment actually objected to but in respect of the subsequent payments also. Macpherson J., held *contra*.²

Article 16
Notes
4—8

4. **Starting point.**—Limitation will, under this Article, begin to run *when the payment is made*. Therefore, in the case of a recurring cause of action, if a plaintiff has failed in his first suit and has appealed against the decree dismissing his suit, he is *not* entitled to wait until the appeal has been disposed of finally before suing in respect of the subsequent causes of action. Thus, if A's suit against the Government for recovery of a certain sum of money paid under protest is decided in favour of the Government, and A prefers an appeal, but before the decision of the said appeal similar payments have, for a number of years, been made or foregone in acquiescence in the judgment of the Court of first instance, and finally the appeal is decided in favour of A, a fresh cause of action does *not* arise on the date of the final determination of suit in appeal, for the recovery of payments made in the intervening period. All that A will be entitled to recover is the payment made within one year before suit.¹

Where money has been paid under protest for several years, only one year's amount can be recovered.²

5. **Article 16 and Section 59, Madras Revenue Recovery Act.**—This Article like every other Article in the Act does not apply to a suit, limitation for which is prescribed by any special or local law (see Section 29). Section 59 of the Madras Revenue Recovery Act (2 of 1864) is such a law and runs as follows:

“Nothing contained in this Act shall be held to prevent parties deeming themselves aggrieved by any proceedings under this Act except as hereinbefore provided, from applying to the Civil Courts for redress provided the Civil Courts shall not take cognizance of any suit instituted by such parties for any such cause of action, unless such suit shall be instituted within six months from the time at which the cause of action arose.”

Hence a suit against Government to recover money paid under protest in satisfaction of a claim made by the revenue authorities under Section 52 of that Act³ or under S 6 of Madras Compulsory

Note 4

- 1 (1920) A I R 1920 Mad 918 (931, 932) 59 Ind Cas 93 (S B), *Secy of State v Vegayarpetta Estate*
- 2 (1874) 11 Bom H C R 1 (2) *Bhujang Mahadev v Collector of Belgaum*: (Suit for declaration that the plaintiff was entitled to enjoy produce of *manu* land free from payment of assessment. Held that suit was governed by Art 144, but only one year's arrears were recoverable.)
- (1866) 5 Suth W R 47 (47) *Abul Ram v The Government* (Held suit to set aside of noksia order in the revenue department was governed by Art 120. It is submitted that such a suit will now be governed by Art 14 or this Article.)
- (1920) A I R 1920 Mad 948 (958, 960) 59 Ind Cas 93 (S B), *Secy of State v Vegayarpetta Estate*
- [See also (1903) 13 Mad L Jour 269 (270) *Kattai Malan mad v Secy of State* (Suit for refund of sums levied as prohibitory assessment for occupation of Government land held barred by either Art 14 or Art 16)]

Note 5

- 1 (1900) 23 Mad 571 (579) 10 Mad L Jour 261, *Orr v Secy of State* (On demand by Collector, fees payable to village servants paid under

Article 17

17.* Against Government for compensation for land acquired for public purposes.	One year.	The date of determining the amount of the compensation.
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1. Suit for compensation for land acquired.—Section 11 of the Land Acquisition Act, 1894, requires that the Collector shall make an award of the compensation which in his opinion should be allowed for the land, Section 12 requires that such award shall be filed in the Collector's Office and shall be final between the Collector and the person interested. If the person interested *accepts* this award, then, as there is no provision in the Act for such award being enforced against the Collector by *execution* proceedings, the ordinary mode of enforcing it is by a suit against the Collector and such suit is governed by this Article¹

If such person does not *accept the award*, he may, under Section 18 of the Act, require that the matter be referred by the Collector for the determination of the Court (Section 18), and the Court may, after considering objections of the parties, make an award in writing specifying the amount awarded (Section 26). It was held in the undermentioned case² that the ordinary mode of enforcing such an award was *by a suit* governed by the present Article and not by execution proceedings against the Collector. The reason of this decision was that the then Land Acquisition Act did not contain any provision for the enforcement of the award by execution proceedings, as the award was only a 'decision' and not a decree. By Act 19 of 1921, sub section 2 was added to Section 26 of the present Land Acquisition Act. That sub section provides that every such award shall be deemed to be a decree within the meaning of the Civil Procedure Code. In view of this addition and by reason of Section 53 of the Land Acquisition Act, the mode of enforcing an award by the Court is by *execution* proceedings and *not by a suit*.

As has been seen above, this Article refers to a case in which the Collector fails to pay the amount awarded by him under the Land Acquisition Act. It has no application to a case where the

* Act of 1877, Article 17 and Act of 1871, Article 19.

Same as above

Act of 1859

No corresponding provision

Article 17 — Note 1

1 (1897) 22 Bom 802 (507) (F B) *Nilkant Ganes v The Collector of Thana*

2 (1897) 22 Bom 802 (507) (F B) *Nilkant Ganes v The Collector of Thana*
(In view of the addition to S. 26 of Land Acquisition Act, the decision on this point is not good law)

amount of the compensation *has not been determined* ³ Again, where the Government has acquired the land and has paid the money to one who was apparently entitled to it, a suit by a person who has also got interest in the land claiming the money paid by the Government from the person who received it is not governed by this Article ⁴ See also Notes to Article 62 and Article 120

Article 17
Note 1

18.* Like suit for com- pensation when the acqui- sition is not completed.	One year.	The date of the refusal to complete.
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Article 18

1. Suit for compensation when the acquisition is not completed.—By virtue of Section 48 of the Land Acquisition Act, 1894, the Government is at liberty to withdraw from the acquisition any land of which possession has not been taken, and when it is so withdrawn, the Collector is required to determine the amount of compensation for damages suffered by the owner in consequence of the notice or of any proceedings thereunder, and to pay such amount to the person interested. The suit contemplated by this Article is one for such compensation for *non completion* of the acquisition. Where the land vests in the Government under Section 17 of the Act, but the Collector refuses to make an order for compensation, a suit for compensation in respect of such land is not within this Article but under Article 120. The reason is that where the land vests in the Government under Section 17, the *acquisition is complete* ¹ A suit in respect of a claim for damages which could not be foreseen at the time of the requisition proceedings under the Land Acquisition Act is not governed by this Article. Such a suit will be governed by Article 120 ²

* Act of 1877, Article 18 and Act of 1871, Article 20

Same as above

Act of 1859

No corresponding provision

- 3 (1907) 34 Cal 470 (486) 11 Cal W N 356 5 Cal L Jour 669 *Rameswar Singh v Secy of State*
 4 (1935) A I R 1935 Pat 42 (48) *Soma Singh v Jajobind Pande* (In this case Secretary of State for India was made first defendant)
 (1919) A I R 1919 Oudh 26 (26) 22 Oudh Cas 312 54 Ind Cas 535 *Ladli Prasad v Nizamuddin Khan*

Article 18 — Note 1

- 1 (1903) 27 Mad 535 (538) 14 Mad L Jour 173, *Mantharavadi Venkayya v Secy of State*
 2 (1907) 34 Cal 470 (487) 11 Cal W N 356 5 Cal L Jour 669 *Rameswar Singh v Secy of State* (Suit for damages due to interference with right of ferry arising out of acquisition of property pertaining to such ferry)

Article 19

19. For compensation for false imprisonment	One year.	When the imprisonment ends
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Synopsis

1. False imprisonment.
2. Terminus a quo.
- 3 Joint torts and cause of action.

Other Topics

Compensation for whole period of imprisonment can be claimed	See Note 2, Pts 2 to 4
False imprisonment is continuing wrong	See Note 2 Pt 1
Malicious prosecution and false imprisonment — Distinction	See Note 1, Pts 4 to 6
Person after release on bail or after remand to jail not under false imprisonment	See Notes 1 2

1. False imprisonment — Every person has a right to personal liberty. An infringement of this right by depriving a person of his liberty may be either total or partial. In the former case it is an imprisonment in the latter it is a restraint. An imprisonment without lawful justification is a *false imprisonment* and a restraint without lawful justification is a *wrongful restraint*. The leading case on the point is *Bird v Jones*¹. The plaintiff in that case was prevented from going along a public way which was enclosed by the defendants but he was at liberty to go back. It was held that this was not false imprisonment. When a total restraint for some period however short, is put upon the liberty of another without sufficient reason an action lies for infringement of the right.²

A person cannot be said to be under an imprisonment after his release on bail.³

* Act of 1877, Article 19
Same as above

Act of 1871, Article 21
Except the words for compensation same as above

Act of 1859
No corresponding provision

Article 19 — Note 1

1 (1845) 68 R R 561 (571) 15 L J Q B 82 9 Jur 870 L R 7 Q B 742 (Quoted in 80 Cal 872 (8 9) (P C) 1er 1 atterson J)

2 See also the
C P
writ
him

(1884) 9 I om 1 (7) *Fisher v Pearse*

[See also Blackstone's Commentaries by Stephen Vol III Page 893]

3 (1903) 80 Cal 872 (880) 80 Ind App 154 Cal W N 729 8 Sar 503 5
Dom L R 490 (P C) *Mahammad Yusufuddin v Secy of State*

False imprisonment must be distinguished from *malicious prosecution*. Where one person has procured the imprisonment of another by obtaining against him a judgment or other judicial order of a Court of Justice, it is not a *false* imprisonment even though the judgment or order is erroneous, irregular or without jurisdiction. The proper remedy in such a case is not an action for false imprisonment but one for *malicious prosecution* or *malicious abuse of process*.⁴ Thus, where a person is wrongfully arrested and taken before a Magistrate who remands him to custody, he must sue in respect of his imprisonment before the remand in an action for false imprisonment, but in respect of that which is subsequent to the remand, in an action for malicious prosecution.⁵ The false imprisonment lasts only whilst the plaintiff is in ministerial hands set in motion by the defendant to take the plaintiff before the judicial officer and till the matter comes before him, whereupon false imprisonment ceases and the malicious prosecution begins.⁶

2. Terminus a quo.—False imprisonment is a continuing wrong within the meaning of Section 23 of the Act.¹ Under that Section time begins to run in the case of such wrongs at every moment of the time during which the wrong continues. If instead of the words "when the imprisonment ends" in the third column of the Article, the words were "when the right to sue accrues, it would (as in other cases of continuing wrongs) have been possible for the defendant to plead limitation in respect of so much of the imprisonment as was beyond the period of limitation. The words "when the imprisonment ends" make it clear that whatever may be the length of the period of imprisonment, the plaintiff can, if he brings his suit within one year from the date when the imprisonment ends, claim compensation for the *whole period of imprisonment*, even though a portion of it may be beyond one year of the suit.² The defendant cannot divide the time of the continuance of the wrong and plead limitation for so much of the imprisonment as was beyond one year of the suit.³ Another reason for postponing the commencement of the period of limitation is probably that the damage sustained cannot be fully ascertained till the end of the imprisonment.⁴

4 Salmond's Law of Torts, 6th Edition, Pages 425-426

5 Salmond's Law of Torts, 6th Edition, Page 426

(1901) 17 C P L R 41 (43-44) *Hasan Ali Bohra v Sheikh Moti*

6 (1870) 39 L J C P 260 (263) L R 5 C P 534 22 L T 721 18 W R (Eng) 1003, *Austin v Dowling*

Note 2

1 See (1903) 6 Bom L R 704 (709), *Surajmal v Manekchand*

2 (1893) 3 Mad L Jour 2 (8) (Jour) (The English law on the point seems to be different)

3 (1904) 17 C P L R 41 (42-43), *Hasan Ali Bohra v Sheikh Moti*

[See also U N Mitra, 6th Edition, Vol 1, Page 333]

4 See (1903) 6 Bom L R 704 (708) *Surajmal v Manekchand*

Article 19
Notes
2—3

As seen in Note 1 *supra*, a person is not under false imprisonment after his remand to jail by a Court, or after his release on bail. Limitation for a suit for false imprisonment, therefore, runs from the date of such remand or release and the suit will be barred unless brought within one year from that date.

Illustrations

- 1 The plaintiff was arrested under a warrant on 28th November 1895 and was released on bail on 30th November. The warrant was cancelled and the criminal proceedings started against the plaintiff were set aside on 3rd August 1897, whereupon he brought a suit for damages for false imprisonment in July 1898 stating in his plaint that the cause of action arose on 3rd August 1897. *Held* that the plaintiff failed to bring his suit within one year from the date of his liberation, viz 30th November and hence the suit was barred by the law of limitation.⁵
- 2 In a suit to recover compensation for false imprisonment, it was alleged that the defendant arrested the plaintiff on the 27th October and on the 30th *idem* placed him before the Magistrate who remanded him to jail custody. *Held* that for the purpose of computing time under this Article the false imprisonment ended on the day on which the Magistrate ordered the remand.⁶

When parties are added after the institution of the suit, the suit, as regards them, should under Section 22 of the Act be deemed to have been instituted when they were made parties. Where, in a suit for compensation for false imprisonment brought by *A* against *B*, *C* and *D*, it was found that *A*'s imprisonment ended on 27th June 1883 and that *C* and *D* were added as defendants on 5th July 1884, it was held that the suit was barred as against *C* and *D*.⁷

3. Joint torts and cause of action. — A suit for damages for false imprisonment is governed by this Article whether the tort is committed by a single person or committed jointly by several persons. If an action for damages for a tort against an individual is barred, the period of limitation is not extended because it is against several persons. Where there is a joint tort, the proper action is on the tort against the joint tortfeasors and not on a cause of action to recover special damage by reason of a conspiracy to cause damage.¹

5 (1903) 80 Cal 872 (880) 30 Ind App 154 7 Cal W N 729 5 Bom L R 490
8 Sar 503 (P C) *Mahammad Yusufuddin v Secy of State*

6 (1901) 17 O P L R 41 (42) *Hasan Ali Bhorn v Sheikh Mot*,

7 (1884) 9 Bom 1 (9 10) *Fisher v Pearce*

Note 3

1 (1914) A I R 1914 Cal 397 (436, 437) 40 Cal 893 23 Ind Cas 25 (S B),
Weston v Peary Mohan Das

20.* By executors, administrators or representatives under the Legal Representatives Suits Act, 1855.	One year.	The date of the death of the person wronged.	Article 20
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1. Scope of the Article.—This Article provides limitation for suit by an executor, administrator or legal representative brought under the special provisions of the Legal Representatives Suits Act (12 of 1855) The first paragraph of Section 1 of that Act runs as follows —

"An action may be maintained by the executors, administrators or representatives of any person deceased, for any wrong committed in the lifetime of such person, which has occasioned pecuniary loss to his estate, for which wrong an action might have been maintained by such person, so as such wrong shall have been committed within one year before his death, and the damages when recovered shall be part of the personal estate of such person "

There is a similar provision in Section 306 of the Succession Act of 1925 to the effect that *all demands whatsoever and all rights to prosecute an action* existing in favour of a person at the time of his decease, shall survive to his executors or administrators except causes of action for *personal injuries*, i. e. injuries not affecting the estate of the deceased¹ The Section is wider in some respects and narrower in other respects than the provision of the Legal Representatives Suits Act referred to above It is wider in that it embraces

* Act of 1877, Article 20 and Act of 1871, Article 12.

Same as above

Act of 1859

No corresponding provision

Article 20 — Note 1

- 1 (1923) A I R 1923 Bom 408 (409) 73 Ind Cas 365 47 Bom 116 *Motilal v Harnarayan* (Suit for damages for malicious prosecution)
- (1901) 31 Cal 406 (408 409) 8 Cal W N 329 *Krishna Behary v Corporation of Calcutta* (Do)
- (1898) 8 Mad L Jour 180 (181) *Salagopa Ramanuja v Mahabir Doss J.*
- (1918) A I R 1918 Mad 1100 (1101) 38 Ind Cas 823 *Veerabhadrapa v Firm of Maricadi Yannaee*
- (1920) A I R 1920 Pat 841 (842) 4 Pat L Jour 676 52 Ind Cas 348 *Punjab Singh v Ramautar Singh*
[See (1902) 26 Bom 597 (606 607) 4 Bom L R 325 *Gopal v Pama chandra* (Where tort affects estate then right to sue will survive)]
- (1921) A I R 1921 Mad 1 (8) 44 Mad 357 62 Ind Cas 200 (F B), *Rustomji Dorabji v W H Nurse* (Do)
- (1916) A I R 1916 Mad 1068 (1069) 31 Ind Cas 4 *Subramanaya Iyer v Venkatarameswari*

Article 19
Notes
2—3

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- 1 The plaintiff was arrested under a warrant on 28th November 1895 and was released on bail on 30th November. The warrant was cancelled and the criminal proceedings started against the plaintiff were set aside on 3rd August 1897, whereupon he brought a suit for damages for false imprisonment in July 1898 stating in his plaint that the cause of action arose on 3rd August 1897. *Held* that the plaintiff failed to bring his suit within one year from the date of his liberation, viz 30th November and hence the suit was barred by the law of limitation.⁵
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5 (1903) 30 Cal 872 (880) 30 Ind App 151 7 Cal W N 729 5 Bom L R 490
8 Sar 503 (P C), *Mahammad Yusufuddin v Secy of State*

6 (1904) 17 C P L R 41 (42) *Hasan Ali Dhora v Sheikh Moti*

7 (1884) 9 Bom 1 (9, 10) *Fisher v Pearse*

Note 3

1 (1914) A I R 1914 Cal 396 (436 437) 40 Cal 898 23 Ind Cas 25 (S B),
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Act of 1859

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Article 20
Note 1

all demands and all rights of action other than personal actions and is not merely confined to actions for *wrongs*. It is narrower in that it refers only to the *executor or administrator* and does not refer to the *legal representatives of the deceased* in cases where there may be no executor or administrator

Article 21

<p>21.* By executors, administrators or representatives under the Indian Fatal Accidents Act, 1855.</p>	<p>One year. The date of the death of the person killed.</p>
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1. Fatal Accidents Act, 13 of 1855. — The Preamble and Section 1 of the Fatal Accidents Act, 13 of 1855 run as follows

“WHEREAS no action or suit is now maintainable in any Court against a person who, by his wrongful act, neglect or default, may have caused the death of another person, and it is often times right and expedient that the wrong doer in such case should be answerable in damages for the injury so caused by him it is enacted as follows ”

<p>S 1 — Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, the party who would have been liable if death had not ensued shall be liable to an action or suit for damages notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony or other crime</p>	<p><i>Suit for compensation to the family of a person for loss occasioned to it by his death by actionable wrong</i></p>
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“Every such action or suit shall be for the benefit of the wife, husband, parent and child, if any, of the person whose death shall have been so caused, and shall be brought by and in the name of the executor, administrator or representative of the person deceased .

“and in every such action the Court may give such damages as it may think proportioned to the loss resulting from such death to the parties respectively, for whom and for whose benefit such action shall be brought and the amount so recovered, after deducting all costs and expenses, including the costs not recovered from the defendant, shall be divided amongst the beforementioned parties or any of them, in such shares as the Court by its judgment or decree shall direct ”

* Act of 1877, Article 21 and Act of 1871, Article 13.

Same as above

Act of 1859

No corresponding provision

The word "representative" in the Section includes all or any one of the persons for whose benefit a suit may be brought under the Act and it makes no difference whether the deceased is a European or Eurasian¹

Article 21
Note 1

The word "child" for whose benefit a suit under the Act may be brought does not include an *adopted* son of the deceased, though such son may sue as his *representative*²

22.* For compensation for any other injury to the person.	Ono year.	When the injury is committed.
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Article 22

Synopsis

1. Applicability of the Article to proceedings under the Workmen's Compensation Act, 1923.
2. "Any other injury."
3. "When the injury is committed."

1. Applicability of the Article to proceedings under the Workmen's Compensation Act, 1923. — Section 19 of the Workmen's Compensation Act, 1923 expressly ousts the jurisdiction of the Civil Court in matters required by that Act to be settled by the Commissioner and Section 10 provides a period of limitation for proceedings before the Commissioner under that Act. This being a period provided by a special law it will prevail over the general provisions of the Limitation Act (See Section 29 *ante*)

Further a proceeding under the Workmen's Compensation Act is not a "suit" to which alone this Article applies. Consequently a proceeding before the Commissioner under the Workmen's Compensation Act is not governed by this Article¹

* Act of 1877, Article 22

Same is above

Act of 1871, Article 22

The word "for compensation" did not occur after the word "for"
Act of 1859, Section I Clause 2

To suits for damages for injury to the person the period of one year from the time the cause of action arose

Article 21 — Note 1

- 1 See (1905) 28 Mad 479 (483) 15 Mal L Jour 903 *Johnson v The Madras Railway Co*
(1934) A I R 1934 Cal 655 (658) 61 Cal 490 151 Ind Cas 680 *E v Penlence v M Minney*
- 2 (1870) 7 Bom II C (O C) 113 (115) II C 1 *Vinayak Raghunath v G I P Railway Co*

Article 22 — Note 1

- 1 (1934) A I R 1934 Bom 23 (29 30) 53 Bom 128 149 Ind Cas 247 1934 Cr C 115 *Hogan v Gafur Ramzan*

Article 20
Note 1

all demands and all rights of action other than personal actions and is not merely confined to actions for *wrongs*. It is narrower in that it refers only to the *executor or administrator* and does not refer to the *legal representatives of the deceased* in cases where there may be no executor or administrator

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S 1 — Whenever the death of a person shall be caused by wrongful act neglect or default, and the act neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, the party who would have been liable if death had not ensued shall be liable to an action or suit for damages, notwithstanding the death of the person injured and although the death shall have been caused under such circumstances as amount in law to felony or other crime

"Every such action or suit shall be for the benefit of the wife husband, parent and child, if any, of the person whose death shall have been so caused, and shall be brought by and in the name of the executor, administrator or representative of the person deceased ,

"and in every such action the Court may give such damages as it may think proportioned to the loss resulting from such death to the parties respectively, for whom and for whose benefit such action shall be brought and the amount so recovered, after deducting all costs and expenses, including the costs not recovered from the defendant, shall be divided amongst the beforementioned parties, or any of them, in such shares as the Court by its judgment or decree shall direct "

* Act of 1877, Article 21 and Act of 1871, Article 13

Same as above

Act of 1859.

No corresponding provision

The word "representative" in the Section includes all or any one of the persons for whose benefit a suit may be brought under the Act and it makes no difference whether the deceased is a European or Eurasian¹

Article 21
Note 1

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22.* For compensation | One year. | When the in-
for any other injury to the | jury is com-
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* Act of 1877, Article 22

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The words "for compensation" did not occur after the word "for"
Act of 1859, Section 1, Clause 2.

To suits for damages for injury to the person the period of one
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Article 21 — Note 1

- 1 See (1905) 28 Mad 479 (483) 15 Mad L Jour 363 *Johnson v The Madras Railway Co*
(1934) A I R 1934 Cal 555 (658) 61 Cal 460 151 Ind Ct 680 *E I Penhiero v M Minney*
- 2 (1870) 7 Bom H C (O C) 113 (115 116) *Vinayak Baghunath v G I P Railway Co*

Article 22 — Note 1

1. (1934) A I R 1934 Bom 28 (29 30) 58 Bom 128 149 Ind Cas 247 1934 Cri Cas 115 *Hogan v Gafur Ramzan*

Article 22
Notes
2—3

2 "Any other injury." — Where a case falls under this as well as under Article 36 *infra* it will be governed by this Article and not by Article 36. The reason is that this Article is a *special* Article dealing with suits for compensation for *injury to the person*, and will prevail over the *general* Article dealing with *malfeasance and misfeasance*.¹ Thus a suit for damages for injury caused to the plaintiff's eye by the defendant's throwing sulphuric acid at his face is governed by this Article and not by the general Article 36.² Similarly, a suit for damages for injury caused to the reputation of the plaintiff by an assault will be governed by this Article.³

The word *injury* in this Article has been given, in the under-mentioned case,⁴ a wider connotation than physical hurt. A voluntary obstruction to a person to prohibit him from entering into a temple is according to that decision technically an injury to the person. A somewhat contrary opinion has however, been held in the case cited below,⁵ where the word "injury" was held to mean *physical* injuries to the plaintiff. A suit by the plaintiff against the defendant for enticing away the former's wife was held, accordingly, not to be for an injury to the plaintiff within this Article, but to be one governed by Article 120.

3. "When the injury is committed." — Time begins to run from the date on which the injury is committed. Hence, an action, if brought more than one year after that date, will be barred.¹ In *A M Jabli v A M Zulaikhi*,² where the defendant threw sulphuric acid on the face of the plaintiff with the result that some months afterwards the plaintiff lost his eye it was held that the injury was committed *when the acid was thrown* and that *continuance of the effect* did not make it a *continuing wrong* so as to attract the operation of Section 23 of the Act. It was also held that Section 24 also did not apply as that Section referred to acts not giving rise to a cause of action unless specific injury results therefrom whereas

Note 2

- 1 (1924) A I R 1924 Bom 290 (291) 84 Ind Cas 796 *A M Jabli v A M Zulaikhi*
- 2 (1924) A I R 1924 Bom 290 (291) 84 Ind Cas 796 *A M Jabli v A M Zulaikhi*
- 3 (1910) 5 Ind Cas 124 (125) (All) *Arhat Utsir v Baldeo Ahir*
[See (1880) 2 All 602 (604) *Ram Subhag Das v Gobind Prasad* (So assumed. No longer law on another point)]
- 4 (1932) A I R 1932 Mad 432 (437) 138 Ind Cas 84 *Manikyaswami v Lalamma*
- 5 (1936) A I R 1936 All 454 (456) 163 Ind Cas 974 *Sobha Ram v Tika Rani*
(A I R 1935 All 855 reversed)
[See also (1912) 15 Ind Cas 505 (506) 36 Bom 443 *Gobind Palkrishna*

Note 3

- 1 (1935) A I R 1935 All 855 (857) 156 Ind Cas 570 *Tika Rani v Sobha Ram*
- 2 (1921) A I R 1921 Bom 290 (292-293) 84 Ind Cas 796

the throwing of sulphuric acid was itself a wrong giving rise to a cause of action independent of any question of damage

Article 22
Note 3

23.* For compensation for a malicious prosecution.

One year.

When the plaintiff is acquitted, or the prosecution is otherwise terminated.

Article 23

Synopsis

1. Actions for malicious prosecution.
2. Applicability of the Article to acts done under the Police Act, 1861.
3. "When the plaintiff is acquitted."
4. Prosecution.
5. "Prosecution is otherwise terminated."
6. Suit against joint tort-feasors.
7. Action against a municipality.

1. Actions for malicious prosecution. — It is an actionable wrong to institute certain kinds of legal proceedings against another person maliciously and without reasonable and probable cause

The question, what kinds of legal proceedings will give rise to such an action, must be ascertained by reference to the law of torts. It may, however, be noted that the gist of an action for malicious prosecution is *damage* actual or implied¹. In *Saillie v Roberts*,² which is the leading case on the subject, it was held by Holt, C J, that the damage which was the gist of an action for malicious prosecution should be one of three kinds

- 1 damage to a man's *fame*, as when the matter he is accused of is scandalous
- 2 damage to the *person* as when a man is put in danger of his life or limb or liberty, and
- 3 damage to his property

* Act of 1877, Article 23

Same as above

Act of 1871, Article 23

23 — For a malicious prosecution | One year | When the plaintiff is acquitted

Act of 1859

No corresponding provision

Article 23 — Note 1

1 (1893) 52 L J Q B 488 (490) 11 Q B D 674 49 L T 219 31 W R 668
Quartz Hill Cold Mining Co v Eyre (Referred to in A I R 1915 Cal 173 (174) See the observation of Bowen L J)

(1928) A I R 1928 Cal 1 (19) 106 Ind Cas 277, *Imperial Tobacco Co v Albert Bonnan*

2 (1697) 1 Ld Raym 374 (Cited in A I R 1928 Cal 1)

Article 23
Notes
1-2

In a suit for malicious prosecution the plaintiff has *inter alia* to prove that the proceedings complained of terminated in his favour if from their nature they were capable of so terminating³ If this termination takes the form of an acquittal, the *terminus a quo* will be the date of the acquittal

2. Applicability of the Article to acts done under the Police Act, 1861. — Section 42 of the Police Act, 1861, as it originally stood, contained the following words: "All actions and prosecutions against any person, which may be lawfully brought for anything done or intended to be done under the provisions of this Act, or under the general police powers hereby given, shall be commenced

3 (1926) A I R 1926 P C 46 (49) 95 Ind Cas 329 29 Oudh Cas 163 1 Luck 215 (P C), *Balbhaddar v Badri Sah*

(1930) A I R 1930 Cal 392 (393) 57 Cal 25 125 Ind Cas 667, *Nagendra Nath v Basanta Das*

(1867) 8 Suth W R 443 (443) *Obedul Hossein v Goluck Chunder*

(1906) 17 Mad L Jour 60 (61), *Venkataramana Iyer v Swami Nair* (A formal order of discharge or acquittal need not be made—A pronouncement by the Magistrate is enough)

In view of the Privy Council decision, the following cases which held that the plaintiff should prove his innocence are no longer good law —

(1922) A I R 1922 All 209 (209) 44 All 485 67 Ind Cas 65, *Gobardhan Singh v Ram Badan Singh*

(1926) A I R 1926 Bom 306 (307) 95 I C 39, *Alamkhan v Banerjiya*

(1901) 28 Cal 591 (592), *Harish Chunder v Nishi Kanta*

(1901) 24 Mad 59 (62) *Nallappa Goundan v Kallappa Goundan*

(1919) A I R 1919 Lah 255 (256) 51 Ind Cas 279 1919 Pan Re No 32 *Pohlo Ram v Hukam Singh*

The other facts which the plaintiff has to prove are —

(i) *that he was prosecuted by the defendant*

(1908) 80 All 525 (525) 28 Ind Cas 100 10 Cal 111 217 10 Bom L R 1 14 Bur

L R 318

204 (P C)

L Tim

(1930) A I R 1930 All 742 (746) 1930 Cri Cas 998 53 All 44 132

(1915)

a criminal charge is made before a judicial officer or tribunal, and any person who makes or is actively instrumental in the making or prosecuting of such a charge is deemed to prosecute and is called a prosecutor)

(1928) 114 Ind Cas 501 (501) (Oudh), *Gajraj v Chandrika*

(ii) *that the prosecution was instituted without any reasonable and probable cause*

(1901) 25 Bom 332 (335) 2 Bom L R 939 4 Cal W N 781 10 Mad L Jour 300 (P C), *Pestonji Muncherji Mody v Queen Insurance Co*

(1902) 24 All 363 (366) 1902 All W N 92, *Bhimsen v Silaram*

(1928) A I R 1928 Oudh 145 (145) 2 Luck 487 101 Ind Cas 274, *Shivaratn v Ram Sumran*

(1910) 6 Ind Cas 675 (677) (Cal), *Shama Bibi v Chairman of Daranagore Municipality*

(1913) 19 Ind Cas 24 (26) (Cal), *Mucki Osta v Horsmull Marwari* (Plaintiff should prove his innocence to justify the inference that the prosecution was commenced without reasonable and probable cause)

within three months after the act complained of shall have been committed and not otherwise." These words were repealed when the Limitation Act of 1871 was passed.¹ The result is that the suits referred to in the said provision are now governed by the general law of limitation contained in the Limitation Act. Hence a suit for damages for malicious prosecution brought against a police officer who conspired with other defendants to prosecute the plaintiff maliciously, is governed by this Article.²

3. "When the plaintiff is acquitted."—Where the case prosecuted is one in which the plaintiff is acquitted, the *terminus a quo* under this Article is the date of such acquittal. It has been held by the High Court of Madras and the Chief Court of Oudh that the fact that a revision petition has been presented against the order of acquittal could not render it the less final, and will not save from the bar of limitation a suit for damages filed more than a year after the acquittal though within a year from the date of the dismissal of the revision petition.¹ Where, however, an order purporting to be an order of discharge was set aside by the District Magistrate under Section 437 of the Criminal Procedure Code, and a retrial ordered, but the High Court in revision set aside the order of the District Magistrate on the ground that the order of the trial Court was really one of acquittal, it was held that the second part of the third column was not excluded by the fact of acquittal in cases where the proceedings had subsequently revived, and that therefore the time commenced to run from the date of the High Court's order which terminated the prosecution.²

4. Prosecution.—The maintainability of a suit for damages for malicious prosecution does not depend on there having been a prosecution in the sense in which the term is used in the Code of Criminal Procedure.¹ The word "prosecution" used in this Article has a very wide significance and does not merely mean an actual trial or an inquiry which may result in a conviction and the imposition of imprisonment or fine.² Thus, an application in revision under

Note 2

- 1 See Limitation Act, 9 of 1871 Schedule
- 2 (1930) A I R 1930 All 742 (744) 1930 Cri Cas 998 53 All 44 192 Ind Cas 17, *Mohamed Sharif v Nasir Ali*

Note 3

- 1 (1900) 23 Mad 24 (25), *Narayana v Seshayya*
(1935) A I R 1935 Oudh 392 (394) 155 Ind Cas 706, *Shankar Prasad v Sheo Narain*
- 2 (1920) A I R 1920 Mad 151 (151) 57 Ind Cas 635 *Sri Ramulu v Subba Rao*

Note 4

- 1 (1922) A I R 1922 Cal 145 (146) 67 Ind Cas 705 49 Cal 1035, *Narendra Nath Dey v Jyotish Chandra Pal*
(1928) A I R 1928 Cal 691 (693) 56 Cal 432 114 Ind Cas 796, *Rabindra Nath v Jogendra Chandra*
- 2 (1930) A I R 1930 All 326 (327, 328) 125 Ind Cas 461 52 All 553 1930 Cri Cas 449, *Madan Mohan v Ram Sunder*

S 436 of the Criminal Procedure Code for ordering an inquiry or trial,³ or an application for binding down a person under Section 107 of that Code⁴ amounts to a prosecution. Again an application for sanction being a preliminary or initial stage in a criminal prosecution an unsuccessful application for sanction to prosecute made before a Civil Court may supply a basis of a suit for damages for malicious prosecution.⁵

The prosecution commences as soon as the proceeding is instituted. It may prove infructuous where for instance no notice is served upon the accused. In such a contingency the action for damages for malicious prosecution would fail not because there was no prosecution commenced, but because there was no damage done to the plaintiff.⁶ But in a case of criminal prosecution for an offence, it does not commence until proceedings are initiated by a Magistrate taking cognizance of the offence. The laying of an information before the police cannot therefore be held to be the commencement of a criminal prosecution consequently in such a case a suit for damages for malicious prosecution does not lie.

5. "Prosecution is otherwise terminated."—A prosecution terminates by an order of the Magistrate declining to commit the accused to Sessions¹ or by an order of discharge.² But if the matter

- (1913) 18 Ind Cns 737 (739) (Cal) *Croft & v O'Reilly* (Proceedings under S 144 or S 145 Criminal Pro Code may constitute a prosecution)
- 3 (1930) A I R 1930 All 326 (327 328) 125 Ind Cns 464 52 All 553 1930 Crn Cas 449 *Madan Mohan v Rani Sunder*
- 4 (1919) A I R 1919 All 338 (389) 41 All 503 50 Ind Cns 140 *Molamed Anarullah v Jai Rani*
- (1913) 18 Ind Cns 737 (739) (Cal) *Croft & v O'Reilly*
- (1915) A I R 1915 Cal 79 (81) 27 Ind Cns 449 *Bishun Pergash v Fulman Singh*
- 5 (1922) A I R 1922 Cal 145 (146) 67 Ind Cns 705 49 Cal 1035 *Asasendra Nath Dey v Jyotish Chandra Pal*
- (1928) A I R 1928 Cal 691 (693) 56 Cal 432 114 Ind Cns 790 *Rabindra Nath v Jogendra Chandra* (To prosecute is to set the law in motion and the law is only set in motion by an appeal to some person clothed with judicial authority in regard to the matter in question — Clerk and Lindsell on Torts at page 637)
- C (1915) A I R 1915 Cal 79 (82) 27 Ind Cns 449 *Bishun Pergash v Fulman Singh* (37 Cal 353 and 38 Cal 880 Dissented from)
- But see I I - - - - -
- I I I I I
- cution)
- (1911) 11 Ind Cns 311 (312) 39 Cal 850 *Golap Jan v Biola Nath*
- (1910) 6 Ind Cns 877 (878) 37 Cal 353 *Derozario v Gulab Chand*
(No prosecution as no process issued on the plaintiff)
- 7 (1907) 24 All 369 (370 371) 1902 All W N 96 *Ishra v Muhammad Hadi*
- (1930) A I R 1930 Cal 992 (993 995) 57 Cal 25 125 Ind Cns 667 *Nagendra Nath v Basanta Das*

1 (1970) V I R 192 P C 4r (49) 95 Ind Cns 929 29 Oudh Cns 163 1 Luck
215 (P C) *Balbalilar v Balri Shah*
2 (1972) V I R 1912 Bom 209 (209) 47 Bom 29 67 Ind Cns 751 *Purshottam*
Isildas v Rags Hari

is taken up in revision or appeal to a higher authority, the prosecution terminates when the proceedings in revision or appeal come to an end in favour of the discharged person³

Time begins to run only from the date of the final judgment of the Magistrate and not from the date on which he says in his judgment that he came to an opinion favourable to the plaintiff⁴

5. Suit against joint tort-feasors.—This Article is not inapplicable to a suit for damages for malicious prosecution against several joint tort-feasors. Where such a suit in respect of such torts is barred by limitation as against one it would be barred as against all¹

7. Action against a municipality.—Ordinarily, an action against a municipality will be governed by the period of limitation given under Article 2 where the act done by the municipality is alleged to be in pursuance of any enactment. Thus Article 2 will govern a case only when the municipality does an act in the honest belief that it was empowered to do the same by some enactment. But if it acts knowing that it had no power under any enactment so to act, a suit for compensation for malicious prosecution against it will fall under Article 23 and not under Article 2¹. It was held by the High Court of Bombay in the undermentioned case² that a suit for malicious prosecution against a municipality on the acquittal of a person who was prosecuted by the municipality for alleged infringement of some provision of the Bombay Municipal Boroughs Act (18 of 1925) was governed by Section 206 of that Act and not by either Article 2 or this Article

- (1882) 6 Bom 376 (380) 6 Ind Jour 535 Chittry s S C C R 106 *Venu v Koorya Varayan*
[See (1930) A I R 1930 All 326 (327) 125 Ind Cas 464 52 All 553 1930 Cri Cas 449 *Madan Mohan v Pam Sunder*]
- 8 (1930) A I R 1930 All 326 (328) 125 Ind Cas 464 1930 Cri Cas 449 52 All 553, *Madan Mohan v Pam Sunder*
- (1938) A I R 1938 Mad 349 (352) 174 Ind Cas 428 (F B) *Kulasekhara Chetty v Tholasingam Chetty* (A I R 1930 Mad 151 Followed 23 Mad 24 Overruled.)
- (1938) A I R 1938 All 49 (50) 173 Ind Cas 669 I L R (1938) All 89 *Dhagat Raj v Ut Garas Dulayya*
[See also (1920) A I R 1920 Mad 151 (151) 57 Ind Cas 635 *Sriramulu v Subba Rao*]
- 4 (1906) 17 Mad L Jour 60 (62) *Venkataramana Iyer v Suami Naich*
(1912) 16 Ind Cas 584 (585) (Mad) *Shuppu Iyer v Sitarama Pattar*

Note 6

- 1 (1914) A I R 1914 Cal 336 (436 438) 40 Cal 893 23 Ind Cas 25 (S B) *Weston v Peary Mohan Das*

Note 7

- 1 (1925) A I R 1925 Rang 311 (312) 3 Rang 268 69 Ind Cas 861 *Maung Ayan Ayan v Ma Ubin Municipality*
[See (1910) 6 Ind Cas 675 (680) (Cal) *Shama Bibi v Chairman Baranagore Municipality*]
- 2 (1937) A I R 1937 Bom 491 (491 492) 122 Ind Cas 430 *Parateppa Mallappa v Hubli Municipality*

Article 24

24. For compensation	One year.	When the libel is published.
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1. Suit for compensation for libel. — 'Defamation is the wrong done by one person to the reputation of another by words, signs or visible representations. It is different from wrongful acts which injure the reputation such as an unlawful arrest or a malicious prosecution. It is also different from words which cause damage to a person's *property* and not to his *reputation*, e.g. slander of title or slander of goods¹

A "libel" is only a *particular form* of 'defamation'. It is a defamatory statement in *writing* or *otherwise recorded* (e.g. by printing, typing, etc.) in such a way as to be of more or less permanence so that after one act of publication it still retains its capacity of expressing the defamatory meaning by subsequent acts of publication²

A statement is not actionable as libel unless it is made and *published*. No suit will lie where there is no publication³. Publication includes a subsequent re-publication of the libellous matter and a suit will lie for every such publication⁴

An allegation by the defendant in a written information laid before the Magistrate that the plaintiff was a woman of no.

* Act of 1877

Same as above

Act of 1871

24 — For libel

One year	When the libel is published
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Act of 1859, Section 1, Clause 2

To suits for damages for injury to the reputation
the period of one year from the time the cause of action arose

Article 24 — Note 1

1 Law of Torts by S. Ramaswami Iyer Pages 241, 242

Salmond's Law of Torts 6th Edition Page 496

Halsbury's Laws of England 1911 Edition Vol. XXIII Page 606

[See (1891) 3 All 815 (817, 818) 1891 All W N 81 6 Ind Jur 320 *Abdul Halim v. Tej Chandar* (Defendant preferring a petition to Magistrate—Petition containing defamatory statements by way of defence to charge made against him—Statements held to have been made in good faith—Suit for damages for libel does not lie)]

2 Law of Torts by S. Ramaswami Iyer Pages 241, 242

Salmond's Law of Torts 6th Edition Page 496

3 (1869) 10 5th W R 181 (184) 1 Beng L R (8 N) 12 (1) *Kornul Chunder v. Nobin Chunder* (No publication if the libel be addressed to the party himself)

[See (1891) 7 All 205 (219) 1891 All W N 310 (F B) *Queen v. Fripes v. Taki Hussain*]

4 See (1897) 12 Bom LR (109) *In re Howard* (The recovery of damages against one defendant is no bar to a suit against another for a repetition of the libel)

character,⁵ or in a report, if written, to the police containing an imputation of having committed dacoity or other offence against the plaintiff,⁶ is defamatory of the plaintiff's character. Where a party brings a suit for defamation against a police officer submitting report in compliance with an order of the Magistrate, this Article and not Article 2 will apply.^{6a} A suit for compensation for exclusion of the plaintiff from civil rights is governed by Article 36 and not this Article.^{6b}

Article 24
Note 1

The starting point of limitation under this Article is the date on which the alleged libel is published.⁷

Where several plaintiffs institute a suit within the prescribed period of limitation the subsequent amendment of the plaint by striking out the names of all the plaintiffs except one on the ground of misjoinder, will not render the suit time barred.⁶

25.* For compensation for slander.

One year.

When the words are spoken, or, if the words are not actionable in themselves, when the special damage complained of results.

Article 25

1. Suit for compensation for slander.—A slander is a defamatory statement, expressed or conveyed by *spoken words*, sounds,

* Act of 1877, Article 25

Same as above

Act of 1871.

25 — For slander

One year

When the words are spoken

Act of 1859, Section I, Clause 2

To suits for damages for injury to the reputation the period of one year from the time the cause of action arose

5 (1913) 20 Ind Cas 768 (768) (Cal) *Dhiraj Bala v Gopal Chandra*

6 (1902) 24 All 368 (371) 1902 All W N 96 *Ishri v Muhammad Hadi*

(1937) A I R 1937 Lah 709 (710) 169 Ind Cas 640, *Harnam Singh v Doola Singh* (A making false accusation against B to police—Case investigated but B not prosecuted—Suit by B for damages for malicious prosecution—Such suit held one for libel or slander and Art 24 or Art 25 applied)

6a (1937) A I R 1937 All 90 (95) 167 Ind Cas 433 I L R (1937) All 390 *Vem Vadhya Prasad Singh v Wajid Ali*

6b (1935) A I R 1935 Bom 361 (363) 158 Ind Cas 414 *Dechand Tetaram v Ghanashyam*

7 (1902) 24 All 368 (371) 1902 All W N 96 *Ishri v Muhammad Hadi*

(1913) 20 Ind Cas 768 (768) (Cal) *Dhiraj Bala v Gopal Chandra*

(1867) 2 Agra 47 (48) *Mahomed Imdadilly v Ameer Ally*

8 (1902) 35 Cal 495 (509) 12 Cal W N 490, *Barrow v Hem Chandra Lahiri*.

Article 25 Note 1

gestures or in some transitory form whether visible or audible¹ A mere abuse which does not amount to a defamatory statement is not actionable as a slander²

The starting point of limitation in a suit for compensation for slander is —

1. when the words are spoken, or,
- 2 if the words are not actionable in themselves, when the special damage complained of results

The latter words were added in the Act of 1877 for the first time According to the English Common Law of slander, a slander is not *per se* actionable except in three cases

- 1 where an imputation is made that the plaintiff has committed a criminal offence,
- 2 where an imputation is made that the plaintiff is suffering from a contagious disease, and
- 3 where an imputation is made against the plaintiff in the way of his trade or business

In these three cases the slander is *per se* actionable³ In this country it has generally been held that the English law in its entirety is not applicable⁴ The High Court of Calcutta has held in the undermentioned case⁵ that the English law is applicable to the Presidency Towns and that therefore in cases not falling within the exceptions referred to above, an action for slander is not maintainable without proof of special damage

It has now been held by the High Courts of Bombay⁶ and

Article 25 — Note 1

- 1 Salmond on Torts, 6th Edition Page 496
- 2 (1899) 26 Cal 653 (663) 3 Cal WN 551 (FB), *Girish Chunder Mitter v Jatadhari Sadhukhan*
(1900) 10 Mad L Jour 83 (84) *Konee Subhadra v Subbarayadu*
[See however (1888) 10 All 425 (447) 1888 All WN 157, *Dauan Singh v Mahip Singh* (Personal insult is actionable *per se*)]
- 3 Salmond on Torts, 6th Edition, Page 538
- 4 (1929) A I R 1929 All 214 (217) 115 Ind Cas 458 51 All 509 *Bahim Baksh v Bachcha Lal*
(1916) A I R 1916 Upp Bur 16 (17) 33 Ind Cas 673 2 Upp Bur Rul 98 *Nga Nyo v Mi Te* (A suit to recover damages for slanderous word imputing unchastity to a woman is maintainable without proof of any special damage)
- (1884) 8 Mad 175 (180) *Parvathi v Mannar* (Words defamatory in themselves and not mere verbal abuse)
- (1885) 12 Cal 424 (426 427), *Trailokya Nath v Chundra Nath* (Defamation of character involving loss of social position and injury to reputation)

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(Culling a

v *Hawder*

Sarwa v Dinaram Sarma

59, *Bhoonimoni Dossie v Natobar*

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Disura

- 6 (1927) A I R 1927 1 om 22 (27, 29) 98 Ind Cas 919 51 I om 167, *Hira Das Dinsaur*

Madras⁷ that the English Common Law of slander is not applicable even to the Presidency Towns and that a slander is *per se* actionable. There is thus no room for the applicability of the second part of the third column, except in cases where, like the High Court of Calcutta, the English law of slander is considered applicable to any particular case.

Article 25
Note 1

26. For compensation for loss of service occasioned by the seduction of the plaintiff's servant or daughter.	One year.	When the loss occurs.
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Article 26

1. Seduction.—Where a person seduces the servant or daughter of another person and thereby causes *loss of service* to the latter, the seduction is an actionable tort. Mere seduction is, therefore, not actionable *per se* but only when it results in *loss of service*¹. The service may be actual or constructive. It will be constructive or presumed and need not be proved in the case of a hired servant or minor child². In other cases it must be proved. Any loss of service is enough if it results from the seduction in any manner not too remote, e.g. illness due to mental agitation after seduction and desertion³.

Time, under the Article, runs from the time when the loss occurs

27.† For compensation for inducing a person to break a contract with the plaintiff.	One year.	The date of the breach.
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Article 27

* Act of 1877, Article 26

Same as above

Act of 1871, Article 27.

Except for the words for compensation the Article was the same as above

Act of 1859

No corresponding provision

† Act of 1877, Article 27.

Same as above

Act of 1871, Article 26

Except for the words for compensation the Article was the same as above

Act of 1859

No corresponding provision

7 (1932) A I R 1932 Mad 445 (450) 55 Mal 727 140 Ind Cas 422 *Narayana Sah v Kannamma Bai*

Article 26 — Note 1

1 Salmond on Torts, 6th Edition Page 486

2 Salmond on Torts 6th Edition Pages 485 489

[See also (1852) 4 All 97 (101) 1651 All W N 143 6 Ind Jur 483 *Ram Lal v Tularam*]

3 Salmond on Torts Page 487

Article 27

Note 1

1. **Inducing breach of contract.**—It is an actionable tort to induce intentionally and without lawful justification any one to break a contract made by him with another, thereby causing the latter damage¹ Under the Limitation Act of 1859, a suit for damages for such a wrong was governed by clause 16 of Section 1 which provided a period of six years for "all suits for which no other limitation is hereby expressly provided"² The suit would now be governed by this Article Where the plaintiff and the defendant were rival contractors to the British Government for supply of camels to the Military Department, and the plaintiff sued the defendant for damages for inducing the sub contractors of the plaintiff to break their contracts with the plaintiff, it was held by the Privy Council that the suit was governed by this Article³

The word "induce" does not mean the same thing as giving advice As Sir John Salmond in his Law of Torts points out "To induce a breach of contract means to create a reason for breaking it, to advise a breach of contract is to point out the reasons which already exist"⁴ Where a person merely advises a breach of contract, it is not an actionable wrong

In *Khimji Vasanji v. Narsi Dhanji*,⁵ it was held by Beaman, J. of the Bombay High Court that malice or conspiracy is necessary to be established before an inducement to break a contract becomes actionable, and that where A, merely knowing of the existence of an unperformed agreement without malice or the use of unlawful means, obtains the benefit of the agreement for himself, no action will lie against him for procuring the breach of the agreement The learned Judge followed this decision in *Jekisondass v. Ranchoddas*,⁶ where he held that a person who induces a girl betrothed to another to break that agreement and marry him, commits no tort, and that the principle is the same when the inducement is made to the father of the girl by the father of the boy who is in fact married

Article 27 — Note 1

- 1 (1853) 95 R R 501 (511) 22 L J Q B 463 17 Jur 627 2 F1 & E1 216 (231) *Lumley v. Gye* (Referred in 31 Mad 171 33 Mad 417 and 39 Mad 781)

- (1891) 6 Q B D 333 (337) 50 L J Q B 305 44 L T 75 29 W R (Eng) 867 45 J P 373 *Louen v. Hall*

- (1901) 1901 A C 495 (506) 70 L J P C 76 85 L T 289 50 W R (Eng) 139 65 J P 708 17 T L R 749 *Cutten v. Leatham* (Referred in 30 Mad 112 31 C 105)

- 10 53 W R (Eng) 593
n v *Glamorgan Coal Co*

- 2 (1867) 7 Suth W R 400 (400) *Troyukhto Tarinee v. Mohima Chunder* (On review from 5 Suth W R 277)

- (1867) 8 Suth W R 257 (258) *Meer Malomei Hazem v. A J Forbes*

- 3 (1926) A I R 1926 P C 84 (89) 1926 Mad W N 592 96 Ind Cas 897, *Hazel, Shah v. Jain la Khan*

- 4 Salmond on Torts 6th Edition, Page 603

- 5 (1915) A I R 1915 Bom 700 (311) 24 Ind Cas 404 (414) 39 Bom 682

- 6 (1916) A I R 1916 Bom 51 (55) 34 Ind Cas 588 41 Bom 137.

28.* For compensation for an illegal, irregular or excessive distress.	One year.	The date of the distress.	Article 28
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Synopsis

1. Scope of the Article.
2. Compensation.
3. Terminus a quo.

1. **Scope of the Article.** — Article 29 *infra* refers to seizure of moveable property *under a legal process* — a distress which is the subject of this Article is the same thing as a 'distrain'^{1a} and is taking, *without legal process* moveable property out of the possession of another for obtaining satisfaction of a debt or wrong. It is therefore a mode of self help or extra judicial remedy available to the aggrieved party. By the statute law in force in various Provinces of India landholders have, in certain cases, a right to attach the moveables of the ryots for arrears of rent¹. Similarly, the Government and public bodies like Local Boards and Municipalities have under various enactments power to distrain the moveable property of defaulters in the payment of revenue or other public dues². In exercising this power however, the distrainer has to conform to the provisions of the statute under which they purport to act. A distress not in conformity with the said provisions will be an illegal, irregular or excessive distress as the case may be^{3a}. In England there is another right of distress called "distress *damage feasant*", i.e. di-train of things doing damage. The right can be

* Act of 1877, Article 28

Same as above

Act of 1871, Article 29.

Except for the words "for compensation" the Article was the same as above

Act of 1859

No corresponding provision.

Article 28—Note 1

1a (1902) 7 Cal W N 525 (525) *Jayiphan Nardas v. Surat Chandra* ("Distress has the same meaning as 'distrain'")

1 See for example Madras Estates Land Act 1908 Ss. 77 to 131

Oudh Rent Act (22 of 1901)

Bengal Tenancy Act 1885

2 See for instance Madras Local Boards Act (14 of 1920) S. 91

Madras District Municipalities Act (5 of 1920) S. 124 and S. 144

United Provinces Municipalities Act (2 of 1916) S. 100 102

Madras Revenue Recovery Act 1904 S. 8

United Provinces Land Revenue Act (3 of 1901) S. 143

2a (1904) 25 All 182 (487) 1 All L J 195 1904 All W N 95 *Mahesh Board of Municipalities v. H. P. Gwill* (Distress under powers given under the Municipal Act)

Article 28
Notes
1—2

exercised by an occupier of land with reference to cattle or other things which go on his land and cause damage there. It is very doubtful if this right exists in this country except under express provisions of the law. The Cattle Trespass Act (1 of 1871) may be said to give a right corresponding to distress *damage feasant*, but the owner of the cattle is not bound to pay any compensation to the owner of the land.

An illegal irregular or excessive distress may also be doing an act alleged to be in pursuance of any enactment within the meaning of Article 2 *ante* or a misfeasance or malfeasance² within Article 36 *infra*. In such cases this Article will prevail over the other two Articles in accordance with the general principle that a special Article dealing with a specific case will prevail over a general provision providing for the generality of cases³.

It has been held in the undermentioned cases⁴ that a distress effected under the provisions of statutory enactments such as those referred to in Foot Notes (1) and (2) above is a seizure of moveable property under a legal process within the meaning of Article 29 *infra* and a suit for damages in respect of the distress is governed by that Article. If this is so then apparently Article 28 is rendered practically infructuous and useless inasmuch as in India there is no other right of distress recognized by law.

2. Compensation.—The Article applies only to cases where suit is for recovery of *compensation* for the tort of wrongful distress. It will not apply to a case where *A* sues *B* to recover a sum which *B* has collected by distress in excess of the amount properly due to him¹. Where *B* had wrongfully distrained *A*'s heaps of paddy and *A* sued for a decree directing *B* to deliver to *A* an equal quantity of grain or Rs. 250 0 0 being the value of the heaps distrained it was held that it was a suit in substance one for compensation for illegal distress and not for recovery of specific property².

(1907) 7 Cal W N 728 (728) *Jagatjiban Nando v Sarat Chandra* (Distress under Bengal Tenancy Act 1885—Art. 28 applies if not Art. 29 will apply.)

3 (1901) 26 All 482 (487) 1 All L Jour 195 1904 All W N 95 *Municipal Council of Mussoorie v H. B. Goolall*

(1902) 7 Cal W N 729 (728) *Jagatjiban Nando v Sarat Chandra Chosh*

4 (1924) 1 I R 1924 All 828 (829) 75 Ind Cas 922 *Man Singh v Parvath* (Distress under Agra Tenancy Act 2 of 1901)

(1892) 1892 Bom P J 32 (32) *Makwana Prag v Talukdari Settlement Officer* (Seizure under Bombay Act 6 of 1862)

Note 2

1 (1886) 10 Bom 663 (668), *I a Iji v Musabai*

(See also (1893) 21 Mad 270 (210) 8 Mad L Jour 165 *Karuppanan Iyabalam v Pannasami Chetty* (A case under the Indian Civil Small Cause Courts Act Art. 75 Cl. (j) of which is worded in similar terms to this Article.)

(1897) 21 Cal 173 (165) *Denaik Poy v Sunilar Tenary* (Do.))

2 (1902) 25 Mad 510 (512) *Paru Sanyasi v Zamindar of Jeypore*

3. **Terminus a quo.** — The starting point of limitation is the date of distress¹

Article 28
Note 3

29.* For compensation for wrongful seizure of moveable property under legal process. | One year. | The date of the seizure.

Article 29

Synopsis

1. Scope of the Article.
2. Wrongful seizure.
3. Seizure.
4. "Under legal process."
5. Moveable property.
6. Compensation.
7. The claim for compensation must be with reference to the wrongful seizure.
8. Starting point of limitation.

Other Topics

Attachment before judgment	See Note 2 Pt 7
Attachment by prohibitory order under Order 21 Rule 46, Civil Procedure Code is not seizure	See Note 3, Pt 5
Debt is not moveable property	See Note 5 Pt 8
Legal process does not mean judicial process	See Note 4
Money—Whether moveable property	See Note 5, Pts 5 to 7
Standing crops are not moveable property	See Note 5, Pts 2 8

1. **Scope of the Article.**—The previous Article refers to cases of seizure *without recourse to legal process*, while this Article refers to a seizure *under a legal process*. A wrongful seizure under a legal process is also a misfeasance or malfeasance within the meaning of Article 35 *infra*, but under general principles of law this Article being an Article providing for a *specific case* will prevail over the general Article 36¹

* Act of 1877, Article 29

Same as above

Act of 1871, Article 30

Except for the words "for compensation" the Article was the same as above

Act of 1859.

No corresponding provision

Note 3

- 1 (1901) 24 Mad 339 (341), *Janunabai Rani Sahiba v Solavva Karundon*
(1902) 25 Mad 540 (542), *Pamu Sanyasi v Zamindar of Jeypore*

Article 29 — Note 1

- 1 (1915) A I R 1915 Cal 681 (685) 28 Ind Cas 463 42 Cal 85, *Madras Steam Navigation Co Ltd v Shalimar Works Ltd*.

Article 29
Notes
1—2

In order that this Article may apply —

- 1 there must be a *wrongful seizure* (see Notes 2 and 3),
- 2 such seizure must have been under a *legal process* (see Note 4),
- 3 the seizure must be of *moveable property* (see Note 5),
- 4 the suit must be one for *compensation* and must claim such compensation for the *wrongful seizure* (see Notes 6 and 7)

2. Wrongful seizure.

I *A* files a suit or other proceeding against *B* in a Court of Justice and applies for attachment of *B*'s moveable property. The Court orders the attachment of *B*'s moveable property and a process therefor is accordingly issued. *A* however, points out to the process officer certain properties as being *B*'s properties and they are seized, but they really are not *B*'s properties but *C*'s. This is a wrongful seizure and is actionable without proof of malice.¹ Their Lordships of the Privy Council observed. If the writ or warrant did not authorise the seizure of the goods seized an action would lie for damages without proof of malice.²

II *A* files a suit or other proceeding against *B* in a Court of Justice and applies for attachment by seizure of certain specified properties, which he alleges belong to *B*. The Court orders the seizure and a process is issued therefor. The officer of the Court seizes those properties. The seizure will be wrongful and this Article will apply under the following circumstances —

- (a) Where the legal process under which the seizure is made is *invalid* for want of jurisdiction, irregularity or any other reason. The seizure in such cases is an act in the nature of a trespass to property and is actionable without proof of malice or want of reasonable and probable cause.³
- (b) Where the process is valid but the property seized is found to be that of a *third party* and not of *B*. In this case also the seizure will be an act in the nature of trespass to property and is actionable without proof of malice or want of reasonable or probable cause.⁴

(1931) A I R 1931 Nag 47 (48) 130 Ind Cas 157, *Krishna v Sitaram*

Note 2

1 (1931) A I R 1931 P C 28 (29) 130 Ind Cas 310 (P C) *Ramanathan Chetty v Mira Saiboo Marikar*

2 (1931) A I R 1931 P O 29 (29) 130 Ind Cas 310 (P C) *Ramanathan Chetty v Mira Saiboo Marikar*

3 Salmond on Torts 6th Edition, Page 593

(1931) A I R 1931 Nag 47 (47, 48) 130 Ind Cas 157 *Krishna v Sitaram*

(1925) A I R 1925 All 131 (132) 81 Ind Cas 1039 *Manga v Changa Mal*

(1920) A I R 1920 Mad 397 (399) 55 Ind Cas 786 *M R M V L Firm of Madura v P S Krishnasami*

(1921) A I R 1921 Cal 774 (774) 61 Ind Cas 513, *Arjan Biswas v Abdul Biswas*

4 (1890) 17 Cal 436 (442) 17 Ind App 17 5 Sar 472 19 Ind Jur 452 (P C) *Aissori, Mohan Roy v Harsukh Das*

(c) Where the process is valid and the property seized is the property of *B*, but the application for seizure was made *maliciously and without reasonable and probable cause*. The seizure in such a case is a *malicious abuse of process*, which is recognised in law as a wrong on which an action would lie.⁵ Where there is no malice or want of reasonable and probable cause, the seizure is lawful and does not give rise to any cause of action. In *Ramanathan Chetty v. Mira Sarbo Marikar*,⁶ their Lordships of the Privy Council observed as follows —

'A distinction must be drawn between acts done without judicial sanction and acts done under judicial sanction improperly obtained. If goods are seized under a writ or warrant which authorised the seizure the seizure is lawful and no action will lie in respect of the seizure unless the person complaining can establish a remedy by some such action as for malicious prosecution.

A filed a suit against *B* and got *B*'s moveable property attached before judgment. It was found that in making the application *A* had not acted *bona fide*. It was held that the seizure was wrongful and that a suit for compensation in respect of it is governed by this Article.⁷

S instituted a suit *in rem* against a vessel called *Clan Macintosh* for recovery of a certain amount due as maritime necessities. *S* applied for and got the ship arrested. The suit was ultimately dismissed and the owners of the vessel sued for damages for the seizure alleging malice. It was held that the suit was governed by this Article.⁸

It has however been held in some cases⁹ that where the property of the *defendant* in a case is got seized by the plaintiff under a legal process, there is no wrongful seizure within the meaning of this Article. This may be a correct proposition where there is no

(1907) 29 All 615 (615-616) 4 All L Jour 548 1907 All W N 194 *Ram Narain v. Umrao Singh*

(1900) 23 Mad 621 (626) *Murugesu Mudaliar v. Jattaram Day*

(1931) A I R 1931 Nag 47 (48) 130 Ind Cas 157 *Krishna v. Sitarani*

(1908) 31 Mad 431 (433) 18 Mad L Jour 590 4 Mad L Tim 271 *Damaraju Narasimha Rao v. Thadinada Gangaraju*

(1912) 14 Ind Cas 182 (182) (Mad) *Pedduppally Mahalakshmi v. Kotturu Basu Peddi* (Suit to recover price of paddy attached in execution)

(1917) A I R 1917 Mad 500 (501) 35 Ind Cas 98 *Veeramma v. Subbarao*

(1902) 24 All 146 (147) 1901 All W N 211 *Idu Mian v. Fakhat Ullah*

(1905) 27 Mad 346 (347) *Multanchand Kanyalal v. Bank of Madras*

5 *Silmond on Torts* 6th Edition Pages 58⁷ 588

(1890) 17 Cal 436 (442) 17 Ind App 17 13 Ind Jur 452 5 Sar 472 (P C) *Kissorimohan Roy v. Harsukh Das*

6 (1931) A I R 1931 P C 23 (29) 130 Ind Cas 310 (P C)

7 (1930) A I R 1930 Mad 635 (642) 126 Ind Cas 721 53 Mad 621 *Pannaji Dets Chand & Co. v. Sanaji Kapur Chand*

8 (1915) A I R 1915 Cal 681 (685) 28 Ind Cas 463 42 Cal 65 *Madras Steam Navigation Co. Ltd. v. Shalimar Works Ltd.*

9 (1920) A I R 1920 Mad 327 (329) 55 Ind Cas 86 M P M L L *Firm of Madura v. Krishnaswami Iyer*

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allegation or proof that the plaintiff maliciously or without reasonable and probable cause procured the seizure but not where there is such allegation and proof. The decisions do not advert to this aspect of the law and the view expressed cannot be accepted as correct as a general proposition. The decisions cannot be accepted as correct also on another ground. Having decided that the seizure is not wrongful, they nevertheless apply other Articles of the Limitation Act on the assumption that there is a cause of action in respect of the seizure. As has been seen already where the seizure cannot be said to be wrongful there is no cause of action at all for any compensation in respect of it and no suit therefor will lie.⁹²

3. Seizure. — This Article implies *actual seizure* under legal process.¹ Actual seizure involves proof of actual possession and deprivation of possession. There can therefore be no wrongful seizure unless the property was in the possession of the person who is setting up the wrong.² Where money in the custody of the Court is taken away by a person not entitled to it and the person entitled to it sues for the recovery of it from the former it cannot be said that there was any seizure of the money at all.³ Again where a person has merely a lien or a mortgage right over certain property but has no right to the possession thereof he cannot complain that a seizure

(1921) A I R 1921 Cal 774 (774) 64 Ind Cas 518 *Arjan Biswas v Abdul Biswas*

(1925) A I R 1925 All 131 (131) 81 Ind Cas 1038 *Manga v Changa Mal* (If Art. 36 read with S. 93 is applied suit is within time.)

(1895) 19 Mad 80 (82) 6 Mad L Jour 11 *Mana Lakshman v Anislan Koya* (Art. 49 or Art. 36 will apply.)

91 (1931) A I R 1931 P C 28 (29) 130 Ind Cas 310 (P C) *Ramanathan Chetty v Mira Saiboo Marika*

Note 3

1 (1903) 6 Bom L R 64 (70) *Sirajul v Manek Chand*

2 (1916) A I R 1916 All 335 (335) 35 Ind Cas 86 38 All 676 *Nader Singh v Mt Ganga Dei*

3 (1917) A I R 1917 All 276 (2 8) 39 Ind Cas 532 39 All 322 *Ram Narain v Brij Bankay Lal* (Per Pigot J.)

[See also (1914) A I R 1914 Mad 126 (128) 22 Ind Cas 870 38 Mad 92 (F B) *Uthammal v Ayyappa Nair*

(1916) A I R 1916 All 335 (335) 35 Ind Cas 86 38 All 676 *Nader Singh v Mt Ganga Dei*

(1902) 30 Cal 440 (442) 7 Cal W N 520 *Lalshum Priya v Rama Kanta*

(1869) 13 Mad 437 (442) *Narayana v Narayana* (Where there is a subsisting decree under which money is paid to a party to the suit its receipt cannot be regarded as a wrongful seizure of moveable property as mentioned in Art. 29 (even though that decree is later on superseded). A suit for the refund of such money is governed by Art. 120.)

(1924) A I R 1924 Nag 248 (249) 81 Ind Cas 6 20 Nag L R 169 *Pajaram v Mulchand* (8 Bom 17 Not foll.)

(1910) 6 Ind Cas 654 (655) (Lah) *Ismat uddin v Zainab* (8 Bom 17 Doubt.)

(1934) A I R 1934 Outh 159 (160) 148 Ind Cas 448 9 Luck 577 *Official Liquidator the Kailashad & Ahmaabad Banking Corporation Ltd v Jam Charan Lal*

(1891) 5 C P L R 9 (12) *Chasiram v Dhanraj*

of such property is wrongful *as against him* ⁴ On the same principle, an attachment by a prohibitory order under Order 21 Rule 46 of the Civil Procedure Code is not a "seizure," the property in such cases being left with the person in possession already ⁵

It is, however, not necessary that the property should be actually *handed* by the person seizing it the locking up and sealing of the godown containing the goods to be seized is actual seizure within the meaning of this Article ⁶

4. "Under a legal process."—The words "legal process" do not mean "judicial process" They include all processes which can be issued by any one under law Where a revenue officer recovers under law the amount due by a person as rent by distraint of his properties, the seizure must be held to be under a legal process ¹ Similarly a distraint effected by a landlord under the provisions of the Agra Tenancy Act (3 of 1901) is a seizure under a legal process, inasmuch as it is done under the special provisions of the Act and subject to the due observance of the procedure laid down therein ²

See also Note 1 to Article 28 *ante*

5. *Moveable property.*—The definition of "moveable property" given in Section 2 (13) of the Civil Procedure Code is only for the purposes of that Code and will not apply to the Limitation Act ³ Hence standing crops, until severed from the soil, are immovable

(1922) A I R 1922 Lah 103 (104) 62 Ind Cas 929 *Balkishan Das Dhanpat Rai v Dett Saran* (Money voluntarily paid by garnishee out of Court to person attaching under Order 21 Rule 46)

(1898) 1898 Pun Re No 59 *Kashi Ram v Secy of State*]

[But see (1893) 8 Bom 17 (19) 8 Ind Jur 200, *Jagjivan v Gulam Jilani* (This decision has not been followed in A I R 1916 All 335 and A I R 1924 Nag 248, Dissented from in 30 Cal 440)]

4 (1930) A I R 1930 Mad 349 (349) 123 Ind Cas 362, *Subbanna v Naranayya*
(1917) A I R 1917 All 276 (278) 39 Ind Cas 532 39 All 922 *Ram Narain v Brij Bankey Lal* (Per Piggot J)

5 (1917) A I R 1917 Mad 500 (502) 35 Ind Cas 98 *Veeramanna v Subba Rao* (Attachment of certain logs by prohibitory order.—The logs having already been seized in another previous attachment by another person the second attachment was made by prohibitory order)

(1903) 6 Bom L R 704 (707) *Surajmal v Vankhchand* (Attachment under the Code of 1882)

(1914) A I R 1914 Mad 126 (127) 38 Mad 972 22 Ind Cas 870 (F B) *Tellammal v Ayyappa Naik* (Prohibitory order under O 21 R 46 is not seizure)

6 (1903) 27 Mad 346 (347) *Multanchand Kanyalal v Bank of Madras*

Note 4

1 (1892) 1892 Bom P J 32 (32) *Malwana v The Talukdars Settlement Officer* (Seizure of moveables under Bombay Act VI of 1862)

2 (1924) A I R 1924 All 828 (829) 75 Ind Cas 922 *Man Singh v Ram Nath*

Note 5

1 (1916) A I R 1916 Mad 1142 (1142) 31 Ind Cas 796 *Narasimham v Venkiah*

(1915) A I R 1915 Nag 69 (69) 11 Nag L R 18 27 Ind Cas 935, *Muridhar v Mulu*

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property for the purposes of this Act² The attachment of such crops is not a seizure of *moveable* property within the meaning of this Article³ Where standing crops belonging to the plaintiff were seized, it was held to a suit for damages for crops so seized that the suit was governed by Article 36 and not by Article 29⁴ Where the standing crops that were wrongfully attached are, subsequent to attachment, cut and removed in spite of the fact that the claim of the objector to such crops was allowed in his favour the suit brought by the objector, within three years of the decision of the claim case for damages representing the value of the crops so cut and removed will be governed neither by Article 29 nor by Article 36, but either by Article 48 or Article 49⁵

It has been assumed in the undermentioned case⁶ that money is "moveable property" for the purposes of this Article A contrary view was held in *Narayan v Narayan*^{6a} The question was raised in the cases cited below,⁷ but not decided A debt is not moveable property within the meaning of this Article⁸

6. Compensation. — This Article applies only to a suit for compensation for the wrongful seizure A suit for the recovery of

2 (1916) A I R 1916 Mad 1142 (1143) 31 Ind Cas 796 *Narasimham v Venkiah*

(1879) 4 Cal 665 (667) 2 Cal L R 526 3 Ind Jur 515 2 Shome L R 28, *Pandah Gazi v Jennuddi*

(1915) A I R 1915 Nag 69 (69) 11 Nag L R 18 27 Ind Cas 935 *Murlidhar v Mulu*

(1905) 82 Cal 459 (462) 9 Cal W N 376 *Haricharan v Harikar*
 (C 11875) 9 Cal W N 306 (1905) 7 Cal 111 2 v *Banes Madhub*
Haji
 65 Ind Cas 665

31 Ind Cas 935

3 (1915) A I R 1915 Nag 69 (70) 11 Nag L R 18 27 Ind Cas 935 *Murlidhar v Mulu*

4 (1905) 82 Cal 459 (462) 9 Cal W N 376 *Haricharan v Harikar*

[See also (1899) 25 Cal 692 (702) 2 Cal W N 265 (F B) *Mangun Jha v Dolhin Golab* (Per Rampac J Majority view contra)]

(1900) 11 Ind Cas 788 (789) 30 Cal 141 *Sripati Sarkar v Harikar*]

[But See (1902) 7 Cal W N 728 (729) *Jagajiban Naudu v Sarat Chandra* (So far as it holds that Art 29 may apply the decision is not clear)]

5 (1913) 18 Ind Cas 253 (254) (Cil) *Jadu Nath Dandapat v Hari Kar*
 (32 Cil 459 Distinguishel)

(1929) A I R 1928 Cil 106 (107) 105 Ind Cas 763 *Maharaja Bahadur Singh Biluchar v Achala Bala Devi* (18 Ind Cas 253 Foll)

6 (1893) 8 Bom 17 (19) 8 Ind Jur 200, *Jagjivan v Gulam Jilani*

6a (1893) 13 Mad 437 (442)

7 (1917) A I R 1917 All 276 (278) 39 Ind Cas 532 39 All 820 *Ravi Naram v Dity Lalkey Lal*

(1911) A I R 1910 All 935 (935) 35 Ind Cas 66 35 All 676 *Asa ler Singh v M C Singh*

8 (1911) 10 Ind Cas 911 (911) (Mal) *Yellammat v Iyyappa Nair* (Per S. J. J. J. J.)

the specific property seized is not a suit for compensation for the wrongful seizure.¹ The compensation claimed may take the form of the value of the goods seized or may be consequential damages arising out of the wrongful seizure. The Article is quite general in terms and is intended to apply to all cases where the alleged wrongful seizure is made under a legal process.²

In the undermentioned case³ it was held that a claim for recovery of the amount wrongfully taken by the defendant from the Government Treasury under legal process is a suit for compensation within the meaning of this Article. The general trend of opinion is, however, that such a claim is not one for compensation.⁴

7. The claim for compensation must be with reference to the wrongful seizure. — In order that this Article may apply, the claim for compensation must be for the wrongful seizure. *B* sold a car to *A*. After delivery of the car to *A* it was attached and seized in execution of a decree against *B*. *A* applied for removal of attachment and, pending decision on the application, *B* became insolvent and the bailiff handed over the car to the Official Receiver. *A*'s application was successful and he thereupon brought a suit for damages for wrongful seizure of the car. It was held that this Article applied, the cause of action being the wrongful seizure of the car.^{1a} Thus, where the claim for damages is not based on the wrongful nature of the attachment or seizure, but with reference to the fact that sale of the property was made irregularly resulting in damages, this Article has no application.¹

Note 6

- 1 (1867) 7 Suth W R 493 (499) *Kazee Nusseentoolah v Hoop Sona Debes* (1935) A I R 1935 All 915 (915) 158 Ind Crs 1014 *Pershad Lal v Chandan*
- 2 (1900) 23 Mad 621 (696) *Murugesu Mudaliar v Jattiram Deiy* (1907) 29 All 615 (617) 4 All L Jour 548 1907 All W N 194 *Ram Narain v Uirio Singh* (Damages as a result of attachment claimed)
- (1903) 27 Mad 346 (347) *Muttanchand Kanyalal v Bank of Madras* (Damages for deterioration of goods seized)
- (1912) 14 Ind Crs 182 (182) (Mad) *Peddupalhi Mahalakshmi v K. Banreddy Gara* (Value of goods)
- (1905) 31 Mad 431 (433) 18 Mad L Jour 590 4 Mad L Tim 271 *Damaraju Narasimha Rao v Gangarati* (Do)
- 3 (1883) 8 Bom 17 (19) 8 Ind Jur 200 *Jaggann v Ghulari Jilani* (Money assumed to have been wrongfully seized—Claim for equivalent sum of money was held to be for compensation)
- 4 (1902) 30 Cal 440 (442) 7 Cal W N 520 *Lalshmi Prina v P ma Kanta* (See also (1910) 1 Ind Crs 401 (403) 39 All 491 *Pajputana Malua Railway Co operative Stores Ltd v Ajmere Municipal Board*)

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In execution of a decree obtained by *A* against *B*, *C*'s property was seized. *C* preferred a claim which was allowed and thereupon *A* filed a suit under Order 21 Rule 63 of the Civil Procedure Code and obtained an injunction restraining *C* from taking possession of his property. *A*'s suit was ultimately dismissed and thereafter *C* got his property but in a damaged condition. *C* thereupon filed a suit for damages resulting from the continued detention of the property by reason of the injunction obtained by *A*. It was held that the suit must be regarded as one for damages for injury caused by the injunction wrongfully obtained and that the suit was not governed by Article 29 but by Article 42.²

A fraudulently and in collusion with the court process-officer got a warehouse of *B* sealed with the court seal, without any authority, in execution of his decree against *B*. *B* was kept in ignorance of the fraud for a long time and when he came to know of the truth sued *A* for damages basing his suit on the fraud committed. It was held that Article 95 and not this Article applied to the case.³ It may be noted that even if the suit fell within both the Articles, Article 95 will prevail as being a special Article providing for the specific case of fraud.

8. Starting point of limitation.—The wrong is complete as soon as the seizure is procured by the person responsible for the act of seizure. It is the seizure of moveable property that gives rise to an immediate cause of action, and not its detention,¹ or its release from attachment,² or the fact that it is subsequently declared wrongful.³ The cause of action, thus, accrues on the day on which the property is seized,⁴ and limitation for a suit for compensation for wrongful seizure runs from that date. And once time has

decreed in favour of *A*.—Property auctioned by *M*.—Suit by *A* for price of property sold.—Suit held not one for damages for wrongful seizure.—Art. 83 and not Art. 29 applied.)

2 (1901) 24 All 146 (147-148) 1901 All W N 211 *Ida Mian v Rahmatullah*

3 (1903) 27 Mad 343 (315) *Bani of Madras v Mullan Chand Kanya Lal*

Note 8

1 See (1914) 4 I R 1914 Mad 135 (196) 24 Ind Cas 751 98 Mad 655, *Venkataramer v Vythilinga Thamburan*

2 See (1907) 29 All 615 (618) 4 All L Jour 548 1907 All W N 194, *Ram Narain v Umrao Singh*

3 (1930) 1 I R 1930 Mad 635 (637) 53 Mad 621 126 Ind Cas 721, *Pannaji Devi Chand & Co v Sanaji Kajur Chand*
[See also (1873) 19 Suth W R 339 (341) *D Hughes v Chairman of the Municipal Commissioners, Howrah*]

4 (1907) 29 All 615 (617, 618) 4 All L Jour 548 1907 All W N 194, *Rama Narain v Umrao Singh*
(1873) 19 Suth W R 339 (341), *D Hughes v Chairman of the Municipal Commissioners, Howrah*

(1915) 4 I R 1915 Cal 681 (685) 28 Ind Cas 463 42 Cal 85, *Madras Steam Navigation Co Ltd v Shalimar Works Ltd*

(1909) 4 Nag L R 49 (52), *Nagoba v Madholala Kalar*

[See (1878) 3 Bom 74 (78), *Goma Mahad Patil v Gokaldas Khimji*]
[See also (1931) 4 I R 1931 P O 28 (29) 130 Ind Cas 310 (P O), *Ramanathan Chetty v Mira Saibo Marikar*]

begun to run, it does not stop during the period the property remains *in custodia legis*⁵. Nor can the plaintiff claim exclusion of time on the ground that he was engaged in prosecuting a claim petition in the attaching Court or in obtaining a declaratory decree in a suit under Order 21 Rule 63 of the Civil Procedure Code⁶. It would appear to be more in accordance with natural justice if the Article had made the date of release rather than the date of seizure in such cases the starting point of limitation^{6a}. But there is nothing to prevent the claimant, whose claim has been dismissed, from bringing his suit under Order 21 Rule 63 of the Civil Procedure Code, and in that suit add a claim for damages for the wrongful seizure as a relief consequential to the declaration prayed for^{6b}. The cause of action in

- 5 (1908) 31 Mad 431 (433, 437) 18 Mad L Jour 590 4 Mad L Tim 271 *Damaraju Narasimha Rao v Gangaram*
- 6 (1900) 23 Mad 621 (625) *Murugesu Mudaliar v Jattarasi Dasy*
(1908) 31 Mad 431 (433) 4 Mad L Tim 271 18 Mad L Jour 590 *Damaraju Narasimha Rao v Gangaram*
- (1930) A I R 1930 Mad 635 (637) 53 Mad 621 126 Ind Cas 721, *Pannayya Devi Chand & Co v Sanjay Kapur Chand*
- (1931) A I R 1931 Nag 47 (48) 130 Ind Cas 15* *Arishna v Sitarani*
- (1934) A I R 1934 Rang 329 (331) 154 Ind Cas 153 13 Rang 48 *M S Chettyar Firm v S E Bholat*
- (1920) A I R 1920 Cal 357 (358) 57 Ind Cas 375 (F B) *Narendra Nath v Bhutan Chandra* (The fact that the judgment creditor instituted a suit under O 21 R 63 and prevented the objector from taking possession does not arrest the running of time under this Article)
- (1912) 14 Ind Cas 182 (182) (Mad) *Peddupalli Mahalakshmi v Dasireddy Garu* (Suit to recover price of paddy illegally seized in execution of decree is one for illegal seizure of property in execution and comes under Art 29)
- (1917) A I R 1917 Mad 500 (501) 35 Ind Cas 98 *Veeramanna v Subba Rao*
- (1911) 9 Ind Cas 774 (774) (Low Bur) *Maung Po On v Maung Tun U* (A suit to recover the value of logs wrongfully seized and sold in execution of a decree is one for compensation for wrongful seizure of property under legal process and the period of limitation prescribed therefor is contained in Art 29 and not Art 120)
- (1911) 9 Ind Cas 773 (773) (Low Bur) *Venkatacelluri Chetty v Nagappa Chetty* (Suit for sale proceeds of paddy in execution on the ground that the paddy was wrongly seized and sold)
- (1908) 4 Nag L R 49 (53) *Nagoba v Madholala Kalar*
- (1899) 3 Oudh Cas 340 (342) *Bindrabai v Gajadhar Parshad*
[See also (1893) 7 C P L R 77 (79) *Tejoo Patel v Mohamed Ali* (In this case the plaintiff instead of bringing first a suit under O 21 R 63 at once brought a suit for compensation—Held that the suit as framed was barred under Art 29)]
- (1911) 12 Ind Cas 406 (406) (Mad) *Pamasani Ayengar v Venkata sanjiva Chetty*
- (1875) 24 Suth W R 298 (299) *Ram Singh Mohapatra v Bhotiro Vajee Sonhai*
- 6a (1908) 4 Nag L R 49 (53) *Nagoba v Madholala* (Per Drake Brockman, J C — There is doubtless good reason to think that Art 29 would be more in accordance with natural justice if it made the date of release,

6b See (1889) 17 Cal 436 (441, 443) 17 Ind App 17 5 Sar 472 13 Ind Jur 452 (P C) *Aissurimohan v Harsukh Das* (On appeal from 12 Cal 696)

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such a case is quite different from that on which a suit merely for damages for wrongful seizure is based ^{6c}

The wrong done by the seizure is not a continuing wrong ⁷ Later manifestations of the original damage and consequent upon the injury originally sustained do not give rise to a new cause of action ⁸

Articles 30

30.* Against a carrier for compensation for losing or injuring goods.	One year.	When the loss or injury occurs.
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Synopsis

1. Scope of the Article.
2. Carrier.
3. For losing goods.
4. Suit, by whom may be brought.
5. Suit, against whom may be brought.
6. Notices of claim to railway administration.
7. Starting point of limitation and onus of proof.

* Act of 1877, Article 30.

PART V — TWO YEARS

30 —Against a carrier for compensation for losing or injuring goods	Two years	When the loss or injury occurs
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NOTE—This Article had formerly been in Part 5. It was transferred to Part 4 by Act 10 of 1899. The limitation was reduced from two years to one year by S. 8 of the same Act which came into force on 1st May 1899.

Act of 1871, Article 36

36 —Against a carrier for losing or injuring goods	Two years	When the loss or injury occurs
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(1917) A I R 1917 Mad 393 (393 395), 36 Ind Cas 445 40 Mad 733 *Daniureddi v Pamayya*

[See also (1928) A I R 1928 Mad 840 (844) 110 Ind Cas 554, *Venkata Subba Rao v Vigneswaradu*

(1918) A I R 1918 Mad 76 (77) 41 Ind Cas 551, *Venkateswara Aiyar v A P P.*]

[But see (1884) 8 Bom 17 (19) 8 Ind Jur 200, *Jagjwan v Gulam Jilani*

(1893) 7 O P L R 77 (79 80) *Tejoo Patel v Mahamedali* (So far as the particular claim for compensation is concerned the suit will be barred by Art. 29)]

6c See (1896) 12 Cal 696 (699), *Kissora Mohan v Hursook Dass*

7 (1907) 29 All 615 (616) 4 All L Jour 548 1907 All W N 191, *I am Narain v Umrao Singh*

(1930) A I R 1930 Mad 635 (637) 53 Mad 621 126 Ind Cas 721, *Pannayya Devi Chaul & Co v Sanjay Kapur Chand*

(1909) 4 Nag L R 49 (53) *Nagoba v Madholala Kalar* (The seizure of moveable property does not constitute a continuing wrong, the *ratio decidendi* being that the cause of action is complete as soon as a wrongful seizure is made the subsequent detention is the act of the Court and nominal damages at least are at once recoverable)

8 (1903) 31 Mad 431 (437) 18 Mad L Jour 590 4 Mad L Tim 271, *Damaraju Narasimha Rao v Gangaram*

Other Topics

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Article applies to all carriers	See Note 2
Common carrier and ordinary carrier	See Note 2, Pts 1, 2
Goods lying in Lost Property Office—Article not applicable			See Note 3, Pt 7
Mere non delivery—No proof of loss ...	...	..	See Note 7, F-N (2)
Misdelivery—Compensation for			See Note 3, Pts 1 to 6
Period of notice can be deducted			See Note 6, Pt 2
Suits by consignor or consignee			See Note 4, Pt 1

1. Scope of the Article. — This and the next Article are intended to provide exceptionally for the case of carriers on account of the difficulty of investigating and settling claims preferred against them after a long lapse of time in respect of a few articles out of the quantity of goods that are constantly passing through their hands¹

Where a suit falls under this special Article and also under another general Article, the operation of the general Article would be excluded by this Article on the principle *generalia specialibus non derogant*. Thus, where plaintiff sued for compensation for injury to goods while in the possession of a carrier, a Railway Company, it was held that the Article applicable was this Article and not Article 49 which prescribes the period of limitation for a suit "for compensation for injuring" specific moveable property.²

2. Carrier. — A carrier is a person who undertakes to transport the goods of another person from one place to another for hire. A common carrier is a person who engages in the business of transporting for hire property from place to place for all persons indiscriminately¹. The distinction between a common carrier and an ordinary carrier depends therefore upon whether he carries for all persons or for particular persons only.²

This Article and the next apply to all carriers whether they are common carriers or not. Thus a landing agent who undertakes to deliver the goods from a ship and deliver them to the consignee³

Act of 1859.

No corresponding provision

Article 30 — Note 1

- (1916) A I R 1916 Mad 314 (315) 39 Mad 1 30 Ind Cas 840 (F.B) Venkatasubba Rao v. Asiatic Steam Navigation Co. of Calcutta
- (1926) A I R 1926 Nag 57 (59) 90 Ind Cas 135, G I P. Railway Co. v. Radha Kisan
- (1918) A I R 1918 Sind 59 (59) 11 Sind L R 103 45 Ind Cas 173, Louis Dreyfus & Co v. Secretary of State (A suit for compensation for injury to goods while in the possession of a carrier falls under Art 30 of the Limitation Act and must be filed within one year from the date when the injury occurs)

Note 2

- Ramaswamy Iyer on Torts, Pages 402 and 456
- Ratanlal on Torts, 5th Edition, Page 431
- (1918) A I R 1918 Mad 341 (343) 45 I C 485, Melappa Chettiar v. British India Steam Navigation Co Ltd

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and the owners of sea going merchant ships⁴ are carriers. The Government owning a railway is also a carrier though it is excluded from the definition of "common carrier" in the Carriers Act (3 of 1865)⁵ But a Port Trust Board which merely stores and delivers goods to the ships calling at the port is not a 'carrier'⁶

In order to establish the relationship of carrier and customer, there must be a *willing delivery of goods* by the customer and *lawful possession of goods* by the carrier for the purpose of carriage. When the plaintiff put certain goods in the defendant's ferry boat and himself got into it, but finding that the boat was being overloaded, got down and wanted to take down his goods which the defendant refused to allow and the boat capsized on the way, it was held that there was no relationship of carrier and customer and that a suit for loss of the goods was not governed by this or the next Article⁷

By delaying to take delivery of goods after they have arrived at their destination and by asking the carrier to keep the goods awaiting plaintiff's further instructions, the position of a carrier is not changed to that of a bailee for the purposes of Limitation Act, during the period following the arrival of goods⁸

3. For losing goods — There is a difference of opinion as to whether a claim against a carrier for compensation for misdelivery of the goods to a wrong person can be said to be a claim against the carrier for 'losing the goods' within the meaning of this Article. In *Fakir Chand v Secretary of State*,¹ it was held that a misdelivery of the goods is not 'losing the goods'. This view rested on *Changan Mal v Bengal & North West Ry Co*,² a case under Section 77 of the Railways Act, where it was held that the word 'loss' within the meaning of Section 77 aforesaid meant loss by the carrier and not loss by the owner and that a misdelivery was not a loss. *Fakir*

4 (1881) 3 Mad 107 (110) *British India Steam Navigation Co v Hajee Mahomed Fack & Co*

(1902) 26 Bom 562 (570) 4 Bom L R 447 *Haji Ajan Gulam v Bombay & Persia Steam Navigation Co*

[See (1928) A I R 1928 Bom 5 (6) 106 Ind Cas 470 52 Bom 37, *Bombay Steam Navigation Co Ltd v Vasudev Baburao*]

5 (1933) A I R 1933 All 348 (349) 144 Ind Cas 1029, *F D R Footwear v N W Railway*

(1933) A I R 1933 All 466 (467, 468) 144 Ind Cas 703, *Alamgir Footwear Co v Secretary of State*

(1938) A I R 1938 Cal 293 (302) 1 L R (1937) 2 Cal 614, *Secretary of State v Golabrai Paliram* (Railways whether State controlled or not are carriers)

6 (1911) 10 Ind Cas 9 2 (974 975) 4 Sind L R 236 *Prag Narain v Karachi Port Trust* (A suit for compensation for damage to goods against the Port Trust is not governed by Art 30)

7 (1929) A I R 1929 Cal 306 (307) 107 Ind Cas 723, *Mujaffar Ahmed v Karim Buksha*

8 (1933) A I R 1933 All 466 (467) 144 Ind Cas 703 *Alamgir Footwear Co v Secretary of State*

Note 3

1 (1913) 19 Ind Cas 477 (478) (Lah)

2 (1897) 1897 Pun Re No 6

*Chand's case*¹ has been followed in Allahabad in the undermentioned case.² *Changan Mal's case*³ has been overruled by a Full Bench of the Lahore High Court in *Hill Sawyers & Co v Secretary of State*⁴ and the basis of the decision of the Allahabad High Court and of *Fakir Chand's case*¹ has thus disappeared. According to the High Courts of Patna⁵ and Madras,⁶ "loss" will include "loss by mis delivery" also.

Where goods are *not lost* but are lying in the Lost Property Office of the carrier, it was held that the case is one of non delivery covered by Article 31 and not one under this Article.⁷

4. Suit, by whom may be brought.—A suit for compensation under this Article and the next is not restricted to a suit by consignee alone. The Articles are wide enough to include suits by the consignor also.¹

5. Suit, against whom may be brought.—The carrier who receives the goods for carriage is *prima facie* responsible for their safe carriage and hence if any injury or loss occurs, a suit for damages against such carrier is maintainable.¹ But, where the goods consigned are carried over by more than one carrier, the carrier *who* delivers or lands the goods may, under circumstances, be sued for the loss or injury to the goods, for the principle on which such a suit may be brought, see the undermentioned cases.²

3 (1923) A I R 1923 All 22 (23) 68 Ind Cas 981 45 All 43, *Jugal Kishore v. G I P Ry Co*

4 (1921) A I R 1921 Lah 1 (5) 2 Lah 133 61 Ind Cas 926 (F B)

5 (1923) A I R 1923 Pat 285 (287) 2 Pat 442 72 Ind Cas 440, *G I. P Railway Co v Jitan Ram Nirmal Ram*

6 (1919) A I R 1919 Mad 140 (142) 41 Mad 871 40 Ind Cas 69, *M & S M Railway Co v Haridos* (Loss in S 77, Railways Act, includes misdelivery)

7 (1920) A I R 1920 All 157 (157) 42 All 390 53 Ind Cas 517, *Mutsaddi Lal v B B & C I Ry Co and Rohilkhand Kumaun Ry Co*

Note 4

1 (1920) A I R 1920 All 157 (159) 42 All 390 53 Ind Cas 517, *Mutsaddi Lal v B B & C I Ry Co and Rohilkhand Kumaun Ry Co*

(1924) A I R 1924 Cal 173 (175) 80 Ind Cas 612, *Fally Muhammad Hays Gunny v Netherland Steam Navigation Co* (A I R 1917 Cal 640, Not followed)

(1925) A I R 1925 Cal 559 (561) 52 Cal 372 86 Ind Cas 127, *Chiranjy Lal Ram Lal v D N Ry Co Ltd*

(But see (1917) A I R 1917 Cal 640 (643) 41 Cal 16 51 Ind Cas 130, *Radha Sham Basak v Secretary of State*)

Note 5

1 See (1923) A I R 1923 Pat 285 (286) 2 Pat 442 72 Ind Cas 440, *G I. P. Ry Co v Jitan Ram Nirmal Ram* (In such a case the suit will be *ex contractu*)

2 (1878) 42 L J Q B 89 (93, 94) L R 8 Q B 186 23 L T 597 21 W
v Manchester Sheffield & Lincolnshire Ry Co

(1831) 5 Dom 371 (378, 379) 5 Ind Jur 646, *G I P Ry Co v Kisen Khushaldas*

(1918) A I R 1918 Mad 341 (343) 45 Ind Cas 483,
Indian India Steam Navigation Co

Article 30
Notes
6—7

6. Notice of claim to railway administration.—Under Section 77 of the Railways Act, 1890, a notice is required to be given to the railway administration of claims to refunds of overcharges and to compensation for losses. Such notice must be given within six months from the date of delivery of goods for carriage by railways. See the undermentioned cases¹

Where a notice to a State Railway under Section 80 of the Civil Procedure Code is necessary, the plaintiff is entitled to deduct the period of notice under Section 15 sub section 2, *ante*²

7. Starting point of limitation and onus of proof.—The “loss or injury” referred to in the third column of the Article means, by reference to the first column, loss or injury *by the carrier* and not

(1933) A I R 1933 Pat 45 (48) 12 Pat 67 141 Ind Cas 813 *B & N W Ry Co v Kameshwar Singh*

Note 6

- 1 (1935) A I R 1935 All 601 (603) 157 Ind Cas 1080, *Secretary of State v Simla Footwear Company*
- (1925) A I R 1925 All 273 (274) 47 All 186 85 Ind Cas 474 *E I Railway Co v Fazal Ellahi* (A I R 1922 Pat 106 dissenting from)
- (1911) 10 Ind Cas 122 (124) 33 All 544, *G I P Railway Co v Ganpat Rai* (Case of non delivery of goods)
- (1923) A I R 1923 Cal 371 (373) 116 Ind Cas 148 *Rivers Steam Navigation Co Ltd v Biswaswar Kundu* (Notice under S 10 Carriers Act)
- (1923) A I R 1923 Cal 397 (399) 72 Ind Cas 714 *Assam Bengal Railway Co Ltd v Radhika Mohan Nath* (Notice to Traffic Manager is not notice to Agent)
- (1917) A I R 1917 Cal 103 (103) 38 Ind Cas 502, *E I Ry Co v Ram Aular* (Notice of suit should be given to the Agent—Notice of claim to the Claim Superintendent is not enough)
- (1917) A I R 1917 Cal 640 (642) 44 Cal 16 34 Ind Cas 180 *Radha Sham Basak v Secretary of State*
- (1924) A I R 1924 Mad 567 (570) 77 Ind Cas 511, *South Indian Railway Co v Narayana Iyer*
- (1912) 17 Ind Cas 419 (419) (Mad), *M. & S M Railway Co Ltd v Bhimappa*
- (1923) A I R 1923 Nag 314 (316) 19 Nag L R 189 73 Ind Cas 1033, *Jivandas v Agent E I Ry Co* (Under S 77 of Railways Act, notice is essential in cases of non delivery or misdelivery)
- (1925) A I R 1925 Oudh 615 (616) 90 Ind Cas 572 *E I Ry Co v Firm Moea Ram Gajanand* (Notice for non delivery of goods is necessary)

(1933) A I R 1933 Pat 45 (47) 12 Pat 67 141 Ind Cas 813, *B and N W Ry Co v Kameshwar Singh*

(1927) A I R 1927 Pat 335 (336) 103 Ind Cas 383, *Gopi Ram Gouri Shankar v G I P Railway Co* (Claim for compensation for non delivery of goods)

(1924) A I R 1924 Pat 315 (316) 73 Ind Cas 642, *E I Ry Co Ltd v Gopi Ram Gouri Shankar*

(But see (1924) A I R 1924 Nag 288 (289) 79 Ind Cas 602, *Seth Mulchand v G I P Railway Co* (No notice is necessary in cases of short delivery)

(1922) A I R 1922 Pat 106 (108) 69 Ind Cas 103, *E I Railway Co v Kali Charan*]

- 2 (1923) A I R 1923 Lah 349 (350) 111 Ind Cas 749 9 Lah 519, *E I. Railway Co v Rahimullah Ilahi*

the loss or injury suffered by the consignor or consignee¹ Time begins to run therefore when the carrier loses or injures the goods, and not from the time when the consignor or consignee may be said to have suffered loss. The burden of proving when the goods were lost or injured is on the carrier,² and if the carrier fails to prove that the goods were lost more than one year before the institution of the suit, the claim is not barred.³ In the case of a suit against a railway company for loss of a part of the consignment, the period of limitation commences when the occurrence of the loss is definitely ascertained and not from the date when the parcel first arrives.⁴ Where it was clearly admitted by the consignee in a letter dated 5th August 1931

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Note 7

Note 7

- 1 (1923) A I R 1923 All 22 (23) 45 All 43 68 Ind Cas 931 *Jugal Kishore v G I P Ry Co*
- 2 (1896) 12 Cal 477 (480) *Dammul v British India Steam Navigation Company*
- (1925) A I R 1925 Cal 371 (373) 116 Ind Cas 148 *Ruters Steam Navigation Co v Bivueswar Kundu*
- (1912) 17 Ind Cas 419 (419) (Mad), *M & S W Ry Co Ltd v Bhimappa*
[See also (1893) 7 Bom 473 (480) 8 Ind Jur 99, *Mohansingh Chawan v Henry Conder* (Mere non delivery of goods is no proof of their loss the onus of proving which, as an affirmative fact, lies on the carrier)]
- [But see (1901) 28 Cal 401 (409) 28 Ind App 144 3 Bom L R 293 5 Cal W N 449 11 Mad L Jour 156 8 Bar 33 (P C), *East Indian Railway Co v Kalidas Mukerji* (Railway is not a common carrier of passengers)]
- 3 (1925) A I R 1925 All 656 (657) 87 Ind Cas 579 47 All 549 *G I P Ry v Firm Radhey Mal Mann Lal* (Per Mukerjee J—The matter was within the peculiar knowledge of the defendants and it was for the defendants to have proved when the actual loss took place)
- (1912) 17 Ind Cas 419 (419) (Mad), *M & S W Ry Co v Bhimappa*
- 4 (1923) A I R 1923 All 842 (843) 75 Ind Cas 669 *Devi Deen and Sons v Rohilkhand and Kumaun Ry Co*
[See also (1927) A I R 1927 Oudh 478 (480) 106 Ind Cas 311 8 Luck 102, *Bala Prasad v B & N W Ry Company* (On 17th

[But see (1923) A I R 1923 Pat 298 (299) 71 Ind Cas 565, *Rameswar Dass Mahi Ram v E I Ry Co Ltd* (250 bags of flour were consigned to the Railway Company on 15th October 1920. The consignment was delivered short by 5 bags and on 11th February 1922 plaintiff brought this suit alleging that the cause of action arose in November 1920 when the short delivery was made. A letter had been received from the Divisional Traffic Manager dated 7th September 1921 informing the plaintiff that the five bags were lost. Plaintiff contended that as the loss occurred on 7th September 1921, time under Art 30 began to run from that date. Held, that the loss occurred when the short delivery which constituted the loss was made, that is to say, in November 1920 and that the suit was barred.)

- (1927) A I R 1927 Pat 335 (336) 103 Ind Cas 353, *Gopa Ram Gours Shankar v G I P. Ry Co*]

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Note 7

to the carrier that the injury to the consignment had occurred prior to that date, a suit brought on 15th of October 1932 was held clearly time barred under this Article. In such a case the consignee cannot claim that limitation runs only from the date of open delivery to him.⁵

Article 31

31.* Against a carrier | **One year.** | **When the**
for compensation for non- | | **goods ought**
delivery of, or delay in | | **to be deli-**
delivering, goods. | | **vered.**

Synopsis

1. Legislative changes.
2. Scope of the Article.
3. Carrier.
4. Suit, by whom may be brought.
5. Suit, against whom may be brought.
6. Notice of claim to railway administration.
7. Non-delivery of goods
8. Conversion by carrier — Suit for damages.
9. Acknowledgment of non-delivery.
10. Starting point of limitation.

Other Topics

Article applies to all suits irrespective of whether in contract or tort

Loss of goods in transit—Starting point of limitation	See Note 7, Pt 3
Non delivery and short delivery	See Note 10, Pt 3
Non delivery of part of goods—Starting point of limitation	See Note 7, Pt 3
Suit for surplus sale proceeds—Article not applicable	See Note 10, Pt 4
	See Note 8, Pt 4

1. Legislative changes.—Articles 30 and 31 of the Act of 1877 (corresponding to Articles 36 and 37 of the Act of 1871 respectively)

*** Act of 1877, Article 31**

31 —Against a carrier for compensa-	Two years	When the goods
tion for non delivery of, or delay in deli-		ought to be delivered
vering goods		

NOTE—This Article had formerly been in Part V. It was transferred to Part IV by Act 10 of 1899. The limitation was reduced from two years to one year by 8-3 of the same Act which came into force on 1st May 1899.

Act of 1871, Article 37.

37 —Against a carrier for delay in	Two years	When the goods
delivering goods		ought to be delivered

Act of 1859.

No corresponding provision

provided a period of two years. By Section 3 of Act 10 of 1899, this period was reduced from two to one year and the words non delivery of, or were inserted in Article 31. (See Note 7 *infra*)

2 Scope of the Article—As stated in Note 1 to Article 30 *ante*, these Articles are intended to provide exceptionally for the case of carriers on account of the difficulty of investigating and settling claims preferred against them after a long lapse of time in respect of a few articles out of the quantity of goods that are constantly passing through their hands. Where therefore a suit falls under this Article as well as under a general Article the former will prevail against the latter on the principle *generalia specialibus non derogant*¹

3. Carrier — See Note 2 to Article 30

4. Suit, by whom may be brought — See Note 4 to Article 30

5. Suit, against whom may be brought. — See Note 5 to Article 30

6 Notice of claim to railway administration — See Note 6 to Article 30

7. Non delivery of goods.—Under the Article as it stood prior to 1877 the words non delivery of or were absent. There was a conflict of opinion as to whether a *non delivery* being a breach of contract was within this Article. One view was that it was not on the ground that the Article only referred to cases of tort as was shown by its position among a number of Articles dealing with torts¹. A contrary view was expressed in the undermentioned case². By Section 3 of Act 10 of 1899 the Legislature amended the Article by inserting the words “non delivery of or” in the Article. It is now clear that the present Article applies to *all* suits for compensation for non delivery, irrespective of the question whether the suit is laid in contract or in tort³.

Article 31 — Note 2

- 1 (1916) A I R 1916 Mad 314 (315) 30 Ind Cas 840 39 Mad 1 (F B) Venkata subba Rao v Anatic Steam Navigation Co Calcutta
- (1926) A I R 1926 Mad 57 (58) 91 Ind Cas 525 Modura Detasthanam v Sindaram Annai
- (1925) A I R 1925 Lah 478 (479) 6 Lah 301 68 Ind Cas 979 Secy of State v Dunlop Pubber Co Ltd Delhi

Note 7

- 1 (1893) 7 Bom 478 (480) 8 Ind Jur 98 Mohan Singh v Henry Conder
- (1886) 12 Cal 477 (480) Danmul v British India Steam Navigation Co
- (1881) 3 Mad 107 (110 111) British India Steam Navigation Co v Mohamad Fack & Co

Article 31 Note 7

Illustration

A suit was brought by plaintiff against defendant for damages for failure to deliver 879 baskets of hard molasses which the defendant as carrier had accepted for carriage and had agreed to carry for the plaintiff from Sauravo in Java to be delivered to the plaintiff at Calcutta. The steamship arrived at Calcutta on 25th January 1920 and left Calcutta on 20th February 1920. Goods ought to have been delivered some time between the 27th and 30th January 1920. Plaintiff brought the present suit on 7th June 1921. Held that Article 31 applied and that the suit was barred by limitation ⁴.

-
- (1918) A I R 1918 Mad 1173 (1173) 42 Ind Cas 536, *British India Steam Navigation Co Ltd v Hussain Kasim Shett*
- (1914) A I R 1914 Mad 57 (58) 24 Ind Cas 676 *Venkatasubba Rao v Asiatic Steam Navigation Co* (Suit against a carrier for non delivery of goods is governed by Art 31)
- (1915) A I R 1915 Nag 6 (7) 11 Nag L R 174 31 Ind Cas 474 *11 Muham mad v G I P Railway Co*
- (1928) A I R 1928 Cal 371 (375) 116 Ind Cas 148, *Rivers Steam Navigation Co Ltd v Bisneswar Kundu*
- (1925) A I R 1925 Cal 559 (560) 52 Cal 372 86 Ind Cas 127, *Chiranjilal Bamlal v B N Ry Co*
- (1922) A I R 1922 Cal 330 (330) 70 Ind Cas 857 *Lal Mohan Harra v E I Railway Co* (Suit for short delivery of goods—Art 31 applies)
- (1917) A I R 1917 Cal 103 (104) 38 Ind Cas 502, *E I Railway Co v Ram Autar*
- (1900) 3 Ind Cas 469 (460) (Cal) *Indian General Navigation and Ry Co Ltd v Nanda Lal Banik* (A suit for damages against a carrier for failure to deliver goods falls within Art 31 (as amended by Act 10 of 1899 S 3) and not within Art 115)
- (1911) 10 Ind Cas 122 (125) 33 All 544 *G I P Railway Co v Ganpat Rai*
- (1909) 26 Bom 462 (570) 4 Bom L R 417 *Hajee Ijam v Bombay & Persia Steam Navigation Co*
- (1927) A I R 1927 Pat 335 (335) 103 Ind Cas 383 *Gopi Ram Gouri Shankar v G I P Ry Co Ltd*
- (1925) A I R 1925 Pat 611 (612) 89 Ind Cas 672 4 Pat 482 *E I Railway Co v Sagar Mull*

- (1918) A I R 1918 Sind 6 (9) 13 Sind L R 1 51 Ind Cas 570 *Ludhmal Purlomal & Co v Secretary of State* (Where a suit is framed as a suit to recover compensation for non delivery of goods Art 31 applies and not Art 30 and the cause of action is the failure of the defendants to perform their contract. It is not a case of misfeasance)
- (1923) A I R 1923 Pat 285 (287) 2 Pat 442 72 Ind Cas 440, *G I P Railway Co v Jutan Ram Nirmal Ram*
- 4 (1921) A I R 1921 Cal 173 (176) 80 Ind Cas 612 *Vally Muhammad v Netherland Steam Navigation Co*

But in *Rodha Sham v Secretary of State*,⁵ Chatterji, J., applied Article 115 to a case of non-delivery of goods on the ground that it was a case of a breach of a written contract, and in so doing followed two old decisions decided prior to the amendment. He was, it seems, of opinion that Article 31 was not applicable to such a case. The decision on this point, it is submitted, cannot be supported and has generally been disapproved⁶ and not followed in later decisions.⁷

Non delivery of the consignment means non delivery of the consignment as a whole as contrasted with short delivery. Hence, a case of short delivery which is equivalent to loss of the portion of the consignment undelivered, is governed, for purposes of limitation, by Article 30.⁸

8. Conversion by carrier — Suit for damages — There is a difference of opinion as to whether a suit against a carrier for compensation in respect of the wrongful conversion of the goods entrusted to him is a suit for non delivery of the goods within the meaning of this Article. In *G I P Railway v Radha Kisan Jaisikan*,¹ it was observed as follows: "Non delivery may be due to many causes of which conversion is one, but the cause of action is the non delivery of the goods whether due to loss, theft, destruction, conversion or misdelivery to somebody else." The same view has been held by the Lahore High Court in *Secretary of State v The Dunlop Rubber Co Ltd*.² A contrary view has been taken in the undormentioned cases,³

5 (1917) A I R 1917 Cal 640 (643) 44 Cal 16 34 Ind Cis 120

6 (1928) A I R 1928 Cal 371 (375) 116 Ind Cas 148 *Inter Steam Navigation Co Ltd v Bisneswar Kundu*

(1924) A I R 1924 Cal 173 (175) 60 Ind Cis 612 *Vally Muhammad v Netherland Steam Navigation Co*

(1925) A I R 1925 Pat 611 (612) 4 Pat 482 69 Ind Cis 672, *F I Railway Co v Sagar Mull*

(1925) A I R 1925 Pat 727 (729) 90 Ind Cis 374 5 Pat 106 *Bengal Nagpur Railway Co Ltd v Hamur Mull Chagan Mull*

7 (1922) A I R 1922 Cal 330 (331) 70 Ind Cas 857, *Lal Mohan Hazra v E I Railway Co*

(1925) A I R 1925 Cal 553 (560) 52 Cal 322 86 Ind Cis 127, *Chitrang Lal Ramial v B N Ry Co Ltd*

(1923) A I R 1923 Pat 298 (299) 71 Ind Cas 565 *Rameswar Das Vals Ram v F I Ry Co Ltd*

(1918) A I R 1918 Sind 58 (59) 45 Ind Cis 173 11 Sind L R 103, *Louis Dreyfus & Co v Secretary of State*

8 (1923) A I R 1923 Pat 298 (299) 71 Ind Cas 565 *Rameswar Das v F I Ry*
[But see (1937) A I R 1937 All 132 (132) 171 Ind Cis 532 *Secy of State v Diulal Ram Mahhan Lal* (Case of short delivery — It was admitted by the counsel that Art 31 would apply to the case)]

Note 8

Articles 31 Notes 8-10

namely that a suit based on conversion will fall under Articles 48 or 49 *infra* and not under this Article. The said decisions have not adverted to the fact that they are general Articles, nor to the principle that where a case falls under this as well as under a general Article, this Article will prevail. It is submitted that the decisions cannot be accepted as correct. See Note 2 *ante*.

Where a railway company sold goods entrusted to it under Section 55 of the Railways Act, it was held that there was no wrongful conversion of the goods and that a suit to recover the surplus sale proceeds was governed by Article 62 and not by this Article.⁴

9. Acknowledgment of non-delivery.—A letter, if it amounts to acknowledgment of non delivery written by the defendant (carrier) long after the expiry of the limitation, cannot save its operation.¹ A letter that denies the liability to account for non delivery of goods is not an acknowledgment.²

10. Starting point of limitation.—Time runs under this Article from the date on which the goods ought to be delivered.^{1a} This date may vary according to circumstances of each case. Ordinarily, a reasonable time is calculated from the date when the goods are consigned.¹ Where there is an agreement that the goods should

(1935) A I R 1935 All 601 (603) 157 Ind Cas 1080 *Secretary of State v Simla Footwear Co* (Goods sold by railway company against express direction of plaintiff—Suit for damages—Case being one of conversion, Article 48 applies and not Article 31.)

[See also (1934) A I R 1934 Pat 507 (510) 151 Ind Cas 990 18 Pat 759 *Sundary Shukla v Secretary of State*]

4 (1921) A I R 1921 Mad 362 (362) 62 Ind Cas 742 44 Mad 873 *Tarabchand v M & S M Ry Co*

Notes 9

1 (1909) 8 Ind Cas 469 (469) (Cal) *Indian General Navigation and Railway Co Ltd v Nanda Lal Bank*

(1920) A I R 1920 All 157 (158) 42 All 390 58 Ind Cas 547 *Mutsaddi Lal v B B & C I Railway Co and Rohilkhand Kumaun Ry Co*

2 (1918) A I R 1918 Sind 6 (9) 51 Ind Cas 570 13 Sind L R 1, *Ludhmal Partomal & Co, v Secretary of State*

[See also (1926) A I R 1926 Nag 57 (59) 90 Ind Cas 135 G I P *Railway Co Ltd v Radha Kisan Jaisikan*]

Note 10

1a (1920) A I R 1920 All 157 (158) 42 All 390 58 Ind Cas 547, *Mutsaddi Lal v B B & C I Ry Co and Rohilkhand Kumaun Ry Co*

(1925) A I R 1925 All 780 (780) 87 Ind Cas 763, *Durga Prasad Badri Prasad v B B & C I Railway Co*

1 (1925) A I R 1925 All 656 (657) 47 All 549 87 Ind Cas 579 G I P Ry v *Radhay Mal Mann Lal*

(1920) A I R 1920 All 157 (158) 42 All 390 58 Ind Cas 547, *Mutsaddi Lal v B B & C I Ry Co and Rohilkhand Kumaun Ry Co*

(1911) 10 Ind Cas 122 (125) 33 All 544, G I P Ry Co v *Ganpat Rai*

(1915) A I R 1915 Nag 6 (8) 11 Nag L R 174 31 Ind Cas 474 *Ali Muhammad v G I P Ry Co*

(1933) A I R 1933 Pat 45 (48) 12 Pat 67 141 Ind Cas 813, *B and N W Railway Co Ltd v Kameshwar Singh*

(1918) A I R 1918 Sind 6 (9) 13 Sind L R 1 51 Ind Cas 570, *Ludhmal Partomal & Co v Secretary of State*

remain with the carrier for a longer time than is actually and reasonably required, time will run only from the expiry of such period^{1b} Where no time is fixed for delivery, if the correspondence between the parties shows that the matter was being enquired into and that there was no refusal to deliver well within a year of the suit, this Article cannot be pleaded as a bar, for, in such a case it cannot be said that the suit was brought more than a year from the expiry of a reasonable time within which the goods should have been delivered² Where the suit is for damages for loss of goods *in transit*, the starting point is the date when the railway company finally says that the goods cannot be delivered³ In a suit against a carrier for compensation for non delivery of *part of the goods*, time begins to run when consignee is entitled to open delivery⁴

Article 31
Note 10

Part V. — Two years

32. Against one who, having a right to use property for specific purposes, perverts it to other purposes

Two years.

When the perversion first becomes known to the person injured thereby.

Article 32

Synopsis

1. Scope of Article.
2. Right to use property for specific purposes.
3. Co-sharers or joint proprietors.
4. Perversion.
5. Starting point of limitation.
6. Starting point of limitation — Burden of proof.
7. Limitation and equitable relief.

Act of 1877, Article 32

Same as above.

Act of 1871, Article 38

The first two columns were same as above

The third column was "The time of the perversion"

Act of 1859.

No corresponding provision.

- 1b(1926) A I R 1926 Nag 57 (59) 90 Ind Cas 135 G I P Railway Co v Radha Kisan Jai Kisan
- 2 (1923) A I R 1923 All 22 (24) 68 Ind Cas 991 45 All 43 Jugal Kishore v G I P Railway Co
[See also (1928) A I R 1928 Cal 371 (376) 116 Ind Cas 149 Pivers Steam Navigation Co v Disaswar]
- 3 (1924) A I R 1924 Mad 567 (569) 77 Ind Cas 511, S I Railway Co v Narayana Iyer
- 4 (1927) A I R 1927 Oudh 478 (480) 106 Ind Cas 311 3 Luck 102, Dala Prasad v B N H Ry Co

Article 32
Note 1

Other Topics

Article is not confined to particular relief	...	See Note 1
Article is independent of nature of remedy	.	See Note 1, Pts 1 to 4
Right of easement — Whether right to use	.	See Note 2, Pts 4 to 9

1. Scope of Article. — The description of the kind of suits to which the Article applies is couched in the following words "against one who, having a right to use property for specific purposes, perverts it to other purposes" Thus, the Article is *general* in its terms and does not describe the suits to which it applies with reference to the *kind of relief* that is asked for Hence, the Article seems to be applicable to *all* suits based on the cause of action referred to therein, viz the perversion by the defendant of the suit property to purposes other than those for which he (the defendant) has a right to use such property The *remedy* that may be asked for in the particular case is immaterial from the point of view of the applicability of the Article¹ Thus, the Article is equally applicable whether the suit is one for ejectment,² or for injunction,³ or for compensation⁴ provided the cause of action is the perversion of the property to a purpose different from that for which the defendant is entitled to use it.

Where, however, the cause of action for a suit is *not* the perversion of property as contemplated by the Article but something else, the Article will not apply although the cause of action on which the suit is based may have resulted from a "perversion" of the property Thus, where a suit is based on the *ouster* of the plaintiff from certain property, this Article will not apply although such ouster has resulted from a perversion of the property by the defendant and even though a relief in respect of such perversion is *incidentally* asked for⁵

Article 32 — Note 1

- 1 (1897) 24 Cal 160 (162) 1 Cal W N 223, *Soman Gope v Raghunath Ojha*.
(Suit for eviction)
- (1899) 26 Cal 564 (568) 3 Cal W N 464 (F B) *Sharooop Dass Mondal v Jogghessur Roy Choudhrya* (Suit for mandatory injunction directing tenant to fill up tank, for compensation and for ejectment in default)
- 2 (1916) A I R 1916 Cal 395 (396) 33 Ind Cas 923, *Taher Mondal v Tarafdar Garami*
- 3 (1924) A I R 1924 All 614 (815) 78 Ind Cas 849, *Piyari Lal v Bed Ram*.
- 4 (1921) A I R 1921 Cal 62 (64) 62 Ind Cas 779, *Krishna Das v Mohendra Chandra*
- 5 (1933) A I R 1933 Lah 705 (709) 14 Lah 267 145 Ind Cas 553 (F B), *Vastan Singh v Santa Singh*
(1912) 15 Ind Cas 285 (286) 1912 Pun Re No 124 *Achar Singh v Badhara Singh* (Suit for ousting the defendant from encroachment made by him upon the shamilat land used as a road)
- (1934) A I R 1934 Lah 701 (703) 156 Ind Cas 858, *Qarun v Dewa Singh*.
(It must be assumed that the suit was based on an ouster)
- (1937) A I R 1937 All 472 (473 474) 170 Ind Cas 121 I L R (1937) All 623, *Lachman v Lal Ratnalar Singh* (Tenant building on land not

2. Right to use property for specific purposes.—The Article applies only where the defendant has some right to use the property and he perverts it for other purposes. It has no application where he has no right at all to the property or to make any use of it.¹ The Article likewise has no application where there is only a *license* to use the property for certain purposes and no legal right to do so.²

The words "right to use property" refer not to the time when the suit is brought but when the perversion took place.³

There is a difference of opinion as to whether a right of *easement* over another's land is a right to use the property for a specific purpose. In *Bishambar Sahai v Janki Dad*,⁴ it was assumed by the High Court of Allahabad that a right of easement to rest a thatch upon another's wall is a right to use the wall for a specific purpose and an encroachment of the right or increase of the burden on the wall is a perversion within the meaning of this Article. In *Juddu Ram v Kanhara Ram*,⁵ an earlier case, also of the same High Court, the same assumption was made, but it was held nevertheless that the Article could not be applied to a suit based upon such perversion. The Court observed as follows—

"The language of the Article is inappropriate to a case of encroachment upon an easement or right of support. No doubt the language of Article 32 in a colloquial sense exactly fits and describes the complaint in this case, but I decide that it is altogether inapplicable on the broad ground that the defendant's case here is a claim of a right of support or easement which can only be acquired after 20 years' uninterrupted enjoyment, and to hold that the plaintiffs were prohibited by Article 32 from

forming part of his tenancy.—Suit by zamindar for demolition of building.—Suit is not merely for prevention of perversion but for assertion of zamindar's title.—Suit is not governed by Art. 32.)

(But see (1929) A I R 1929 Lah 166 (167) 112 Ind Cas 644 *Nand Ram v Jas Chand* (This is not good law after A I R 1933 Lah 705 (F B))

(1929) A I R 1929 Lah 535 (536) 118 Ind Cas 447, *Dewa Singh v Qarun* (Village shamilat pathway—This is not good law after A I R 1933 Lah 705 (F B))

(1930) A I R 1930 Lah 283 (284) 121 Ind Cas 186, *Bhagwana v Bhankana* (Hotha built on a common land—This cannot be good law after A I R 1933 Lah 705 (F B))]

Note 2

1 (1888) 10 All 634 (635) 1899 All W N 257 *Masharaf Ali v Iftikhar Husain* (Trespasser planting trees on waste land of plaintiff zamindar)

2 (1935) A I R 1935 All 964 (965) 159 Ind Cas 521, *Gurcharan Prasad v Jay Narain Singh* (Planting of trees by defendant who had only a license to use the property with general public for grazing cattle as thrashing floor etc.)

(1931) A I R 1931 All 836 (837) 153 Ind Cas 670, *Lachman v Patnagar* (See (1924) A I R 1921 All 443 (443) 46 All 52 75 Ind Cas 206, *Mahomed Shafi v Bimdeshr Saran Singh* (Planting trees by defendant without any right to do so))

3 (1891) 1891 All W N 165 (166) *Krishna Murari Ram v Ghivaran Singh* (The defendant was a tenant at the time of perversion though not at the time of suit—Article applies)

4. (1922) A I R 1922 All 320 (320) 69 Ind Cas 619

5. (1916) A I R 1916 All 92 (93) 33 Ind Cas 90

Article 32
Notes
4—7

5 Person entitled to use land as *sehan darwaza* only constructing structures upon it commits perversion⁵ Person entitled to use the water of A's tank for first crop using it for second crop does not commit any perversion⁶

5. **Starting point of limitation.**—Time runs under this Article from the date when the perversion first becomes known to the person injured thereby Where at the time of perversion one of the four plaintiffs in a suit was in jail, another had absconded in fear of a criminal charge and the other two plaintiffs were minors, it was held that they could not be charged with knowledge of the perversion¹

6. **Starting point of limitation—Burden of proof.**—In cases where the perversion took place more than two years before the suit, it is for the plaintiff to state and prove when the perversion became known to him¹

7. **Limitation and equitable relief.**—The mere fact that the suit is within time does not entitle the plaintiff to a relief, if the conduct of the plaintiff does not entitle him to the relief in equity For example, where a tenant of an agricultural holding built a construction on it at a cost of a lakh of rupees and the landlord being aware of the commencement and progress of the building took no steps to restrain the defendant from proceeding with it but sued for a mandatory injunction more than a year after its completion, it was held that the Court would be justified in refusing the relief of the mandatory injunction notwithstanding the suit was brought within the time prescribed by this Article¹

(1897) 24 Cal 160 (162, 163) 1 Cal W N 223 *Soman Gope v Raghunath Ojha*
 [See (1920) A I R 1920 Oudh 233 (234) 57 Ind Cas 476 23 Oudh
 Cas 163 *Khuda Bakhsh v Gauri Shanker*

(1908) 11 Oudh Cas 379 (380), *Manohar Nath v Raghunath Lal*
 (Limitation dates from the planting of each tree)]

5 (1938) A I R 1938 All 20 (21) 173 Ind Cas 140 *Ram Narain Singh v Shripal Singh*

6 (1936) A I R 1936 Mad 250 (250) 161 Ind Cas 538 *Manga Reddy v Venkataraghata Iyyangar*

Note 5

1. (1911) 10 Ind Cas 186 (186) (Oudh) *Bharmajit Singh v Sarnam*

Note 6

1 (1911) 12 Ind Cas 108 (109) (All) *Lach Pao Pao v Jangsi Pao*

(1905) 9 Cal W N 246 (246) (Notes) *Gobind Chandra v Karimuddin Soyai*
 (There must be a finding as to the date of knowledge)

Note 7

1 (1906) 29 Mad 497 (501) (Note), *Santharalingam Chettiar v S A Palli*

33.* Under the Legal Representatives' Suits Act, 1855, against an executor	Two years.	When the wrong complained of is done	Article 33
34.* Under the same Act against an administrator	Two years.	Ditto	Article 34
35.* Under the same Act against any other representative	Two years	Ditto	Article 35

1. Scope of Articles 33, 34 and 35 — Article 20 *ante* provides a period of limitation for suits by executors, administrators or

* OLD ACTS

The Articles of the old Acts correspond to the present Articles 33, 34 and 35 of the Bill —

Article 33 of the Act of 1877 — *See* *Annals* (in effect)

Article 34 of the Act of 1877 — *See* *Annals* Art. 34 of the Act of 1877

Act of 1877 — No corresponding provision

Note — Articles 33 and 34 of the Act of 1877 have been omitted in the present Act. Article 35 of the Act has been inserted in the present Act and it preserves the substance of the present Act. *See* *State of Objects of the Law*

Articles 33 and 34 of the Act of 1877 were as follows —

33. If the executor of a will	Two years	When the cause of action arises
34. If the administrator of a will	Two years	When the cause of action arises

Remarks for the purpose of Articles 33 and 34 of the Act of 1877 —

Article 33. A wife can sue a husband for the loss of her property by the law of intestacy in a suit of intestacy. The Civil Code of 1907 (Act of 1907) has set out the provisions relating to the loss of property by a wife (Order 21 of 1907) — *State of Objects of the Law*

Article 34. The provisions of Article 34 are very limited. It is not applicable to a suit for the loss of property by the law of intestacy. It is not applicable to a suit for the loss of property by the law of intestacy. It is not applicable to a suit for the loss of property by the law of intestacy.

Article 32
Notes
4—7

5 Person entitled to use land as *sehan darwaza* only constructing structures upon it commits perversion⁶ Person entitled to use the water of A's tank for first crop using it for second crop does not commit any perversion⁶

5. Starting point of limitation.—Time runs under this Article from the date when the perversion first becomes known to the person injured thereby Where at the time of perversion one of the four plaintiffs in a suit was in jail another had absconded in fear of a criminal charge and the other two plaintiffs were minors, it was held that they could not be charged with knowledge of the perversion¹

6. Starting point of limitation—Burden of proof.—In cases where the perversion took place more than two years before the suit it is for the plaintiff to state and prove when the perversion became known to him¹

7. Limitation and equitable relief.—The mere fact that the suit is within time does not entitle the plaintiff to a relief, if the conduct of the plaintiff does not entitle him to the relief in equity For example, where a tenant of an agricultural holding built a construction on it at a cost of a lakh of rupees and the landlord being aware of the commencement and progress of the building took no steps to restrain the defendant from proceeding with it but sued for a mandatory injunction more than a year after its completion, it was held that the Court would be justified in refusing the relief of the mandatory injunction notwithstanding the suit was brought within the time prescribed by this Article¹

(1897) 24 Cal 160 (162 163) 1 Cal W N 223 *Soman Gope v Raghunir Ojha*
 [See (1920) A I R 1920 Oudh 233 (234) 57 Ind Cas 476 23 Oudh
 Cas 163 *Khuda Baksh v Gauri Shanher*

(1908) 11 Oudh Cas 379 (390) *Manohar Nath v Raghubans Lal*
 (Limitation dates from the planting of each tree)]

5 (1938) A I R 1938 All 20 (21) 173 Ind Cas 140 *Ram Narain Singh v Shripat Singh*

C (1936) A I R 1936 Mad 250 (250) 161 Ind Cas 538 *Manga Reddi v Venkataraghava Ayyangar*

Note 5

1 (1911) 10 Ind Cas 186 (186) (Oudh) *Bikarmazit Singh v Sarnati*

Note 6

1 (1911) 12 Ind Cas 108 (109) (All) *Lach Pam Rao v Jangsi Rai*

(1905) 9 Cal W N 246 (246) (Notes) *Gobind Chandra v Kamayuddi Soyai*
 (There must be a finding as to the date of knowledge)

Note 7

1 (1906) 29 Mad 497 (501) (Note) *Sankaralingam Chettiar v S A Ralli*

33.* Under the Legal Representatives' Suits Act, 1855, against an executor.	Two years.	When the wrong complained of is done.	Article 33
34.* Under the same Act against an administrator.	Two years.	Ditto.	Article 34
35.* Under the same Act against any other representative.	Two years.	Ditto.	Article 35

1. Scope of Articles 33, 34 and 35.—Article 20 *ante* provides a period of limitation for suits *by* executors, administrators or

* OLD ACTS.

The Articles of the old Acts corresponding to the present Articles 33, 34 and 35 are the following —

Article 33 of the Act of 1877 — Same as above (in effect)

Article 39 of the Act of 1871 — Same as in Art. 33 of the Act of 1877.

Act of 1859 — No corresponding provision

Note — Articles 34 and 35 of the Act of 1877 have been omitted in the present Act. Article 33 of that Act has been divided into three Articles in order to preserve the numbering of the present Act. See *Statement of Objects and Reasons*

Articles 34 and 35 of the Act of 1877 were as follows —

34. For the recovery of a wife	Two years.	When the possession is demanded and refused
35. For the restitution of conjugal rights	Two years	When the restitution is demanded, and is refused by the husband or wife, being of full age and sound mind

Reasons for the omission of Articles 34 and 35 of the Act of 1877 —

Article 34 "A wife, even if a minor, should not be looked upon by the law as a chattel and an object of possession. The Civil Procedure Code Bill of 1907 [Act 5 of 1908] has left out the provision relating to decree for the recovery of a wife (Order 21 Rule 32)".—*Statement of Objects and Reasons*

Article 35 "The scope of this Article is very limited. It does not apply to cases arising under the Indian Divorce Act. The Allahabad High Court has held that it does not apply to Hindus or Mahomedans as their personal law does not require an antecedent demand to sustain a suit for restitution of conjugal rights, nor make restitution unenforceable against a minor and it has further held that the withholding of conjugal rights by

husband would be compelled to take the matter into Court within two years".—*Statement of Objects and Reasons*

**Articles 33-35
Note 1**

representatives under the Legal Representatives' Suits Act, 1855. Articles 33, 34 and 35 prescribe the period of limitation for suits against executors, administrators or representatives under the same Act. The second paragraph of Section 1 of that Act (12 of 1855) runs as follows —

“and further, an action may be maintained against the executors or administrators or heirs or representatives of any person deceased for any wrong committed by him in his lifetime for which he would have been subject to an action, so as such wrong shall have been committed within one year before such person's death, and the damages to be recovered in such action shall, if recovered against an executor or administrator bound to administer according to the English law, be payable in like order of administration as the simple contract debts of such person.”

As is seen from the Preamble to Act 12 of 1855, the Act applies only in respect of certain wrongs which do not survive to or against executors, administrators or representatives.¹ It does not also apply to a suit commenced against the wrongdoer himself in his lifetime but which is continued against his legal representatives after his death.²

Article 36

<p>36.* For compensation for any malfeasance, misfeasance or non-feasance independent of contract and not herein specially provided for.</p>	<p>Two years.</p>	<p>When the malfeasance, misfeasance or non-feasance takes place.</p>
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Synopsis

1. Scope.
2. “Independent of contract.”
3. “For compensation.”
4. Commencement of limitation.
5. Continuing wrongs.
6. Misfeasance applications under Section 235 of the Indian Companies Act.
7. Illustrations of wrongs within the meaning of Article 36.
8. Suit against trustees.

* Act of 1877, Article 36
Same as above

Articles 33, 34 & 35 — Note 1

- 1 See also (1864) 1 Suth W R 251 (251), *Chunder Monee Dasse v Santomone Dasse*
- 2 (1889) 13 Bom 677 (679), *Haridas Ramdas v Ramdas Mathuradas* (1905) 29 Mad 487 (488), *Ramchode Doss v Rukmany Bhoj*

Other Topics

Article 36
Note 1

Article not applied—Instances — See N to 1 Pt 6 to 1 N to 2 Pt 2 to 2
 Contra. may be imp'd or merged in defence See N to 2, Pt 2 to 2
 Preceding attachment under Section 145 Criminal Procedure Code See N to 2 Pt 11
 Section 24 and the Article—Starting point of "not" See N to 4 Pt 8
 Nature of standing or ps See N to 5, Pt 3

1. Scope.—Article 36 is an 'omnibus Article' which concludes the series of causes of action for which the prescribed period of limitation is two years.¹

The words 'malfeasance, misfeasance and non-feasance independent of contract' are of the widest import and embrace all possible acts and omissions commonly known as torts, i.e. wrongs independent of contract.² They refer to actions which may lie on account of the commission of some act which is in itself unlawful, or of the improper performance of some lawful act or of the omission of some act which a person is by law bound to do.³ The Article applies as a residuary Article in case of wrongs independent of contract whereas the residuary Article applicable for actions *ex contractu* is Article 115.⁴

Being a residuary Article, where a case is specially provided for elsewhere in the Act this Article does not apply, though the act complained of may be one of malfeasance, etc.⁵ Thus the following

Act of 1871, Article 40

40 —For compensation for any wrong, malfeasance nonfeasance or misfeasance, independent of contract and not herein specially provided for	Two years	When the wrong led to or the default happens
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Act of 1859

No corresponding provision

Article 36 — Note 1

- 1 (1917) A I R 1917 All 270 (278) 39 Ind Cas 532 33 All 922, *Jam Narsim v Brij Dhanraj Singh* (1917) 43
- 2 (1837) 11 Bom 133 (135) *Feroz Bhanji v The S S Sultans*
 [See also (1894) 25 Cal 692 (193) 2 Cal W N 205 (1 11), *Mungun Jha v Dohun Lal Koor* (But the words are not generally applied to wrongful acts by persons in fiduciary or quasi-industry relationship such as executors, trustees and directors of companies—*See Maclean v C J. Ooster*)]
- 3 (1932) A I R 1932 All 251 (259) 51 All 407 136 Ind Cas 603, *Kripasim v Kunwar Bihulur*
 (1917) A I R 1917 Mal 100 (103) 35 Ind Cas 98 *Jeeramma v Sull* 11 11
- 4 (1929) A I R 1929 Pat 215 (216) 120 Ind Cas 626 8 Pat 770 *Jayram v Maricore v Aklidra Jha*
- 5 (1927) A I R 1927 Cal 117 (121) 101 Ind Cas 62, *Jinnu Lal Ghouse v Hfid Coal Co*
 (1918) A I R 1918 Mal 100 (103) 47 Ind Cas 416 41 Mal 129 *Bharat Singh Mudhar v Arunachal Singh*
 (1930) A I R 1930 Mal 100 (103) 47 Ind Cas 416 41 Mal 129 *Bharat Singh Dett Chand & Co v Sonajy Kapurchan*

Article 36 Note 1

suits being specially provided for by the Articles noted against them are not governed by this Article —

- 1 Suit for relief on the ground of fraud—Article 95^a
- 2 Suit for injury to person—Article 22⁷
- 3 Suit for injury to reputation of money by a servant—Article 89^a
- 4 Suit for damages against a Municipality for omission to complete repairs quickly and for the closing of the road at both ends due to negligence and malice⁸ and suit for damages against such a body for negligence in putting up drainage works in plaintiff's land—Article 21¹⁰
- 5 Suit for compensation for the unlawful seizure of a ship—Article 29¹¹

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- (115) A I R 1935 Nag 189 (190) 82 In 1 Cas 493 *S. vs. Lalit v. Torian* (Injury to person by instruction of water urn—Art. 97 and 110)
- (1021) A I R 1924 Nag 15 (127-128) 80 In 1 Cas 701 20 Nag L R 60 *Harold v. Prasad v. K. v. K. v. K.* (Trespass to land—Art. 110)
- (1895) 2 C 187 (852) *S. v. Lalit v. Torian* (Suit for damages for injury to person by instruction of water urn—Art. 97 and 110)
- (1814) 5 Cal 493 (814-899) 2 Cal W N 205 (110) *M. v. Jha v. D. v. D.* (Suit for damages for injury to person by instruction of water urn—Art. 97 and 110)
- (1009) 11 C 187 (852) 90 Cal 141 *J. v. D. v. D.* (Suit for damages for injury to person by instruction of water urn—Art. 97 and 110)
- [See (107) A I R 1904 Cal 707 (701) 04 In 1 Cas 411 *M. v. Jha v. D. v. D.* (Suit for damages for injury to person by instruction of water urn—Art. 97 and 110)]
- (1010) A I R 1910 M 111 (911) 30 I 1 Cas 840 20 M 111 (210) *J. v. D. v. D.* (Suit for damages for injury to person by instruction of water urn—Art. 97 and 110)
- (1015) A I R 1935 All 995 (1000) 159 In 1 Cas 917 59 All 911 *Delra D. v. D.* (Suit for damages for injury to person by instruction of water urn—Art. 97 and 110)
- (1090) A I R 1910 All 579 (574-576) 121 In 1 Cas 160 *J. v. D. v. D.* (Suit for damages for injury to person by instruction of water urn—Art. 97 and 110)
- 7 (104) A I R 1914 All 200 (201-211) 81 In 1 Cas 706 *M. v. Jha v. D. v. D.* (Suit for damages for injury to person by instruction of water urn—Art. 97 and 110)
- (1019) 8 In 1 Cas 124 (125) (All) *J. v. D. v. D.* (Suit for damages for injury to person by instruction of water urn—Art. 97 and 110)
- 8 (1010) A I R 1910 Cal 44 (215) 24 In 1 Cas 453 *Sho. v. S. v. S.* (Suit for damages for injury to person by instruction of water urn—Art. 97 and 110)
- 9 (194) A I R 1910 All 579 (579) 95 In 1 Cas 1010 48 All 500 *Municipal v. J. v. D. v. D.* (Suit for damages for injury to person by instruction of water urn—Art. 97 and 110)
- [But see (199) A I R 1909 Loh 790 (735) 121 In 1 Cas 500 *M. v. Jha v. D. v. D.* (Suit for damages for injury to person by instruction of water urn—Art. 97 and 110)]
- 10 (1000) 2 In 1 Cas 819 (823-824) 1909 In 1 No 72 *J. v. D. v. D.* (Suit for damages for injury to person by instruction of water urn—Art. 97 and 110)
- [But see (1919) 21 In 1 Cas 194 (427) 11 O. In 1 Cas 211 *W. v. D. v. D.* (Suit for damages for injury to person by instruction of water urn—Art. 97 and 110)]
- 11 (1915) A I R 1915 Cal 491 (495) 42 Cal 85 24 In 1 Cas 403 *M. v. Jha v. D. v. D.* (Suit for damages for injury to person by instruction of water urn—Art. 97 and 110)

- 6 Suit for compensation for malicious arrest by a Police Sub Inspector—Article 2¹²
- 7 Suit for value of crops wrongfully attached cut and sold,¹³ or for compensation for carrying away trees *after* cutting—Article 48 or Article 49¹⁴
- 8 Suit for specific moveable property or for unlawfully seizing it—Article 49¹⁵
- 9 Suit for compensation for libel or slander — Article 24 or Article 25¹⁶
- 10 Suit for wrongful attachment and *seizure* of goods under legal process—Article 29¹⁷
- 11 Suit for profits of immovable property wrongfully received by the defendant—Article 109¹⁸
- 12 Suit for wrongfully detaining *specific moveable* property—Article 49¹⁹
- 13 Suit for damages for the defendants unlawfully setting fire to and destroying pepper vines on plaintiff's land — Article 39²⁰
- 14 Suit for damages for seduction—Article 22^{20a}

12 (1932) A I R 1932 All 10 (18) 135 Ind Cas 558, *Shariful Hasan v Lachari Narain*

13 (1928) A I R 1928 Cal 100 (107) 105 Ind Cas 763 *Maharaj Dahadur Singh v Achala Dala Devi*

plaintiff)

(1918) 21 Ind Cas 213 (215-216) (F B) (Mad) *Kolagiri Venkataraya nujam v Patibanda Dasatayya* (On appeal from 17 Ind Cas 185)]

14 (1909) 2 Ind Cas 955 (956) (Cal) *Mulamad Hamidar Rahaman v Ali Faqir* (After cutting the trees Art 48 or Art 49 applies being specific moveable property)

15 (1888) 11 Mad 333 (335) *Passanha v The Madras Depont and Benefit Society*

(1912) 17 Ind Cas 906 (906) 6 L B R 75 *Sithambaram Chetty v U K) a Gyn* (Injury to a boat pledged to plaintiff by negligence of defendant)

16 (1902) 24 All 368 (369 370) 1902 All W N 96 *Ishra v Muhammad Hadi*

17 (1907) 29 All 615 (617) 4 All L Jour 548 1907 All W N 194 *Rani Narain v Umrao Singh*

(1917) A I R 1917 Mad 500 (507 503) 35 Ind Cas 93 *Veeramanna v Subba Rao* (If the attachment is not by *seizure* but by prohibitory order

18 (1879) 4 Cal 695 (698) *Surnomoyee v Pattarri Surkar*

19 (1910) 7 Ind Cas 5 (6) (Cal) *Tula Ram Varwari v Mohri Lal Varwari* (Suit for compensation for detention of money in Court deposit owing to the unlawful acts of the defendants)

20 (1912) 17 Ind Cas 605 (606) (Mad) *Mosdin Khatib v Koman Nair* (The act complained of is trespass to immovable property which includes any damage done after entering on owner's land)

20a (1935) A I R 1935 All 835 (836) 156 Ind Cas 556 *Tula Ram v Subba Rao*

Articles 36
Note 1

suits being specially provided for by the Articles noted against them are not governed by this Article:—

- 1 Suit for relief on the ground of fraud—Article 95⁶
- 2 Suit for injury to person—Article 22⁷
- 3 Suit for misappropriation of money by a servant—Article 89⁸
- 4 Suit for damages against a Municipality for omission to complete repairs quickly and for the closing of the road at both ends, due to negligence and malice⁹ and suit for damages against such a body for negligence in putting up drainage works in plaintiff's land—Article 2¹⁰
- 5 Suit for compensation for the unlawful seizure of a ship—Article 29¹¹

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- (1925) A I R 1925 Nag 189 (190) 82 Ind Cas 482 *Sona Patil v Larman* (Injury to crops by obstruction of watercourse—Arts 37 and 89)
- (1924) A I R 1924 Nag 125 (127, 128) 80 Ind Cas 769 20 Nag L R 80, *Narbada Prasad v Albar Khan* (Trespass to immovable property—Arts 39 and 49)
- (1895) 22 Cal 877 (882) *Surat Lall Mondal v Umar Haje* (Suit for wrong fully cutting and misappropriating crops on plaintiff's land—Held that Art 43 or Art 49 applied and not Art 36)
- (1898) 25 Cal 692 (698, 699) 2 Cal W N 265 (F B), *Mangun Jha v Delhin Golab Keer* (Do)
- (1909) 1 Ind Cas 788 (790) 36 Cal 141, *Jadunath Dundput Sripati Sarkar v Harihar*
[See (1926) A I R 1926 Cal 757 (761) 94 Ind Cas 444 *Albert Bonnan v Imperial Tobacco Co Ltd*
(1916) A I R 1916 Mad 314 (316) 30 Ind Cas 840 39 Mad 1 (F B), *Venkatasubba Rao v Asiatic Steam Navigation Co*]
- 6 (1935) A I R 1935 All 995 (1000) 159 Ind Cas 977 58 All 342, *Dehra Dun Messcorie Electric Tramway Co v Hantraj*
- (1930) A I R 1930 All 573 (574, 576) 124 Ind Cas 180, *Benares Bank Ltd v Ram Prasad*
- 7 (1924) A I R 1924 Bom 290 (291, 293) 84 Ind Cas 796 *Mid Jabli v A M Zullaikhi* (Sulphuric acid thrown at the plaintiff and injury caused to his eye)
(1910) 5 Ind Cas 124 (125) (All), *Arhat Missir v Baldeo Akhr*
- 8 (1916) A I R 1916 Cal 244 (245) 28 Ind Cas 452, *Sheo Saran Lal v Harihar Prasad Singh*
- 9 (1926) A I R 1926 All 538 (539) 95 Ind Cas 1030 48 All 560, *Municipal Board of Benares v Behari Lal*
[But see (1929) A I R 1929 Lah 730 (735) 121 Ind Cas 500, *Maya Ram v Municipal Committee, Lahore* (Damage to plaintiff's buildings by breakage of municipal water pipes etc, owing to negligence and omission of municipality—Suit governed by Art 36 and not by Art 2)]
- 10 (1909) 2 Ind Cas 819 (823, 825) 1909 Pun Re No 72, *Richard Watson v. The Municipal Corporation, Simla*

11 (1915) A I R 1915 Cal 681 (685) 42 Cal 85 28 Ind Cas 463, *Madras Steam Navigation Co Ltd v Shalimar Works Ltd*

- 6 Suit for compensation for malicious arrest by a Police Sub-Inspector—Article 2¹²
- 7 Suit for value of crops wrongfully attached, cut and sold,¹³ or for compensation for carrying away trees *after* cutting—Article 48 or Article 49¹⁴
- 8 Suit for specific moveable property or for unlawfully seizing it—Article 49¹⁵
- 9 Suit for compensation for libel or slander — Article 24 or Article 25¹⁶
- 10 Suit for wrongful attachment and seizure of goods under legal process—Article 29¹⁷
- 11 Suit for profits of immovable property wrongfully received by the defendant—Article 109¹⁸
- 12 Suit for wrongfully detaining *specific moveable* property—Article 49¹⁹
- 13 Suit for damages for the defendants unlawfully setting fire to and destroying pepper vines on plaintiff's land — Article 39²⁰
- 14 Suit for damages for seduction—Article 22^{20a}

12 (1932) A I R 1932 All 16 (18) 135 Ind Cas 558, *Sharsful Hasan v Lachma Narain*

13 (1928) A I R 1928 Cal 106 (197) 105 Ind Cas 763, *Maharaj Bahadur Singh v Achala Bala Devi*

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plaintiff)
(1913) 21 Ind Cas 213 (215, 216) (F B) (Mad), *Kotagiri Venkatarama nujam v Palibanda Basaiayya* (On appeal from 17 Ind Cas 185)]

14 (1909) 2 Ind Cas 955 (956) (Cal) *Muhamad Hamdar Rahman v Ali Faqir* (After cutting the trees, Art 48 or Art 49 applies, being specific moveable property)

15 (1888) 11 Mad 333 (335), *Passanha v The Madras Deposit and Benefit Society*

(1912) 17 Ind Cas 906 (906) 6 L B R 75, *Sithambaram Chetty v U Kha Gyi* (Injury to a boat pledged to plaintiff by negligence of defendant)

16 (1902) 24 All 368 (369 370) 1902 All W N 96 *Ishri v Muhammad Hadi*

17 (1907) 29 All 615 (617) 4 All L Jour 548 1907 All W N 194, *Ram Narain v Umrao Singh*

(Suit for refund of price of moveable property wrongfully sold after such attachment)]

18 (1879) 4 Cal 625 (628) *Surnomoyee v Pattarri Sirkar*

19 (1910) 7 Ind Cas 5 (6) (Cal) *Tula Ram Marwari v Mohri Lal Marwari* (Suit for compensation for detention of money in Court deposit owing to the unlawful acts of the defendants)

20 (1912) 17 Ind Cas 605 (606) (Mad) *Mendis Kuthi v Koman Nair* (The act complained of is trespass to immovable property which includes any damage done after entering on owner's land)

20a(1935) A I R 1935 All 835 (836) 156 Ind Cas 536, *Tula Ram v Sobla Ram*

Article 36
Notes
1—2

The Article has no application where there is no question of misfeasance, etc.²¹

The Article applies only to suits. It was accordingly held that applications under Section 214 of the Indian Companies Act of 1882 based on malfeasance, etc. were not covered by Article 36.²² But the Indian Companies Act of 1913 before its amendment in 1936, provided by sub section 3 to Section 235 that such applications were to be deemed to be suits for purposes of the Indian Limitation Act.²³ That sub section has however now been repealed by Amending Act 22 of 1936.

2. "Independent of contract."—The misfeasance, etc. on which an action may be founded must be without reference to any contract between the parties. If it is not independent of contract the Article has no application.¹

The following are examples of misfeasance etc., not independent of contract —

- 1 Suit for damages against a municipal committee for breach of conditions in a *labuliyat*.²
- 2 Suit for compensation against the defendant for entering into a contract with the plaintiff falsely representing himself to have the authority of his principal to do so.³

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- 21 (1916) A I R 1916 Pat 384 (395) 1 Pat L Jour 69 85 Ind Cas 430 *Kishan Deyal Singh v Kishun Deo Jha* (Suit by one co sharer against another for his share in the profits of a ferry)
- (1917) A I R 1917 All 276 (278 279) 39 All 322 39 Ind Cas 532, *Ram Narain v Brij Bankey Lal* (Creditors drawing monies rateably distributed to them out of funds realised by sale of property the title to which was subsequently declared to be in a claimant other than the judgment debtor)
- (1896) 23 Cal 799 (804) *Robert Watson & Co Ltd v Ram Chand Dut* (Exclusive occupation by plaintiffs of lands belonging to both the plaintiff and defendants as tenants in common)
 [See (1914) A I R 1914 Mad 126 (128) 38 Mad 972 22 Ind Cas 870 (F B), *Yellammal v Aiyappa Naick*]
- 22 (1896) 18 All 12 (15) 1895 All W N 136 *Connell v The Himalaya Bank Ltd* (Nor will Article 178 apply because that Article applies only to applications under the Civil Procedure Code)
- (1897) 19 Mad 149 (150) *Ramasami v Streeramulu Chetty*
- 23 (1924) A I R 1924 Lah 285 (285) 69 Ind Cas 255 *Hukam Chand v Bank of Multan Ltd* (By sub section 3 of S 235 an application is treated as a suit)
- (1923) A I R 1923 Lah 59 (60) 71 Ind Cas 899, *Bank of Multan Ltd v Hukam Chand* (Do)
- (1927) A I R 1927 Lah 433 (434) 100 Ind Cas 907 8 Lah 167 *Bhim Singh v Dasheswar Nath*

Note 2

- 1 (1886) 10 Bom 214 (218) *Muhammad Sayad Phaki v Noorooj Balabhai*
 (1896) 1896 Bom P J 21 (21) *Gurlingaya v Nagappa*
- 2 (1932) A I R 1932 Cal 85 (86) 53 Cal 930 133 Ind Cas 179 *Ajit Kumar Basu v Chairman of the Commissioners of the Dacca Municipality*
- 8 (1915) A I R 1915 Mad 889 (890) 38 Mad 275 21 Ind Cas 65 *Vaivaran Chettyar v Aicha Chettyar* (Such a wrong is connected with contract)

- 3 Suit for value of goods converted by the defendant in breach of a contract of pledge⁴ or for damage to goods under such a contract⁵
- 4 Suit based on a contractual relation between master and servant⁶
- 5 Suit for damages for breach of contract to marry plaintiff's daughter⁷

See also the undermentioned case⁸

The contract may be *implied*⁹ or being in the form of a compromise, may have merged in a decree⁹

As to misfeasance and malfeasance actions in the matter of companies see Note 6

3. "For compensation."—This Article applies only to suits for compensation for some tortious act. Where there is no question of damage but the suit is only for recovery of specific property, the Article has no application¹. If the claim is not for any 'compensation' or for compensation for *misfeasance* etc., the Article does not apply².

4 (1930) A I R 1930 Mad 361 (371) 122 Ind Cas 37, *Tamaraamy Chettiar v Palaniappa Chettiar*

5 (1933) A I R 1933 Oudh 515 (519) 145 Ind Cas 1001 9 Luck 120, *Hollway v Holland* (Loan of plaintiff's motor car by defendant and damage done to it in its use)

6 (1910) 5 Ind Cas 764 (764) (Mad) *Seshu Guruklal v Somasundara Muthiah* [See (1895) 8 Mad L Jour 185 (186), *Sri Piyah Annaderara v Putman*]

7 (1922) 65 Ind Cas 812 (813) (Pat) *Mathura Prasad Singh v Sitjannarawana Prasad Sahu*

8 (1937) A I R 1937 Pesh 23 (30) 163 Ind Cas 41, *Amir Khan v Ikram* (Suit for accounts against co-sharer who has received amounts due to all)

9 (1929) A I R 1929 Pat 245 (246) 8 Pat 776 120 Ind Cas 626 *Jagannath Marwari v Kalidas Pasha* (Implied covenant running with the land that the surface owner has an inherent right of support from owner of the underground mines)

(1915) A I R 1915 Mad 889 (890) 21 Ind Cas 65 (66) 98 Mad 275 *Tairatan Chettiar v Arischa Chettiar* (Defendant misrepresenting himself as agent—Wrong is connected with *implied* contract)

9 (1934) A I R 1934 Pat 7 (9) 12 Pat 702 143 Ind Cas 375 *Copul Saran Narayan Singh v Chhakaurs Iall*

Note 3

1 (1917) A I R 1917 Pat 260 (262) 33 Ind Cas 523, *Mt. Raja Kumar v Fateh Bahadur Lal*

2 (1895) 3 Cal W N 202 (201) *Rajah of Khettar Kristo Miller v Kumar Dinendra Narain I v* (Suit for recovery of money awarded as compensation by the Government under the Land Acquisition Act and driven by a tenant representing himself to be the owner—Held there was no compensation in question)

(See (1899) 9 Mad L Jour 103 (104) *Sutbier v Langa Iyengar*

(1888) 1888 Pun R N 59 *Kashi Lal v Secretary of State* (Money stolen from Government Treasury paid to plaintiff in discharge of debt due to him in a criminal case for theft the money was seized from plaintiff as it deposited in the Magistrate's Court. After the criminal case the money was ordered by

The divergence of view arose on account of the difference of opinion on two main questions —

- (a) Whether such misfeasance was one independent of contract so as to attract Article 36
- (b) Whether the claim by a liquidator or creditor or contributory under Section 235 of the Companies Act was based on a new *right* created by the Section giving rise to a new cause of action and a new starting point of limitation on his appointment

It was held by the High Court of Allahabad¹ that such misfeasance was not one independent of contract as embodied in the articles of association of companies and that therefore the application was not governed by Article 36 but by Article 120 of the Act. As to the starting point of limitation, it was held in the same case that Section 235 created a *new right* in the liquidator and that time began to run from the date of his appointment irrespective of the date of the misfeasance.

The Bombay High Court,² while holding that such misfeasance was not *entirely* independent of contract, and concurring with the Allahabad High Court on the applicability of Article 120, differed from it on the question of the starting point of limitation. According to it Section 235 of the Indian Companies Act created no new right or new liability and that therefore the starting point of limitation would have to be decided with reference to the date of injury and not to the appointment of the liquidator. The Court of the Judicial Commissioner of Sind³ also agreed that such misfeasance is not independent of contract, but held that the Article of the Limitation Act applicable to the case was either 115 or 116. The question of a new right being created by Section 235 of the Companies Act though referred to was not considered and decided as the Court took the view that in the particular case before them the breach of contract was a continuing breach under Section 23 of the Limitation Act. It was held by the Lahore High Court⁴ that Article 36 alone applied to misfeasance applications, that the Companies Act contained

Note 6

1 (1925) A I R 1925 All 519 (529) 47 All 699 88 Ind Cas 785, *In re Union Bank Allahabad Ltd* (Distribution of dividend out of capital)

2 A I R 1925 Bom 250 47 All 699 88 Ind Cas 785, *In re Union Bank Ltd*

ch Bank Ltd
nt of contract,
neglecting to

4 (1923) A I R 1923 Lah 58 (60) 71 Ind Cas 699, *Bank of Multan Ltd v Hukam Chand*

(1924) A I R 1924 Lah 285 (285) 69 Ind Cas 255, *Hukam Chand v Bank of Multan Ltd*

(1927) A I R 1927 Lah 433 (434, 435) 8 Lah 167 100 Ind Cas 907, *Bhim Singh v Dasheswar Nath*

Article 36
Notes
6—7

only a rule of *procedure* and not any new *right* whatever and that the starting point of limitation was the date of the misfeasance, the date of the winding up proceedings being irrelevant. The Madras High Court⁵ was of the same opinion as to the scope of Section 235 of the Companies Act and held that the date of the appointment of the liquidator did not affect the question of limitation.

The conflict has now been set at rest by the amendment of Section 235 of the Companies Act in 1936. By that amendment sub section 3 of the former Section was repealed and sub section 1 contains now in itself a period of limitation for such applications.

7 Illustrations of wrongs within the meaning of Article 36

- 1 Irregular sale of property in execution of a decree the sale realizing a sum far below the market value on account of irregularities¹
- 2 Decree holder in execution proceedings not crediting the sum paid by the judgment debtor²
- 3 Wrongful attachment of moveable property by a prohibitory order (not by actual seizure)³
- 4 Treading on and damaging plaintiff's stock in trade at the time of attachment⁴
- 5 Seizure of standing crops under colour of fictitious distress in a fictitious suit⁵

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- 5 (1931) A I R 1931 Mad 58 (61) 54 Mad 153 128 Ind Cas 477 *Narasimha Iyengar v Official Assignee of Madras* (It is not decided whether Art 36 or Art 190 applies but it is stated that whether the one or the other Article applies S 235 of the Companies Act does not save actions barred at the time of winding up order)

Notes 7

- 1 (1924) A I R 1924 Lah 136 (137) 85 Ind Cas 24 *Chanda Singh v Jas Kishen Das*
- 2 (1924) A I R 1924 Lah 136 (137) 85 Ind Cas 24 *Chanda Singh v Jas Kishen Das*
- 3 (1917) A I R 1917 Mad 500 (503) 35 Ind Cas 93 *Veeramma v Subba Rao* (Actual seizure falling under Art 29)
 (1903) 6 Bom L R 704 (70) *Surajmal v Manekchand* (Attachment of rubes before judgment on insufficient grounds—Attachment not by seizure—Art 29 does not apply)
 [See (1896) 19 Mad 80 (82) 6 Mad L Jour 12 *Manasikraman v Arinlan Koya*]
- 4 (1920) A I R 1920 Mad 397 (399) 55 Ind Cas 786 *Sokkalinga Chetty v Krishnaswami Iyer*
- 5 (1909) 12 Cal 433 (432) 9 Cal W N 576 *Hari Charan v Hari Kar* (As standing crop is not moveable property Art 29 does not apply)

- (1905) 32 Cal 433 (432) 9 Cal W N 576 *Hari Charan v Hari Kar* (As standing crop is not moveable property Art 29 does not apply)

- 6 Cutting of timber and trees on the mortgaged property by the mortgagor and his men and thereby diminishing the mortgage security ⁶
- 7 Mortgage causing damage to mortgaged property after a decree for redemption⁷ or wrongfully cutting trees on the mortgaged land while in mortgagee's possession ⁸
- 8 Wrongfully depositing on the plaintiff's land silt which was removed from the defendant's watercourse ⁹
- 9 Causing damage to plaintiff's ship by a collision due to the negligence of the defendant in the management of his vessel ¹⁰
- 10 Wrongfully procuring an attachment order of a Magistrate under Section 145 Criminal Procedure Code, thereby preventing cultivation and causing damage ¹¹
- 11 Cutting the banks of a canal and the flood-water, thereby injuring the plaintiff's mill ¹²
- 12 Causing damage to the plaintiff's building by the closing up of certain drains emitting water from the plaintiff's building on the defendant's premises ¹³
- 13 Causing damage by procuring the detention of goods by the customs authorities on the malicious representation of the defendant without reasonable and probable cause ¹⁴
- 14 Causing damage by deterioration of plaintiff's oranges by procuring the seizure thereof by the Police on information by the defendant, an *ujaradar* of a market, between whom and the plaintiff there was a quarrel about the payment of tolls ¹⁵
- 15 Perquisites received by a trustee from third persons during the wrongful suspension of an *archaka* ¹⁶

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Kanaran

- 8 (1909) 3 Ind Cas 433 (434) 33 Mad 71, *Sitachidambara Vudeley v Kamakshi Ammal*
- 9 (1933) A I R 1933 Sind 176 (177, 178) 27 Sind L R 41 144 Ind Cas 452, *Morunal v Gobindram Dhhchand*
- 10 (1887) 11 Bom 133 (138) *Essoo Bhayaji v The S S 'Satra'*
- 11 See (1909) 3 Ind Cas 12 (15) *Vina Kumari Bibi v Surendra Narain Chakravarty* (Whether Art 29 or Art 36 would apply not decided)
- 12 (1927) A I R 1927 P C 72 (72) 103 Ind Cas 1 10 Lah 161 (P C), *Punjab Cotton Press Co Ltd v Secretary of State*

(1928) A I R 1928 Cal 1 (5) 106 Ind Cas 277, *Imperial Tobacco Co v Albert Donnan* (Not Art 49)

- 15 (1926) A I R 1926 Cal 177 (177, 178) 90 Ind Cas 509 *Ananda Chandra v Barada Kanta* (Art 36 applies and not Art 49)

16 See (1918) A I R 1918 Mad 366 (368) 41 Mad 528 45 Ind Cas 414, *Bharad waja Mudalsar v Arunachalla Gurulkal*

Article 36
Notes
7—8

- 16 Recovery of amounts advanced by a trustee from his own funds to the debutter estate owing to the defendant having kept the trustee out of possession of the debutter properties and income ¹⁷
 - 17 Exclusion of the plaintiffs from their civil rights, if occasion arises for their exercise, in the administration of caste funds and from the benefit of being able to scrutinize caste accounts ¹⁸
 - 18 Damage resulting from a conspiracy to cause injury ¹⁹
 - 19 Loss of money to the municipality by embezzlement by the manager — Suit against the chairman during whose tenure of office it took place ²⁰
- See also the undermentioned cases ²¹

8. Suit against trustee. — In *Subbiah Thevar v Samiappa Mudaliar*,¹ a Full Bench of the High Court of Madras has held that this Article has no application to wrongs committed by trustees in respect of trusts. It was observed that the word 'compensation' was a word which was appropriate only in connexion with a suit to remedy an injury to a person or a person's property and not to a wrong committed by trustees in respect of the trust. Leach, C J, observed as follows

'If Article 36 were to apply to an act of non feissance on the part of the trustee it would mean that if the trustee lived he

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- 17 (1903) 5 Cal W N 273 (277) *Rajah Peary Mohan v Narendra Krishna*
 - 18 (1935) A I R 1935 Bom 361 (363) 158 Ind Cas 414 *Dechand Tolaram v Ghanshyam Sakharam* (Though these are remote benefits and hardly assessable to compensation yet the suit is for vindication of plaintiff's position in the caste)
 - 19 (1912) 18 Ind Cas 721 (775) (Cal) *Peary Mohan Das v Weston*
 - 20 (1899) 22 Mad 342 (343) *Srinivasa Ayyangar v Municipal Council of Karur* (Chairman not being agent of the Municipality Arts 89 and 90 do not apply)
 - 21 (1928) A I R 1928 Cal 306 (307) 107 Ind Cas 723 *Muzaffar Ahmed v Karim Baksh*
 - (1936) A I R 1936 Rang 310 (312) 164 Ind Cas 410 *Tatoy Municipal Committee v U Khoo Zun Nee* (Ward headmen of Municipality executed mutual guarantee bond to the Municipality for due collection and credit of revenue by each of them subsequently one of them M was guilty of defalcations and on a petition by the headmen to the President of the Municipality that they would no longer stand guarantee for M no action was taken and the Municipality sued the President for the recovery of loss—Case was held to be governed by Art c/o 36)
 - (1938) A I R 1938 Nag 84 (86) *Hargovind Dullabh Juman v Khabbar Bahadurullah* (Person making false statement as to habitability of certain house and dissuading people from taking it on rent)
 - (1936) A I R 1936 Mad 250 (250) 161 Ind Cas 538 *Manga Reddi v Venkataraghata Ayyangar* (Wrongful use of water by tenant in contravention of term in mchahika)
- [But see (1861) 3 Mad 240 (245) *Kalu Ram Mangraj v Madras Railway Co*]

Note 8

- 1 (1938) A I R 1938 Mad 353 (356) (F B) (33 Mad 308 Overruled)

would be free from all liability in two years, but if he died before the two years had elapsed, his estate would continue to be liable for another three years. This could never have been the intention of the Legislature and leads in itself to the conclusion that Article 36 does not include wrongs committed by trustees in respect of trusts. As Article 36 does not apply the only Article which can apply to a suit like the one out of which this reference arises is Article 120 and we answer the first question accordingly.

Article 36
Note 8

Part VI — Three years

37. For compensation for obstructing a way or a watercourse	Three years	The date of the obstruction.
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Article 37

Synopsis

1. Legislative changes.
2. Scope of the Article.
- 3 Starting point.

1. Legislative changes.

- (a) There was no provision in the Act of 1859 corresponding to the present Article. In the absence of such a provision a suit for compensation for obstruction of a watercourse was regarded for the purposes of limitation as a suit for damages done to real property.¹
- (b) Article 31 of the Act of 1871 corresponding to this Article dealt with suits 'for obstructing a way or a watercourse. This would include suits not only for compensation but for the reliefs as well arising from such obstruction.² The introduction of the words 'for compensation' has restricted the scope of the Article only to suits for compensation.

* **Act of 1877, Article 37**

Same as above

Act of 1871

Part I — Two years

31 — For obstructing a way or a watercourse	Two years	The date of the obstruction
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Act of 1859

No corresponding provision

Article 37 — Note 1

1 (1864) 1864 Suth W R (Gap) 106 (106) *Buddun Thakoor v Shunkar Dass*

2 See (1891) 6 Cal 394 (395) — Ind App 240 4 Sar 199 7 Cal L R 529 4 Ind Jur 530 3 Suther 816 4 Shome L R 7 (P C) *Raj Pup v Abdul Husain* (Suit for an injunction and for declaration)

Article 37
Notes
 2—3

2. Scope of the Article.—This Article is applicable only to suits for *compensation* for obstructing a way or watercourse. A suit for *injunction* restraining the obstruction of a watercourse, or for removal of such obstruction, or for declaration of rights as to a water course, does not fall within this Article ¹

3. Starting point.—The starting point from which the period prescribed begins to run is *the date of the obstruction*. Where the obstruction is however a *continuing* one then by virtue of Section 23 of the Act a fresh period of limitation begins to run at every moment of the time during which the obstruction continues and the suit would be within time if it is brought within 3 years of the last day to which the obstruction continued ¹. In *Rajrup Koer v Abdul Husain* ² their Lordships of the Privy Council observed as follows

“If the Judges really meant to apply the limitation of Article 31 (of the Act of 1871 corresponding to the present Article) above referred to their decision is clearly wrong for, the obstructions which interfered with the flow of water to the plaintiff's *mehal* were in the nature of continuing nuisances as to which the cause of action was renewed *de die in diem* so long as the obstructions causing such interference were allowed to continue”

Article 38

38.* For compensation for diverting a water- course.	<div style="border-left: 1px solid black; border-right: 1px solid black; height: 100px; margin: 0 auto; width: 20px;"></div>	Three years. The date of the diver- sion.
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Synopsis

1. Legislative changes.
2. Scope.
- 3 Starting point.

* Act of 1877, Article 38
Same as above

Act of 1871, Article 32

32 —For diverting a watercourse | Two years | The date of the diversion
 Act of 1859
 No corresponding provision

Note 2

- 1 (1903) 2 Ind Cas 410 (411) (Cal) *Nirode Kanta v Bharat Chandra*

Note 3

- 1 (1925) A I R 1925 Nag 189 (190) 82 Ind Cas 482 *Sona Patil v Lazman*
 (The suit would be within time if it is brought within three years of the last day to which the wrong continued)
- 2 (1881) 1 Cal 394 (404 405) 7 Ind App 240 4 Str 199 7 Cal L R 529 4 Ind Jur 530 3 Sather 816 4 Shome L R 7 (P C)

1. **Legislative changes.**—Article 39 of the Act of 1871 dealt with suits "for diverting a watercourse" This would apparently include suits for any relief arising from the diversion such as suits for injunction and declaration of right.

The words "for compensation" have been added with a view to restrict the Article to suits for *compensation* only. See Note 1 to Article 37 *ante*.

2. **Scope.**—As has been seen in Note 1 *ante*, this Article is applicable only to suits for *compensation* for diverting a watercourse. A suit for injunction restraining the obstruction of a watercourse or for the removal of such obstruction or for a declaration of rights as to a watercourse does not fall within this Article¹

3. **Starting point.**—The starting point is the date of the diversion. Where the diversion is a continuing wrong, then by virtue of Section 23 *ante*, a fresh period of limitation begins to run at every moment of the time during which the wrong continues,¹ and the plaintiff can claim damages arising from the wrong within three years from the date of the suit²

39.* For compensation for trespass upon immoveable property. | Three years. | The date of the trespass.

Article 38
Notes
1—3

Article 39

Synopsis

1. Legislative changes.
2. Scope of the Article.
3. Compensation.
4. Trespass to immovable property.
5. Trespass beneath the surface of land.
6. Trespass by placing things on land.
7. Trespass by cutting and carrying away crops.
8. Trespass and re-entry upon land by owner.
9. Trespass, a continuing wrong.
10. Immoveable property.
11. Starting point of limitation.

* Act of 1877, Article 39.
Same as above

Article 38 — Note 2

1 See Note 2 to Article 37 *ante*

Note 3

1. See Note 12 to Section 23 *ante*

2 (1910) 6 Ind C 1881 (885) 3 Sind L R 228, *Goverdhan Das v Naraindass* (1868) 6 Mad H C R 6 (24), *Ponnusami Thevar v Collector of Madura*. (3 Mad H C R 111, Referred to)
[See also (1891) 18 Cal 91 (98), *Dwarkanath v Corporation of Calcutta* (Case under S 359 of the Calcutta Municipal Consolidation Act, 4 of 1876)]

Article 39
Notes
1—3

Other Topics

Crops — Suit for value of, wrongfully attached, cut and removed	See Note 7 F N (1)
Trespass by attachment	See Note 7 F N (1)
Trespass includes mischief committed by trespasser	See Note 2 Pt 2

1. Legislative changes. — The wording of the first column of Article 43 of the Act 9 of 1871 (corresponding to this Article) was not clear. It ran "For trespass upon immovable property." However, in the undermentioned case¹ it was pointed out that the limitation provided in Article 43 applied only to suits for *damages* on account of trespass, and *not* to suits to recover immovable property from a trespasser, for which the period of limitation was twelve years as provided by Article 143 (now Article 142). The words "for compensation" inserted in the Act of 1877 make this position quite clear.

2. Scope of the Article.—Trespass in its general sense signifies a direct or forcible injury to person or property, whether moveable or immovable as distinguished from an indirect or consequential injury.¹ This Article deals with trespass to *immovable* property only. Trespass to moveable property is dealt with in various other Articles, namely Articles 28, 29, 36, 48 and 49. Trespass to person is provided for by Articles 19 and 22.

Trespass to immovable property includes the mischief which the trespasser commits after entering on the land. Thus a suit for damages for setting fire to and destroying pepper vines is governed by this Article and not by the general Article 36.²

3. Compensation. — Plaintiff who had obtained an ejectment decree against the defendant, sued him for mesne profits for the period between the date of the institution of the suit and the date of the judgment. It appeared that the defendant had not received any profits, the land having been left waste. It was held that Article 109 (which applies only where profits are received) did not apply, but the Court, with hesitation, held that Article 39 applied, on the

Act of 1871

Part VI — Three Years

43 — For trespass upon immovable property	Three years	When the trespass takes place
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Act of 1859

No corresponding provision

Article 39 — Note 1

- 1 (1878) 6 Bom 580 (582) *Joharmal v. Municipality of Ahmednagar*
 [See also (1883) 7 Bom 323 (327) 7 Ind Jur 613 *Anandrai Bhilaji Phadke v. Shankar Daji*]

Note 2

- 1 Salmond on Torts, 6th Edition, Page 219
 2 (1912) 17 Ind Cas 605 (606) (Mad) *Moudin Kully v. Roman Nar*

ground that a claim for mesne profits, when the plaintiff has been ousted from possession, was essentially one for damages¹

Article 39
Notes
3—6

4. Trespass to immovable property.—The wrong of trespass to land consists in the act of *entering* upon land in the possession of the plaintiff or remaining upon such land or placing any material object upon it, in each case without lawful justification^{1a} Trespass is, thus, a wrong committed against the *possession* of the plaintiff^{1b} The fact that such possession is in his own right or in that of other person's is immaterial¹ A seizure of a well in the possession of the plaintiff is a trespass on immovable property² But where there is no proof of the plaintiff's possession being disturbed, a suit for compensation cannot be sustained³

5. Trespass beneath the surface of land.—In general he who owns or possesses the surface of land owns or possesses all the under lying *strata* also¹ Any entry beneath the surface, therefore, at whatever depth is an actionable trespass as when the owner of an adjoining coal mine takes coal from under the plaintiff's land² But if the relief claimed is not in respect of the trespass but in respect of the coal taken and utilised, the action will be governed not by this Article but by Article 48 *infra*, as being one for conversion³

6. Trespass by placing things on land.—It is a trespass to cause any physical object to cross the boundary of the plaintiff's land, or even to come into physical contact with the land even

Note 3

- 1 (1910) 8 Ind Cas 162 (163) 84 Mad 502 *Ramaswamy Reddy v Authi Lakshmi*
trial

Note 4

- 1a Salmond on Torts 6th Edition Page 222

- 1b Salmond on Torts 6th Edition Page 228

- 1 (1907) 9 Bom LR 1301 (1304) *Pestonji Nusserwanji v Nemchand Manekchand*

- 2 (1882) 6 Mad 176 (178) *Narasimma v Ragupathi*

- 3 See (1888) 10 All 498 (505 506) 1888 All W N 205 *Ramphal Rai v Raghu*
mandan Prasad

- (1922) A I R 1922 Cal 255 (258) 65 Ind Cas 39 *Gyanendra Nath Chakra*
varts v Pores Nath Pal

- (1938) A I R 1938 Lah 267 (268) *Municipal Committee Amritsar v Kans*
Ram (Entry on the plaintiff's land under an implied understanding
or contract)

Note 5

- 1 (1870) L R 9 Eq 671 (673) 39 L J Ch 547 22 L T 263 *Corbett v Hill*

- 2 Salmond on Torts 6th Edition Page 226

- 3 (1929) A I R 1929 P C 69 (71) 56 Ind App 93 114 Ind Cas 604 8 Pat
516 (P C) *Ienis Pugh v Ashutosh Sen*

- (1930) A I R 1930 P C 113 (114) 123 Ind Cas 726 57 Ind App 144 57 Cal
1341 (P C) *Adyar Coal Co Ltd v Ianna Lal* (On appeal from
A I R 1927 Cal 111—Relief in respect of trespass as well as conversion
claimed—Appeal to Privy Council only as regards latter relief—Art. 48
held to apply)

- (1920) A I R 1920 Pat 383 (403) 55 Ind Cas 113, *Lodna Colliery Co Ltd v*
Bepi Behary

Article 39
Notes
6—7

though there may be no crossing of the boundary for example, to turn cattle upon the land, or to throw stones upon it, or to drive nails into a wall,¹ or to pile rubbish against it²

It is commonly said that the ownership and possession of land bring with them the ownership and possession of the column of space above the surface *ad infinitum*³ This is doubtless true to a limited extent Thus, a person may cut the overhanging branches of a tree growing in his neighbour's land, whether they do him harm or not⁴ However, it is not clear whether an entry above the surface of land is in *itself* an actionable trespass⁵

7. Trespass by cutting and carrying away crops.—Where A cuts and carries away the crops on B's land and converts them to his own use, there is, by the act of cutting, a trespass upon the immovable property (standing crops being immovable property before the cutting) and secondly there is, by the act of carrying away and appropriating the crops, a conversion or taking away of moveable property A suit based on the *trespass* as the cause of action will be governed by this Article, but in so far as it is based on the conversion of taking away of the crops, it may be governed by Article 48 or Article 49 *infra*¹

Note 6

- 1 (1815) 1 Stark 22(22), *Laurence v Obee* (Referred in 9 Bom LR 1801 (1303))
- 2 (1829) 9 B & C 591 (593) 4 M & Ry 500, *Gregory v Piper* (Referred in (1907) 9 Bom L R 1801 (1303))
- 3 (1870) L R 9 Eq 671 (673) 39 L J Ch 547 22 L T 263, *Corbett v Hill*. (Cited in 29 Mad 511 (513))
- 4 (1894) 19 Bom 420 (426, 427) *Hari Krishna v Shankar Vishal* (1613) 1 Roll 393 (393) *Norris v Baker* (Cited in (1894) 19 Bom 420 (425). Followed in (1904) 31 Cal 914 (948))

- (1869) 5 Beng L R 18 (43) *J G Bagram v Ahetranath* (No man has any absolute property in the open space above his land To interfere with the column of air superincumbent upon such land is not a trespass) [See also Salmond's Law of Torts 6th Edition, Page 227 Foot Note (i)] [But see Pollock's Law of Torts, 11th Edition, Pages 351, 352]

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P 676 51

Works v

¹ assumed

c above a

Note 7

- 1 (1895) 22 Cal 877 (883 886) *Surat Lall v Umar Haji* (1900) 1 Ind Cas 788 (788, 790) 36 Cal 141, *Jadu Nath Dundput Sripats Sarkar v Hari Kar* (Per Doss J, Rampani J contra)

Article 39
Note 8

8. Trespass and re-entry upon land by owner.—An owner may re enter on his land and, if he does so *peaceably*, cannot be sued for in ejectment for the recovery of the land, nor in trespass for damages. However, by reason of the statutes against the *forcible* re entry, different considerations will arise, where such re entry is attended with force. In England there was a controversy over this question¹ which has now been settled by the decision in *Hemmings v Stoke Poges Golf Club*². The correct view as now laid down by the Court of Appeal (in this case) is that possession of a rightful owner gained by a forcible entry is lawful as between the parties but he shall be punished for the breach of the peace by losing it, besides making a fine to the King.³ In India an owner entering by force cannot be sued in ejectment but if he uses force or commits a breach of the peace he may lose the right of private defence (see Section 103 of the Penal Code) and be liable to punishment under the Penal Code⁴. He will also be liable in a suit under Section 9 of the Specific Relief Act to restore the property to the person so ejected⁵. And probably the violation of a public duty causing

(1913) 18 Ind Cas 253 (254) (Cal) *Jadu Nath Dunduput v Hari Kar* (L R Appeal on 1 Ind Cas 788.—Held that Art 36 did not apply but Art 48 or Art 49 would.—Suit was stated to be for taking away the crops.)

(1924) A I R 1924 Nag 125 (126-127) 80 Ind Cas 769 20 Nag L R 80, *Narbada Prasad v Akbar Khan*. (A suit for damages for wrongfully cutting lac producing trees and removing the trees is a suit for compensation for trespass upon immovable property within Article 39.)

(1928) A I R 1928 Cal 106 (107) 105 Ind Cas 763 *Maharaj Baladur Singh v Achala Bala Devi*. (Suit for value of crops wrongfully attached, cut and removed.—Art 48 or Art 49 applies.)

[See also (1909) 3 Ind Cas 12 (15) (Cal) *Mina Khatun Bibi v Surendra Narain*.

(1913) 21 Ind Cas 913 (216) (F B) (Mad) *Venkata Rao aiyar v Basaiayya*. (Suit in respect of trespass by attachment.—Article 39 applied.)

(1929) A I R 1922 Nag 212 (213) 65 Ind Cas 665 18 Nag L R 96, *Suraj Mai v Pralhad Bhat*. (Do.)

(1898) 25 Cal 692 (699-700) 2 Cal W N 265 (F B) *Mangunji a v Dolhin Golab*. (Rampunji J held that Article 36 applied.)

(1916) A I R 1916 Mad 1142 (1143) 31 Ind Cas 796 *D Narasimha v Venkiah*. (The facts are not clear but it must be assumed since 21 Ind Cas 218 is followed that the suit was based upon trespass.)

Note 8

1 (1840) 1 Van & G 644 (648) 2 Scott N R 474 *Newton v Harland*
(1881) 50 L J Ch 401 (405-406) 17 Ch D 174 44 L T 248 29 W R (Eng)
484 *Beddall v Maillaud*

(1845) 14 M & W 437 (442-443) 3 D & L 55 14 L J Ex 272 *Harley v Brydges*. (Cited in (1866) 6 South W R 21 (23).)

2 (1920) 89 L J K B 744 (759) 1 K B 20 122 L T 479 61 S J 131 36 T L R 77

3 Pollock & Law of Torts 11th Edition Page 390

Apparu Nayak v Qce
to a charge of rioting by
a trespasser who is in

5 (1928) A I R 1928 Pat 194 (126) 6 Pat 794 29 Cri L Jour 99 106 Ind Cas 691 *Emperor v Bandhu Singh*. (If the trespasser has entered by force or fraud he cannot sue the owner under S 9.)

Article 39
Notes
8—10

damage would be a good ground for a suit in damages⁶ although the contrary was held to be the rule in England⁷

9. Trespass, a continuing wrong.—Trespass by way of a personal entry is a continuing injury, lasting as long as the personal presence of the wrongdoer. The same is true even in regard to those trespasses which consist in placing things upon the plaintiff's land. Such a trespass continues until it has been abated by the removal of the thing which is thus trespassing. Thus, the construction of a drain on plaintiff's land is a continuing wrong and each act of trespass constitutes a fresh cause of action¹. So also, a seizure of a well in possession of the plaintiff is a trespass on immovable property; it continues to be a trespass until the possession of the trespasser comes to an end².

See also Section 23 *ante* and Notes thereunder.

10. Immovable property.—The Limitation Act itself does not define the expression immovable property. The expression must therefore be taken in the sense in which it is defined by the General Clauses Act, 1897. Standing crops are according to that definition immovable property. The definition of moveable property in the Civil Procedure Code, which includes standing crops, is not applicable to the Limitation Act¹. Standing crops, as soon as they are cut, however, will become moveable property². In the undermentioned cases³ decided under the Act of 1871, it was held that a right to *jalkar* was an interest in immovable property.

- 6 (1882) 6 Mad 245 (247) 1 Weir 68 7 Ind Jur 135 *Apparu Nair v Queen*
 7 (1945) 14 M & W 437 (442) 3 D & L 55 14 L J Ex 272, *Harley v Bridges* (Cited in 6 Mad 245 (247))

Note 9

- 1 (1875) 24 Suth W R 97 (98) *Ramphul Sahoo v Misree Lall*
 [See also (1839) 10 Ad & E 503 (509) *Holmes v Wilson* (Referred in (1888) 10 All 498 (504 505))]
 (1847) 1 C B 236 (246) *Bouyer v Cool* (Referred in (1889) 10 All 498 (504 505))
Addison v Torts 5th Edition Page 331 (Cited in (1888) 10 All 498 (504 505))]
 2 (1883) 6 Mad 176 (178) *Narasimhacharya v Iaghupathycharya*

Note 10

- 1 (1879) 4 Cal 665 [667] 2 Cal L R 526 3 Ind Jur 515 2 Shome L R 23, *Pandah Gazi v Jennuddi*
 (1916) 4 J R 1916 Mad 1142 [1143] 31 Ind Cas 796 *Narasimham v Venkiah*
 (1913) 21 Ind Cas 213 (215) (F B) [Mad] *Venkataraniannujam v Basaiayya*
 [See also (1924) A I R 1924 Nag 125 (126) 20 Nag L R 80 80 Ind Cas 769 *Narbada Prasad v Akbar Khan* (Trees standing on

Haji
gun Jha v Dolhun

- (1909) 1 Ind Cas 783 (789) 36 Cal 141 *Jadu Nath v Hari Kar*
 2 (1878) 3 Cal 276 (279) 1 Cal L R 592 *Parbatty Nath v Mudho Parol*
 (1877) 3 Cal L R 507 (510) *Juchunna Dasa v Korunna Kant*

11. Starting point of limitation.—In the case of a continuing trespass, the plaintiff can rely upon the *last act* of trespass as constituting a cause of action¹. Damages can be recovered in respect of so much of the trespass as has occurred within three years of the suit².

Article 39
Note 11

40.* For compensation for infringing copyright or any other exclusive privilege. Three years. The date of the infringement.

Article 40

Synopsis

1. "Compensation."
2. "Copyright."
3. "Exclusive privilege."
4. Infringement.
5. Starting point.

1 "Compensation."—Article 11 of the Act of 1871 corresponding to this Article used the word "damages" instead of the word "compensation". It was held by the High Court of Calcutta in a case arising under that Act that the words 'suit for damages' should be read as not confined to what was technically known at Common Law in England as an 'action for damages', but as meaning generally every civil suit seeking a compensation for infringement of a copyright or exclusive privilege¹. A suit for an *account* of the profits made by the defendant by reason of having infringed an exclusive privilege was thus held to be only a mode of compensating an inventor for the infringement of his privilege other than by assessment of damages and to be governed for the purposes of limitation by Article 11 of the said Act of 1871². The word

* Act of 1877, Article 40

Same as above

Act of 1871, Article 11

11 —For damages for infringing copy right or any other exclusive privilege | One year | The date of the infringement

Act of 1859, Section 1, clause 2

To suits for damages for the infringement of copyright or of any exclusive privilege | the period of one year from the time the cause of action arose

Note 11

- 1 (1875) 24 Suth W R 97 (98) *Pariphal Sahoo v. Misree Lall*
(1882) 6 Mad 176 (178) *Narasimhacharya v. Paghupathycharya* (Suit may be instituted within 3 years of the cesser of the trespass)
- 2 (1882) 6 Mad 176 (178) *Narasimhacharya v. Paghupathycharya*
(1893) 3 Mad L Jour 2 ("S) (Jour)

Article 40 — Note 1

- 1 (1878) 3 Cal 17 (19) 2 Ind Jur 170 *Kimmond v. Jackson*
- 2 (1878) 3 Cal 17 (19) 2 Ind Jur 170 *Kimmond v. Jackson*

Article 40
Notes
1—3

"damages" has, in the Act of 1877 and in the present Act, been substituted by the word "compensation," presumably to avoid the possible technical interpretation above referred to. A suit for an account of the profits made by the defendant by reason of infringing a copyright or exclusive privilege will now clearly be within this Article.³

A suit for an *injunction* restraining the defendant from making the infringement is not one for *compensation* within the meaning of this Article.⁴

2. "Copyright."—The Copyright Act, 1911 (1 & 2 Geo V, Ch 46) applies by virtue of Section 25 thereof to this country also, subject to such modifications as may be made by the Indian Legislature (see Section 27 of the Act). The Indian Copyright Act, 1914, has made certain modifications in the Act of 1911 which are, however, not material for the purposes of the present discussion. By Section 1 sub section 2 of the Act of 1911, a copyright means "the sole right to produce or reproduce the work or any substantial part thereof in any material form whatsoever, to perform, or in the case of a lecture to deliver, the work or any substantial part thereof in public, if the work is unpublished, to publish the work or any substantial part thereof and shall include the sole right —

- (a) to produce, reproduce, perform or publish any translation of the work,
 - (b) in the case of a dramatic work, to convert it into a novel or other non dramatic work,
 - (c) in the case of a novel or other non dramatic work or of an artistic work, to convert it into a dramatic work, by way of performance in public or otherwise,
 - (d) in the case of a literary, dramatic or musical work, to make any record, perforated roll, cinematograph film, or other contrivance by means of which the work may be mechanically performed or delivered,
- and to authorise any such acts as aforesaid "

3. "Exclusive privilege."—A right to a *trade mark* or a *trade name*,¹ or a right to an *invention* under the Patent Act, 1859,² or to a patent or design under the Patents and Designs Act (2 of 1911)^{2a} is an exclusive privilege within the meaning of this Article. But the right to perform the duties of a village *Joshi* and receive the profits is not

3 See (1903) 2 Low Bur Rul 113 (114) *Aga Mahmood v Edward Peltzer* (The Court was inclined to this view but did not decide the point)
[See also (1919) A I R 1919 Lah 90 (90) 51 Ind Crs 434 1919
Pun Re No 45, *Varcados v Mcleod*]

4 (1903) 2 Low Bur Rul 113 (114) *Aga Mahmood v Edward Peltzer*

Note 3

1 (1883) 6 Mad 103 (110), *Thomas Arkhur Taylor v Varasany Chetty*

2 (1878) 3 Cal 17 (17) 2 Ind Jur 170 *Kinmond v Jackson*

2a As to Patent, see S 12 of the Patents and Designs Act (2 of 1911)

As to Design, see S 2 sub section (4) and S 43 of the said Act

a privilege within the meaning of this Article the reason is that the word "privilege" must be construed in the light of the definite word "copyright" with which it is linked. The right of a *Jyotishi* may popularly be called a privilege but it really rests on a customary law giving him certain advantages along with many others though these advantages are in their nature, such as must be gathered in each instance within some limited area.³

4. Infringement. — Section 2 of the Copyright Act 1911 (1 & 2 Geo V, Ch 46) applicable to India enacts when a copyright shall be deemed to be infringed. The question whether a person has done anything which is an infringement of a copyright or other exclusive privilege is a question of fact.¹ See also the undermentioned cases.²

5. Starting point. — The starting point of limitation is the date of the infringement. Where the infringement takes place within three years a suit for compensation in respect thereof is within time.¹ Every fresh act of infringement, however, would give a fresh cause of action for a suit for compensation thereof² until such act becomes, as it may do in some cases, no longer wrongful. Thus the owner of a trade mark has a right to sue for every infringement thereof until the mark becomes *publici juris*, i.e. until the

3 (1875) 1875 Bom P J 154 (155) *Damodar Abaji v Martand*

Note 4

1 (1931) A I R 1931 Cal 233 (236) 126 Ind Cas 197 *Mohini Mohan Singh v Sita Nath Basak* (Whether there is colourable imitation within the meaning of S 35 of the Copyright Act 1 & 2 Geo V Ch 46 is a question of fact)

(1870) 17 Cal 351 (362) *Macmillan v Suresh Chunder Deb* (Selections of different authors involving extensive reading and judgment)

2 (1921) A I R 1921 All 95 (96) 43 All 412 61 Ind Cas 394 *Sheikh Ghafoor Baksh v Juala Prasad Singhal*

(1924) A I R 1924 P C 75 (87) 51 Ind App 109 46 Bom 308 83 Ind Cas 101 *Macmillan & Co Ltd v A and J Cooper* (Use of another's labour and skill only is an infringement)

(1934) A I R 1934 All 922 (927) 154 Ind Cas 207 *M P Marshall v Ram Narain Lal* (Infringement of copyright of book takes place not only when a book is re printed but also when a book is sold)

(1908) A I R 1928 Cal 359 (360) 112 Ind Cas 784 30 Cri L Jour 16 *Mohen Chandra Chandra v Emperor* (Copyright in pictures)

(1924) A I R 1924 Cal 595 (595) 81 Ind Cas 754 *Sita Nath Basak v Mohini Mohan Singh*

(1920) A I R 1920 Mad 529 (530) 59 Ind Cas 229 *Ramiah Asari v Chidambaram Mudaliar*

Note 5

1 (1934) A I R 1934 Cal 668 (671) 152 Ind Cas 835 *Asladris Nath v Satish Chandra*

2 (1903) 2 Low Pur Rul 113 (114) *Agas Molamad v Edward Peltzer*

(1934) A I R 1934 All 992 (997) 154 Ind Cas 207 *M P Marshall v Ram Narain Lal* (In infringement of copyright in book every sale of the book is an infringement under the Copyright Act and gives a fresh cause of action)

(1919) A I R 1919 Lah 90 (90) 51 Ind Cas 434 1919 Pan Re No 45 *Arca-dos v Veludo*

Article 40
Note 5

proprietor of it has, in effect, thrown open the use of it to the public by allowing his right to be so habitually infringed that the mark no longer conveys to those who see it the impression that the goods to which it is attached are the manufacture of one manufacturer, or the property of one person or firm who originally adopted the mark³

Article 41

41. To restrain waste. | Three years. | When the waste begins.

Synopsis

1. Scope.
2. "Waste."
3. Starting point.

1. *Scope.* — This Article applies to suits to restrain waste. A common instance of such suits is a suit by a Hindu reversioner against a limited owner for an injunction restraining her from committing waste. See the undermentioned cases¹

A suit for *compensation* for waste is not one to *restrain* waste and is therefore not within this Article. The words in the third column "when the waste *begins*" show that the Article contemplates only cases where waste *has been committed*. A suit to restrain an *apprehended waste* in future would seem not to be within this Article²

2. "Waste." — "Waste" may be defined as unlawful damage done or permitted by the occupier of land or by a person in possession of any property, as against those having reversionary interests in it¹. A person *not entitled* to remain in possession but who commits

* Act of 1877, Article 41.

Same as above

Acts of 1871 and 1859

No corresponding provision

3 (1903) 2 Low Bur Rul 118 (114), *Aga Mahmood v Eduard Peltzer*

Article 41 — Note 1

- 1 (1856) 6 Moo Ind App 433 (447) 1 Sar 361 *Hurrydoss Dutt v Sreemutty Uppoornah Dessee* (Daughter's estate)
- (1921) A I R 1921 Mad 234 (235) 44 Mad 984 66 Ind Cas 10, *Venlanna v Narasimham* (Hindu widow)
- (1915) A I R 1915 Mad 456 (458 459) 25 Ind Cas 153, *Thanilackala Mudaliar v Alamelu Ammal* (Do)
- (1903) 31 Cal 214 (221) 8 Cal W N 11, *Durga Nath v Chintamani Doss*
- 2 (1871) 7 Beng L R 131 (135) *Biswanath Chaudar v Khantamani Das* (The case was decided in 1871 when no Article corresponding to Art 41 existed, but the principle will still apply)

Note 2

- 1 Salmond on Torts, 6th Edition, Page 361

unlawful damage to the property does not commit "waste" but may be liable for trespass

"Waste" is of two kinds, voluntary or *commissive* waste as where the person in possession pulls down a house or a part thereof, and permissive or *omissive* waste as where a tenant suffers a house to fall into dis-repair². A person is not liable for permissive waste unless he is under an obligation to keep the property in good repair. The word "restrain" and the words "when the waste begins" show that the Article is intended to apply only to *commissive* waste and not also to *permissive* waste

3. Starting point.—The starting point is the date when the waste *begins*. In *Danjibhoy Bomanji v. Harabai*,¹ it was observed by Jenkins, C J, though incidentally, that Section 23 will not apply to such cases, inasmuch as this Article is a particular provision and Section 23, a general one, and the particular provision should prevail over the general if there is a repugnancy between the two. It is submitted that this reasoning is not correct. A suit to "restrain waste" is a suit to restrain *future acts* of waste which it is apprehended will be committed, a particular past act having given rise to such apprehension. The suit is not in respect of any wrong actually committed at all, and so, necessarily, not in respect of any continuing wrong committed. There is no room for the application of Section 23 at all. The act of waste committed, from which time runs, is not one in respect of which any relief is claimed in the suit, but is made the starting point of limitation inasmuch as it gives rise to an apprehension of future similar acts, and so constitutes the cause of action

Article 41
Notes
2—3

42. For compensation for injury caused by an injunction wrongfully obtained.

Three years.

When the injunction ceases.

Article 42.

Synopsis

1. Injunction.
2. Suit for wrongfully obtaining injunction, in what cases maintainable.
3. "Wrongfully obtained."
4. Starting point of limitation.

* Act of 1877, Article 42

Same as above

Act of 1871, Article 86

Same as above except that the word 'damage' was used in the first column instead of the word 'injury'

2 Wharton's Law Lexicon

Note 3

1 (1901) 25 Bom C 44 (649) 3 Bom L R 371 (F N)

Article 42

Notes

1—2

Other Topics

Application under S 95, C P C and regular suit — Conditions necessary	See Note 2, Pt 5
— Difference between	See Note 2, Pts 3, 3a
Article confined only to temporary injunctions	See Note 2, Pt 3
Malice and absence of reasonable and probable cause — Both necessary	See Note 2, Pt 4
Omission to proceed under S 95, C P C — No bar to regular suit	See Note 2, Pt 4
Prohibitory order under O 21, R 46 C P C — Not injunction	See Note 1, Pt 4

1. Injunction. — An injunction is a judicial process whereby a party is required to do or to refrain from doing, any particular act. It is in the nature of a preventive relief granted to a litigant *quia timet*, i. e. because he fears future possible injury.¹

Injunctions are of two kinds, temporary and perpetual. A perpetual injunction restrains a party *for ever* from doing the act specified. It can be granted only by a decree passed after the hearing of the suit on the merits.² A temporary injunction, on the other hand, endures only until the disposal of the suit in which it is granted or until the further orders of the Court.³ It can be granted on an interlocutory application at any stage of the suit. An injunction, whether temporary or perpetual, compelling a party to do a particular act is called a mandatory injunction.

A prohibitory order, made under Order 21 Rule 46 of the Civil Procedure Code is an attachment, and cannot be treated as an injunction within the meaning of this Article.⁴

2. Suit for wrongfully obtaining injunction, in what cases maintainable. — As has been seen in Note 2 to Article 29 *ante*, a *malicious abuse of process* is recognized in law as a wrong on which an action will lie for damages. But a *malicious abuse of process* is not the same thing as the bringing of an ordinary civil action. The latter is not except in certain cases,^{1a} recognized in law as

Act of 1859

No corresponding provision

Article 42 — Note 1

¹ Woodroffe's Law of Injunction 3rd Edition Page 15

² Specific Relief Act, 1877, Section 54

³ Civil Procedure Code O 39 R 1

⁴ (1917) A I R 1917 Mad 500 (503) 35 Ind Cas 98, *Veeramanna v Subbarao*

Cas 280 (281)
case is treated

¹¹ *Idumian v*

Thakur Dass

(100 JJ)

Note 2

^{1a} See (1928) A I R 1928 Cal 1 (9) 105 Ind Cas 277, *Imperial Tobacco Co v Albert Bonnan*

affording any cause of action, however unfounded, vexatious or malicious it may be.¹ The reason is that an unfounded and unsuccessful civil action is not the cause of any damage of which the law can take any notice. The only liability that the litigant instituting the suit may incur is the liability to pay the costs of the opposite party.²

The obtaining maliciously of a *temporary* injunction is a *malicious abuse of process* and is actionable.³ But the institution of a suit for *permanent* injunction and obtaining a decree for permanent injunction does not, on the principles stated above, furnish any cause of action, and is therefore not actionable.^{3a} It follows that the obtaining of a permanent injunction is not "wrongful" even if the decree granting it is reversed in appeal as being erroneous. This Article is thus confined to cases of *temporary* injunctions.

Section 95 of the Code of Civil Procedure empowers a Court, on the application of the defendant, to award compensation not exceeding rupees one thousand for a temporary injunction, where it appears to the said Court that such injunction was applied for on insufficient grounds. The remedy provided under that Section is only optional. Hence, a regular suit for compensation for injury caused by the temporary injunction is not barred by the omission to proceed under that Section.⁴

There is, however, a difference between the conditions necessary for the maintainability of an application under Section 95, and those necessary for the maintainability of a regular suit. Under that Section, it is enough if the applicant shows that the temporary injunction was obtained *on insufficient grounds*. But in a suit for

1 (1893) L R 11 Q B D 674 (689) 52 L J Q B 483 49 L T 249 31 W R (Eng) 608, *Quartz Hill Gold Mining Co v Eyre* (Per Bowen L J)

(1928) A I R 1928 Cal 1 (9) 106 Ind Cas 277, *Imperial Tobacco Co v Albert*

2 Salmond on Torts, 6th Edition, Page 588

3 (1928) A I R 1928 Cal 1 (7) 106 Ind Cas 277, *Imperial Tobacco Co v Albert*

(1917) A I R 1917 All 451 (454) 36 Ind Cas 245 38 All 520, *Mt Kasturi v. Pannalal*

[See (1911) 12 Ind Cas 507 (509, 510) 35 Mad 598, *Nanjappa v Ganapathi Goundan*

(1895) 19 Mad 80 (81) 6 Mad L Jour 11, *Manasikraman v Arisilan*,

(1928) A I R 1928 Mad 679 (679) 51 Mad 642 109 Ind Cas 414, *Rama Row v Somasundaram Asary* (Where it is assumed that such a suit will lie)

(1870) 13 Suth W R 305 (306) 5 Beng L R App 4, *Nand Kumar v Gaur Shankar* (Which decision implies that such an action will lie)

(1927) A I R 1927 Cal 247 (249) 53 Cal 1008 100 Ind Cas 318, *Har Kumar v Jagat Bindhu*]

[But see (1915) A I R 1915 Cal 173 (174, 175) 42 Cal 550 26 Ind Cas 296 *Mohini Mohan v Surendra Narain* (In this decision it is doubted whether such an action is maintainable)]

3a (1915) A I R 1915 Cal 173 (174) 42 Cal 550 26 Ind Cas 296, *Mohini Mohan v Surendra Narain*

4 See S 95 sub-s 2, Civil Procedure Code.

[See (1920) A I R 1920 Mad 897 (899) 55 Ind Cas 766, *M. P. M. V. L. Firm of Madura v. Krishnaswamy Iyer*]

Article 42
Notes
2—3

compensation for injury caused by the temporary injunction wrongfully obtained, the plaintiff must allege and prove that the defendant acted *maliciously and without reasonable and probable cause*. For, as has been seen already, apart from malice and want of reasonable and probable cause, a plaintiff has no cause of action and cannot recover compensation in an independent suit upon mere proof that an injunction was granted to restrain him from doing what has since been held to be within his rights.⁵

3. "*Wrongfully obtained.*" — It has been seen in Note 2 that the obtaining of a *permanent* injunction in the suit is not 'wrongful' at all. In the case of *temporary* injunctions the element of wrong consists in obtaining the injunction maliciously and without reasonable and probable cause.¹ Thus, the malice of the person at whose request the injunction is granted results in some form of mis statement or leads him to suppress some fact or facts which it was his duty to lay before the Court.² Malice and the absence of reasonable and probable cause must both be present.³ Merely an allegation in the plaint that the defendant was actuated by malice coupled with the fact that the suit in which the injunction was obtained ultimately proved unsuccessful is not enough to show the want of reasonable and probable cause.⁴

5 (1928) A I R 1928 Cal 1 (7) 106 Ind Cas 277 *Imperial Tobacco Co v Albert Bonnan* (On appeal from A I R 1926 Cal 757)

(1929) A I R 1929 P C 222 (223) 119 Ind Cas 606 (P C) *Albert Bonnan v Imperial Tobacco Co* (Affirming A I R 1928 Cal 1)

(1928) A I R 1928 Mad 679 (679) 109 Ind Cas 414 51 Mad 642 *Rama Row v Somasundaram Asary*

[See also (1920) A I R 1920 Cal 357 (360) 57 Ind Cas 375 (F B), *Norendra Nath v Bhusan Chandra*

(1922) A I R 1922 Lah 303 (303) 69 Ind Cas 523 *Evans v Arthur*]

[But see (1912) 16 Ind Cas 443 (444) (Cal) *Bhut Nath v Chandra*

But see (1912) 16 Ind Cas 443 (444) (Cal) Bhut Nath v Chandra

But see (1912) 16 Ind Cas 443 (444) (Cal) Bhut Nath v Chandra

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But see (1912) 16 Ind Cas 443 (444) (Cal) Bhut Nath v Chandra

Note 3

1 (1917) A I R 1917 All 451 (453 454) 36 Ind Cas 245 38 All 520 *Mt Kastur v Panna Lal*

2 See (1928) A I R 1928 Cal 1 (7) 106 Ind Cas 277, *Imperial Tobacco Co v Albert Bonnan*

3 (1929) A I R 1929 P C 222 (223) 119 Ind Cas 606 (P C) *Albert Bonnan v Imperial Tobacco Co*

[But see (1912) 16 Ind Cas 443 (444) (Cal) *Bhut Nath v Chandra* *Dunode* (Held that it was not necessary for the plaintiff to prove any malice or want of reasonable and probable cause.—In view of Privy Council decision cited above it is submitted this decision is no longer good law)]

4 (1915) A I R 1915 Cal 173 (175 176) 42 Cal 550 26 Ind Cas 296 *Vohans Vohan v Surentra Narain*

4. **Starting point of limitation.**—The cause of action for a suit for injury caused by the injunction accrues from the time at which the plaintiff was first damaged and continues as long as the injunction remains in force. Limitation for such a suit begins to run when the injunction ceases¹. Where an injunction, which was granted on 8th November 1902, terminated when the suit was dismissed on 3rd July 1905, and the plaintiff applied on the 2nd July 1908 for assessment of damages under Section 95 of the Civil Procedure Code, and the application was converted by order of Court into a regular suit, it was held that the suit must be considered to have been instituted on the 2nd July 1908 though the court-fee was paid and the application registered as a suit on 1st August 1908, and that the suit was not barred under this Article².

Under Order 39 Rule 1 of the Civil Procedure Code a temporary injunction remains in force "until the disposal of the suit or until further orders". In the absence of such orders, an interlocutory injunction granted in a suit is *ipso facto* dissolved when the Court passes a decree in the suit. Hence, the suit for injury caused by the temporary injunction must be instituted within three years from the cessation of the injunction, even though the suit in which it was granted be pending in appeal³.

Article 42
Note 4

43. Under the Indian Succession Act, 1925, section 360 or section 361 to compel a refund by a person to whom an executor or administrator has paid a legacy or distributed assets.

Three years. The date of the payment or distribution.

Article 43

Synopsis

1. Legislative changes.
2. Scope.

* Act of 1877, Article 43.
In effect the same as above
Acts of 1871 and 1859
No corresponding provision

Note — "This Article formerly appeared in Section 321 of Act 10 of 1865, but the limitation then was two years after the death of the testator or one year after the payment of the legacy. —Stirling 6th Edition, Page 193

Note 4

- 1 (1870) 13 Suth W R 305 (306) 5 Bng L R App 4, *Nanda Kumar Shaha v Gaur Shankar*
(See (1907) 29 All 615 (618) 4 A L J 514, *Ram Narain v Umrao*
"200 C.R. 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000

Article 43
Notes
1—2

1. **Legislative changes.**—The words and figures "Indian Succession Act, 1925, section 360 or section 361" have been substituted by the Repealing and Amending Act, 8 of 1930, for the words and figures "Indian Succession Act, 1865, section 320 and section 321 or under the Probate and Administration Act, 1881, section 139 and section 140"

2. **Scope.**—Under the proviso to Section 360 of the Indian Succession Act of 1925, where the executor or administrator has distributed the assets to certain persons to the exclusion of other creditors or claimants of whose claim he had no knowledge at the time of the distribution, the latter may follow those assets or any part of them in the hands of the former

Section 361 of the same Act provides that a creditor who has not received payment of his debt may call upon a legatee who has received payment of his legacy to refund the same, whether the assets of the testator's estate were or were not sufficient at the time of his death to pay both debts and legacies, and whether the payment of the legacy by the executor or administrator was voluntary or not

Suits under the above provisions for a refund are governed by this Article

As to the limitation for suits for legacies, or for a share of a residue bequeathed by a testator, see Article 123 *infra*

Article 44

44. By a ward who has attained majority, to set aside a transfer of property by his guardian.	Three years.	When the ward attains majority.
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Synopsis

1. Legislative changes.
2. Scope of Article.
3. What transfers by guardian are binding on ward unless and until set aside.
4. "Transfer of property."
5. Transfer must be by guardian.
6. De facto guardian, transfer by.
7. Suit by assignee or legal representative of ward.
8. Burden of proof as to age.
9. Several wards—Transfer of their joint property—Suit to set aside transfer—Limitation applicable.

Act of 1877, Article 44.

44 —By a ward who has attained majority, to set aside a sale by his guardian	Three years	When the ward attains majority
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Acts of 1871 and 1859.
No corresponding provision

Other Topics

Article 44
Notes
1—2

Alien in possession—Suit not brought by ward—Ward's right to property barred under Section 23	See Note 2
Article does not bar defence	See Note 2 Pt 3
	See Note 4, Pt 7
	See Note 5 Pt 4
	of a tarwad is not guardian
	See Note 5, Pts 2, 3
Principle of Section 6 is applicable to Article 44	See Note 7, Pts 7 to 9
Suit by assignee or legal representative with ward as co plaintiff—Applicability of Article	See Note 7, Pts 3, 6
Suit for declaration and injunction—Substantially one for setting aside	See Note 2 F N (2)
Suit to set aside decree based on compromise—Article not applicable	See Note 4, Pt 4
Transfer void <i>ab initio</i> —Article does not apply	See Note 2 Pt 1
	Note 3 Pts 5 to 7

1. Legislative changes.

- 1 There was no provision corresponding to this Article in the Acts of 1859 and 1871¹
- 2 The Article in the Act of 1877 applied only to sales² The present Article applies to *any* transfer of property

2. Scope of Article.—The Article only applies to a suit to *set aside* a transfer of property made by the guardian of a minor. A transaction can be set aside by a person only if it is binding on him unless and until it is set aside. Hence the Article only applies to cases where the transfer by the guardian is binding on the ward till it is set aside. But where a transfer by the guardian is void *ab initio* or is otherwise not binding on plaintiff, it need not and cannot be set aside. In such cases, therefore, the Article does not apply. The ward can, in such cases, sue for a *declaration* that the transfer does not affect his interests or if the transferee is in possession, the ward can sue for possession treating the transfer as a nullity and such suit will be governed by Articles 120, 142 or some other Article.¹

Article 44 — Note 1

- 1 (1866) 1 Agr 180 (181) *Iradat Khan v Debee Dyal* (Case under Act of 1859—Limitation was 12 years from the date of the cause of action)
- 2 (1906) 28 All 30 (32) 1905 All W N 176 2 All L Jour 507 *Abdul Rahman v Sukhdoyal Singh* (Leave—Art 44 did not apply)
- (1883) 5 All 490 (491) 1883 All W N 64 *Pamansar Pandey v Paghbar Jati*
- (1907) 80 Mad 893 (395) 2 Mal L Tim 351 1st Mal L Jour 220 *Madigula Latchiah v Palli Mukhalinga* (Transfer of plaintiff's interest as mortgagor is sale within Art 44)

Note 2

- 1 (1920) A I R 1920 Mad 578 (601) 43 Mad 436 5th Ind Cas 519 *Narasimha Rao v Papanna*
- (1917) A I R 1917 Mad 254 (255) 33 Ind Cas 436 *Sims Konnu v Indra Narajji*

Article 44
Note 2

But, where the alienation is binding on the ward till it is set aside, the Article applies to the case and a suit to set aside the alienation must be brought within the period prescribed by this Article. Where the alienee is in possession of the property by virtue of the transfer, the ward cannot recover the property till the alienation is set aside. Hence in such cases a suit for possession of the property by the ward is also governed by this Article though the Article refers in terms only to a suit to set aside a transfer of property. The result is that if no suit is brought for the recovery of the property within the time prescribed by this Article, the ward's right to the property itself will be extinguished under Section 28².

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- (1893) 22 Bom 1 (4, 5), *Jugmohandas v Pallonjee Eduljee*
 (1929) A I R 1929 Bom 186 (189) 53 Bom 360 115 Ind Cas 405, *Parashram v Lakshmi Bai* (Where certain leases executed by the guardian were held to be void as constituting a clog on the equity of redemption held that a suit to set aside the leases was not governed by Art 44 of the Limitation Act)
 (1928) A I R 1928 Nag 202 (203) 107 Ind Cas 897, *Maroti Suryabhan v Raimant Rao* (Transfer of spes successionis)
 (1931) A I R 1931 Mad 45 (46) 54 Mad 352 129 Ind Cas 245, *Sobhanadri Apparao v Venkoba Rama Rao*
 (1935) A I R 1935 All 417 (418) 157 Ind Cas 118 *Bhagwan Dass v Kashi Prasad*
 (1915) A I R 1915 All 113 (119) 27 Ind cas 687, *Kalyan Singh v Pitambar Singh*
 (1921) A I R 1921 Cal 572 (578) 62 Ind Cas 428 *Laloo Karikar v Jagat Chandra Shaha*
 (1918) 19 Ind Cas 235 (235) 1913 Pun Re No 15, *Uttam Singh v Barkat Ali*
 (1915) A I R 1915 Mad 1196 (1197 1198) 29 Ind Cas 1 89 Mad 456, *Narayanan v Lakshumanan Chettiar*
 (1894) 1894 Pun Re No 56, *Bhai Asa Ram v Attar Singh*
 (1911) 9 Ind Cas 377 (378) (Cal), *Sham Chandra v Godadhar Mandal*

- (1909) 1 Ind Cas 545 (545) 1909 Pun Re No 28, *Sardar Shah v Haji*
 (1929) A I R 1929 Mad 313 (318) 118 Ind Cas 481, *Ramaswami v Govind ammal*

[See also (1907) 31 Cal 329 (333) 31 Ind App 87 9 Bom L R 602 11 Cal W N 424 5 Cal L Jour 334 2 Mad L Tim 133 17 Mal L Jour 154 4 All L Jour 329 (P C) *Bijoy Gopal v Krishna Mahishi Debi* (Transfer by Hindu widow — Transfer is voidable in the sense that reversioner may ratify it — But reversioner is entitled to ignore it and sue for possession)]

- (1894) G All 260 (262) 1894 All W N 73 *Ikram Singh v Intizam Ali*]
 2 (1932) A I R 1932 All 103 (109) 53 All 733 136 Ind Cas 71 *Ram Charittr v Suraj Teh*

But, where the ward continues in possession notwithstanding the transfer and the transferee sues him for possession, the ward can resist the suit on the ground of the transfer being liable to be set aside at his instance although the period laid down by this Article

- (1929) A I R 1929 All 879 (681) 122 Ind Cas 680 52 All 110 *Dipchand v Munni Lal*
 (1920) A I R 1920 Bom 1 (6) 44 Bom 742 58 Ind Cas 257 (F B) *Fakirappa Lumanna v Lumanna Mahadu* (Overruling A I R 1915 Bom 132)
 (1924) A I R 1924 Bom 172 (173) 81 Ind Cas 673 *Shitbasappa Ningappa v Balappa Bisappa*
 (1920) A I R 1920 Cal 776 (777) 59 Ind Cas 589 *Brojendra Chandra Sarmia v Prosunna Kumar Dhar*
 (1919) A I R 1919 Cal 401 (404) 52 Ind Cas 269 *Kanok Das v Srisahari Goswami*
 (1917) A I R 1917 Cal 610 (611) 34 Ind Cas 188 *Krishna Dhone v Bhagaban Chandra*
 (1914) A I R 1914 Cal 825 (826) 24 Ind Cas 110 *Manmatta Nath v Khirdar Ghosh*
 (1911) 9 Ind Cas 37 (380) (Cal) *Sham Chandra v Godadhar Mandal*
 (1898) 3 Cal W N 278 (279) *Satish Chandra Guha v Chandra Kant Pym*
 (1923) A I R 1923 Lah 254 (254) 70 Ind Cas 984 *Jagat Singh v Balaga Singh*
 (1921) A I R 1921 Lah 25 (26) 61 Ind Cas 334 *Tara Chand v Murlidhar*
 (1913) 19 Ind Cas 235 (235) 1913 Pun Re No 15 *Uttam Singh v Barkat Ali*
 (1925) A I R 1925 Lah 619 (620) 6 Lah 447 89 Ind Cas 602, *Ladha Mat v Malak Ram*
 (1891) 1891 Pun Re No 57 *Ghulam Pasul v Ajab Gul*
 (1904) 1904 Pun Re No 23 (p 395) 1904 Pun L R No 107 *Moti Singh v Ghasia Singh*
 (1902) 1902 Pun Re No 19 (p 705) 1901 Pun L R No 183 *Said Shah v Abdullah Sial*
 (1936) A I R 1936 Mad 346 (346 347) 161 Ind Cas 797 59 Mad 549, *Ankamma v Kameshwaramma*
 (1935) A I R 1935 Mad 1 (2) 154 Ind Cas 616 *Ankamma v Kameshwaramma*
 (1929) A I R 1929 Mad 668 (669) 119 Ind Cas 38, *Doraistwamy Reddiar v Thangavelu Madaiar*
 (1929) A I R 1929 Mad 313 (318) 118 Ind Cas 481 *Pamaswamy v Govindamma*
 (1931) A I R 1931 Mad 45 (46) 129 Ind Cas 245 54 Mad 352 *Sobhanadri Appa Rao v Venkata Rama Rao*
 (1921) A I R 1921 Mad 425 (426) 62 Ind Cas 630 *Arunugam Pillai v Panayadian Ambalai*
 (1918) A I R 1918 Mad 724 (726) 41 Mad 102 40 Ind Cas 664 *Kandasamy Naicken v Irusappa Naicken* (If thereafter the ward ousts the transferee from possession and the latter sues the ward for possession he cannot resist the suit)
 (1918) A I R 1918 Mad 487 (489) 47 Ind Cas 939 *Satyalakshmi Narayana v Jagannadham*
 (1918) A I R 1918 Mad 19 (20 21) 45 Ind Cas 807 41 Mad 650 *Murajalli Henna v Panasams Chetti*
 (1915) A I R 1915 Mad 1055 (1055) 28 Ind Cas 704 *Suryanarayana v Narayanaswamy*
 (1916) A I R 1916 Mad 350 (362) 19 Ind Cas 596 35 Mad 371 *Rajah of Ponnad v Arunachallam Chettiar*
 (1912) 15 Ind Cas 365 (366) (Mad) *Srinivasulu Pillai v Ponnasami*
 (1886) 1 C P L R 75 (76) *Sitaram Sadashree v Nates Patel*
 (1914) A I R 1914 Oudh 338 (339) 17 Oudh Cas 52 23 Ind Cas 406 *Mit Sicoatlal v Sicoaraj Singh*

Article 45
Notes
2-3

for a *suit* by him may have expired³ The reason is that the Limitation Act does not bar a *defence* Nor is the right of the ward affected by Section 29, as that Section does not apply to a person who is in possession and consequently has no occasion to sue for possession⁴

As to the cases in which an alienation by the guardian is binding on the ward till it is set aside, see Note 3, *infra*

Where a ward sues not to *set aside* a sale by his guardian but for redemption of the property on the ground that the alleged sale is only a mortgage, this Article has no application⁵

3. What transfers by guardian are binding on ward unless and until set aside. — It has been seen in Note 2 that this Article only applies to a transfer which is binding on the ward till it is set aside The question therefore arises under what circumstances a transfer effected by a guardian is binding on the ward unless and until it is set aside A transfer by the guardian under the following

[See (1900) 23 Mad 271 (279) 27 Ind App 60 4 Cal WN 329 10 Mad L Jour 29 2 Bom L R 597 7 Bar 671 (P C) *Gnanasam banda Pandara Sannadhi v Velu Pandaram* (The decision of the Privy Council in this case in which it held that an alienation of a religious office by the guardian of a minor was void *ab initio* and at the same time held that the minor's right was lost under Section 23 by his failure to sue within the period of three years under this Article is not clear)]

[See also (1898) 15 Cal 58 (65) 14 Ind App 148 5 Sar 92 12 Ind Jur 9 R & J 90 (P C) *Janki Kumar v Ajit Singh*

(1902) 25 Bom 337 (341 352) 27 Ind App 216 5 Cal WN 10 2 Bom L R 927 10 Mad L Jour 368 7 Sar 78 (P C) *Valhar jun v Varhar* (Court sale not held without jurisdiction—Not voidable—Must be set aside)

(1895) 12 Cal 69 (74 75) *Raghubar Dyal Sahu v Bhikyalal Visser*

(1924) A I R 1924 Cal 1003 (1009) 83 Ind Cas 1040 *Uma Charan Chakravarti v Guram Bag* (Suit for declaration and injunction—Substantially one for setting aside)]

3 (1923) A I R 1923 Lah 247 (247) 70 Ind Cas 966 *Chauhar v Mansha Singh*

(1906) 30 Bom 395 (408) 8 Bom L R 296 *Minatal v Kharsetji*

(1890) 14 Bom 222 (227), *Hargovan las Lakshmidas v Bajubhai Jajubhai*

(1904) 23 Bom 639 (642) 6 Bom L R 592 *Panganath Sakhamam v Govind Narasim*

(1916) A I R 1916 Lah 229 (230) 32 Ind Cas 465 1916 Pan Re No 1, *Golachand v Nialar Mal*

(1916) A I R 1916 Mad 350 (352) 19 Ind Cas 596 39 Mad 321, *Rajah of Pamnad v Arunachallam Chelliar*

(1919) A I R 1919 Mad 1650 (1652) 48 Ind Cas 856 42 Mad 36 *Chinnaswamy Reddi v Krishnaswamy Reddi*

(1917) A I R 1917 Mad 190 (191) 34 Ind Cas 483 *Thiruvengalata v Seshadri*

(1907) 30 Mad 169 (178) 17 Mad L Jour 19 2 Mad L Tim 4 (F B) *Lakshmi Doss v Poop Lal*

4 (1894) 17 Mad 255 (256, 257), *Orr v Sunlara Pandia*

(1923) A I R 1923 Lah 247 (247) 70 Ind Cas 966 *Chauhar v Mansha Singh*

(1930) A I R 1930 All 848 (859, 860) 52 All 979 132 Ind Cas 21, *Mohamed I Raza Umali v Zuloor Umali*

5 (1924) A I R 1924 Bom 172 (179) 81 Ind Cas 673, *Shubasara Ningappa v Dalapa Bivapa*

circumstances has been held to be one which will be binding on the minor till it is set aside —

Article 44
Note 3

- 1 A transfer of property by a certificated guardian without the permission of the Court ¹
- 2 A transfer of property by a certificated guardian with the permission of the Court where such permission has been obtained by fraud or misrepresentation ²
- 3 A transfer of property by the natural guardian of a minor in excess of his powers as such guardian, i.e. in the absence of any legal necessity or other justifying cause for such transfer ³

Note 3

- 1 (1926) A I R 1926 Oudh 83 (92-94) 89 Ind Cas 69 *Mohan Lal v Muham-mad Adil*
- (1930) A I R 1930 All 853 (859) 52 All 949 132 Ind Cas 21 *Mohamed Raza Ahmad v Zahoor Ahmad*
- (1932) A I R 1932 All 108 (109) 53 All 738 136 Ind Cas 71 *Ram Charittr Visir v Suraj Teh*
- (1919) A I R 1919 Cal 404 (404) 52 Ind Cas 269 *Kanok Das v Srishari Goswami* (A sale by a certificated guardian of a minor not in accordance with the Court's sanction is voidable but it is good until it is avoided)
- [See however (1931) A I R 1931 Cal 131 (192) 58 Cal 128 130 Ind Cas 2 8 *Nagendra Nath Ghosh v Mohini Mohan Bose* (Sale by guardian without sanction is voidable but need not be avoided by suit. It may be avoided by executing another sale with permission. It is submitted that this is not correct. A party to a voidable transaction can avoid it only by a suit brought for the purpose. See (1916) A I R 1916 Mad 850. See also Notes to Art 91 *infra*)]
- 2 (1932) A I R 1932 All 109 (109) 53 All 738 136 Ind Cas 71 *Ram Charittr Visir v Suraj Teh*
- (1915) A I R 1915 Bom 132 (133) 33 Ind Cas 441 *Anandappa v Totappa*
- 3 (1929) A I R 1929 All 879 (891) 122 Ind Cas 680 52 All 110 *Dip Chand v Munni Lal*
- (1920) A I R 1920 Bom I (6) 44 Bom 42 53 Ind Cas 257 *Fakirappa v Laxmaia* (Overruling A I R 1915 Bom 132)
- (1918) A I R 1918 Bom 180 (180) 46 Ind Cas 29 42 Bom 626 *Laxmaia v Rachappa*
- (1924) A I R 1924 Cal 420 (422) 81 Ind Cas 680 *Prof Lal Chandra Chowdhury v Nivaran Choudhury*
- (1920) A I R 1920 Cal 76 ("") 59 Ind Cas 589 *Brajendra Chandra Sarma v Prasanna Kurnar Dhar*
- (1919) A I R 1919 Cal 404 (404) 52 Ind Cas 269 *Kanok Das v Srishari*
- (1917) A I R 1917 Cal 610 (611) 34 Ind Cas 189 *Krishna Dione v Bhagawan Chandra*
- (1911) Ind Cas 3 ("") (300) (Cal) *Slam Chandra v Colidhar Mandal*
- (1928) A I R 1928 Lah 115 (116) 9 Lah 33 103 Ind Cas 365 *Akhusia v Fazl Mahor el Khaz*
- (1925) A I R 1925 Lah 619 (670) 6 Lah 41 69 Ind Cas 607 *Lakha Mal v Malik Lom*
- (1935) A I R 1935 Mid I (9) 154 Ind Cas 616 *Annamia v Kameswarama*
- (1929) A I R 1929 Mad 669 (669) 119 Ind Cas 33 *Doraisamy Reddyar v Thangavelu Muthiar*
- (1929) A I R 1929 Mad 313 (318) 115 Ind Cas 451 *Lamaswami v Govindammal*
- (1928) A I R 1928 Mad 42 (43) 10 Ind Cas 63, *Surrayya v Subamma*

Article 44
Note 3

- 4 A transfer of property by the natural guardian which has been induced by fraud or undue influence ⁴

The following transfers are *void* and hence not within the scope of this Article —

- 1 A transfer of property which is vitiated by want of consideration ⁵
- 2 A transfer of property which is compulsorily registrable but is not registered ⁶

- (1921) A I R 1921 Mad 425 (425) 62 Ind Cas 630, *Arumugam Pillai v Pandigam Ambalam*
- (1920) A I R 1920 Mad 208 (208) 43 Mad 433 55 Ind Cas 655, *Kadiri Masathan Rowther v Segammall*
- (1918) A I R 1918 Mad 724 (726) 41 Mad 102 40 Ind Cas 664, *Kandasamy Naicken v Iyusappa Naicken*
- (1918) A I R 1918 Mad 467 (489) 42 Ind Cas 939, *Satyalakshmi v Jagannadham*
- (1916) A I R 1916 Mad 1207 (1207) 31 Ind Cas 811, *Vellayudham Pillai v Perumal Naicker*
- (1915) A I R 1915 Mad 1055 (1055) 28 Ind Cas 704, *Suryanarayana v Narayanaswamy*
- (1915) A I R 1915 Mad 296 (301) 36 Mad 867 24 Ind Cas 120, *Muthukumara v Anthoney*
- (1922) A I R 1922 Nag 201 (207) 66 Ind Cas 303 17 Nag L R 183, *Kholhu v Belsingh*
- (1900) 23 Mad 271 (279) 2 Bom L R 597 4 Cal W N 329 27 Ind App 69 10 Mad L Jour 29 7 Sar 671 (P C) *Gnanasambanda v Velu*

clear)

- (1936) A I R 1936 Mad 914 (914) 165 Ind Cas 656 *In re Annia Pillai* (Suit by a brother in a joint Hindu family on behalf of himself and his minor brothers to set aside an alienation of the joint family property by their mother during their minority—Suit governed by S 7 and Art 44)
- [See also (1926) A I R 1926 Mad 46 (49) 88 Ind Cas 967, *Deenackala*

suing for possession)

makshi Nayakan v
be set aside before

- (1916) A I R 1916 Sind 53 (54) 35 Ind Cas 551 10 Sind L R 38, *Ghimat Dyalmal v Karmoomal Sircomal* (Do)
- (1909) 11 Oudh Cas 346 (351), *Balbahaddar Singh v Jowahir Singh* (Do)
- (1910) 5 Ind Cas 585 (586, 587) 32 All 392, *Bechan Singh v Kamta Pershad* (Do)
- (1890) 14 Bom 279 (291) 1899 Bom P J 311, *Bhagvant Govind v. Konda Mahadu* (Do)
- (1925) A I R 1925 Mad 990 (991) 85 Ind Cas 546, *Janaki v Govindan* (Do —Obiter)

3. A transfer of property which is vitiated by fraud on the law of registration⁷

Article 44
Notes
3—4

4. "Transfer of property." — The Article does not apply unless the transaction impeached is a *transfer of property* by the guardian¹. But the Article is wide enough to include *any* transfer of property².

In the undermentioned case³ it was observed that this Article applies only where possession is also transferred to the donee and that it will not apply to simple mortgages where possession is not transferred. It is submitted that this view is not correct.

A suit to set aside a *decree* based on a compromise entered into by the guardian of a minor is governed not by this Article but by Article 120⁴. But, where the compromise involves a transfer of property, it has been held that the minor must sue for the recovery of the property within three years of his attaining majority⁵.

Where the subject-matter of the transfer is not the property of the minor at all, the Article does not apply. Thus, where the guardian purports to transfer property in which the minor has no present interest at all, the Article does not apply⁶.

- 7 (1920) A I R 1920 Mad 593 (601) 43 Mad 436 56 Ind Cas 519, *Narasimha v Papanna*
(1931) A I R 1931 Mad 45 (46) 129 Ind Cas 245 54 Mad 852 *Sobhanadri Appa Rao v Venkata Rama Rao*

Note 4

- 1 (1932) A I R 1932 P C 81 (87) 59 Ind App 74 136 Ind Cas 454 54 All 93 (F C) *Ghulam Muhammad v Ghulam Hussain* (Held on construction of document executed by the mother, the legal guardian, that there was no transfer of property)
(1918) A I R 1918 Mad 724 (727) 41 Mad 102 40 Ind Cas 664, *Kandasamy v Irusappa* (Suit to recover property not covered by the transfer by the guardian—Article does not apply—Mother transferring as guardian of A — Mother deceased at the time of transfer — Transfer does not operate on share of son subsequently born and latter need not sue within three years of attaining majority)
(1921) A I R 1921 Mad 553 (554) 61 Ind Cas 762, *Venkata Reddi v Kuppu Peddi* (Assent to partition is not transfer)
2 (1907) 30 Mad 993 (995) 2 Mad L Tm 352 27 Mad L Jour 280 *Madejais Latchiah v Pally Mukkalings* (Transfer of plaintiff's interest as mortgagee is within the Article)
(1918) A I R 1918 Nag 20 (21) 15 Nag L R 55 51 Ind Cas 913, *Vithu v Devdas*
(1915) A I R 1915 Mad 295 (301) 33 Mad 867 21 Ind Cas 120 *Muthukumara v Anthony* (Lease)
(1913) 20 Ind cas 275 (278) 16 Oudh Cas 119, *Id Masato v Annullah Khan*
[See also (1909) 3 Ind Cas 51 (52) 5 Nag L R 97, *Ganpat v Trimbak*]
3 (1930) A I R 1930 All 839 (859) 52 All 979 132 Ind Cas 21, *Mid Raza Ahmad v Zahoor Ahmad*
4 (1922) A I R 1922 Lah 166 (167) 2 Lah 164 62 Ind Cas 794, *Jeta Singh v Man Singh*
5 (1924) A I R 1924 Lah 427 (428) 77 Ind Cas 523 *The Fay v Kleanu*
6 (1928) A I R 1928 Nag 262 (263) 107 Ind Cas 897, *Maroti Suryabhan v Bhurant Rao*
(1930) A I R 1930 Oudh 82 (83) 123 I C. 72, *Iqbal Narain v Danley Lal*.

Article 44
Note 5

The expression "guardian" in the Article includes not only a certificated guardian but also a *natural* guardian ⁴

As to who are natural guardians of a ward, the question depends on the personal law of the parties. The undermentioned cases⁵ may be referred to

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- 4 (1929) A I R 1929 All 879 (880) 122 Ind Cas 680 52 All 110, *Dip Chand v Munni Lal*
 (1924) A I R 1924 Bom 517 (518) 76 Ind Cas 636, *Irangauda Fakirgauda v Ningappa*
 (1920) A I R 1920 Bom 1 (6) 44 Bom 742 58 Ind Cas 257 (FB), *Fakirappa Lumanna v Lumanna Mahadu*
 (1914) A I R 1914 Cal 825 (826) 24 Ind Cas 110, *Manmathanath Mandal v Ahirudhar Ghosh*
 (1918) A I R 1918 Bom 180 (180) 46 Ind Cas 22 42 Bom 626, *Lazmaia v Rachappa*
 (1911) 9 Ind Cas 377 (380) (Cal), *Sham Chandra v Galadhar Mandal*
 (1934) A I R 1934 Mad 605 (607) 57 Mad 1062 162 Ind Cas 546, *Bangar ammal v Lydia Kent* (Natural guardian of Christian)
 (1929) A I R 1929 Mad 318 (316) 118 Ind Cas 481, *Ramasami v Govind ammal*
- 5 (1914) A I R 1914 P C 41 (42) 38 Mad 807 41 Ind App 814 24 Ind Cas 290 (P C) *Mrs Annie Besant v Narayanasah* (Under Hindu law, father is natural guardian)
 (1921) A I R 1921 All 346 (347) 43 All 213 59 Ind Cas 909, *Deba Nund v Anandmani* (Do)
 15 Ind App 78 47 Ind Cas
 (Under Muhammadan law)
- (1922) A I R 1922 P C 135 (138) 68 Ind Cas 754 (P C), *Amba v Shrinivasa Kamathi* (Father of Hindu minor married girl is not her guardian)
 (1929) A I R 1929 P C 24 (27) 56 Ind App 21 52 Mad 175 114 Ind Cas 17 (P C) *Venkatappayya v Nayani Venkata Ranga Rao* (The natural father of an adopted son may under certain circumstances be taken to be the natural guardian in the absence of any judicial appointment)
 (1867) 7 Suth W R 74 (75) *Soobah Doorgah Lal Jha v Rajah Neelanund Singh* (Hindu father can appoint testamentary guardian for self acquired property)
 Testa
 lai v
- (1919) A I R 1919 Mad 1046 (1050) 41 Mad 561 45 Ind Cas 905 (F B) *Chidambara Pillai v Rangasamy Naicker* (Do)
 (1928) A I R 1928 Bom 8 (13) 106 Ind Cas 79 52 Bom 16, *Venkataraman Mukund v Janardhan Baburao* (Do)
 38 Bom 94 *Mahableshewar*
 2 Ind Cas 437, *Venkata*
- (1924) A I R 1924 Nag 351 (358) 78 Ind Cas 946 24 Nag L R 8 *Ganpat Sambhaji v Mahaleo* (Under Hindu law, if there is no father, mother is natural guardian)
 1925) A I R 1925 Nag 385 (386) 88 Ind Cas 268, *Shampuri v Ramchandra* (Do)
 (1926) A I R 1926 Lah 693 (694) 93 Ind Cas 514, *Ichhar Singh v Natha* (Do)
 (1915) A I R 1915 Bom 150 (151) 33 Ind Cas 444 *Balappa Dundappa v Chanabasappa Shitalingappa* (Step-mother held not natural guardian under Hindu Law)

6 De facto guardian, transfer by.

Article 44
Note 6

Under Hindu Law—The Article does not apply to a transfer by the *de facto* guardian of a Hindu minor¹ The reason is that the Article applies only to a transfer by the guardian which is *binding on the ward till it is set aside* whereas a transfer by the *de facto* guardian of a Hindu minor is not such a transfer

No doubt the *de facto* guardian of a Hindu minor is entitled to transfer the minor's property for a valid necessity² It has also been held that a transfer by the guardian without such necessity is not totally void but only voidable at the option of the

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- (1936) A I R 1936 Mad 346 (347) 161 Ind Cas 797 59 Mad 549 *Ankamma v Kar eshavaramma* (In absence of adult coparceners Hindu mother is natural guardian of even joint family property)
 (1906) 30 Bom 152 (155) " Bom L R 809 *Bindaji Laxuman v Mallura bai* (Do)
 (1935) A I R 1935 Mad 1 (2) 151 Ind Cas 616 *Ankamma v Kameswaramma* (Do)

Note 6

- 1 (1915) A I R 1915 Mad 659 (660) 88 Mad 1125 26 Ind Cas 179 *Thayammal v Kuppanna Koundan*
 (1930) A I R 1930 Mad 708 (710) 196 Ind Cas 632 *Sorimuthu Thondeman v Perumal Immal*
 (1928) A I R 1928 Mad 226 (230) 108 Ind Cas 529 *Ras asuami Pillai v Kasinatha Iyer*
 (1931) A I R 1931 Mad 597 (598) 133 Ind Cas 773 *Purslothama Palho v Brundatana Dass*
 (1936) A I R 1936 Mad 884 (886) 165 Ind Cas 287 *Ponnammal v Gomathi Ammal*
 (1918) A I R 1918 Nag 20 (21) 15 Nag L R 55 51 Ind Cas 943 *Vithu v Devidass*
 (1927) A I R 1927 Nag 145 (147) 99 Ind Cas 1050 *Mahadeo v Somaji*
 (1919) A I R 1919 Nag 27 (28) 63 Ind Cas 397 *Sahu v Mohiddin*
 (1914) A I R 1914 Nag 75 (77) 10 Nag L R 133 26 Ind Cas 813 *Husen v Rajaram*
 (1926) A I R 1926 Nag 124 (126) 87 Ind Cas 1018 *Punjabrao v Ataram*
 2 (1856) 6 Moo Ind App 393 (412 413) 18 South W R 81 (Foot Note) See 953 (Note) 2 South 29 1831 552 (PC) *Hussainpershad Pande v Mt Babooee Munraj Koonerree*
 (1899) 21 Cal 820 (822, 823) 3 Cal W N 770 *Mofanund Mondul v Nafur Mondul*

legal guardian)

- (1890) 1890 Lun Re No 73 *Mastu v Nand Lal*
 (1909) A I R 1909 Lah 491 (423) 67 Ind Cas 431 *Madan Lal v Labhu Ram*
 (1903) 13 Mad L Jour 273 (274) *Ari nachalla Peddy v Chandambara Peddy*
 (1906) A I R 1906 Mad 45 (457) 97 Ind Cas 87 49 Mad 768 *Seetharamamma v Ippiah*
 (1918) A I R 1918 Nag 18 (19) 49 Ind Cas 246 *S. micarpuri v Gopal Singh*
 (1903) A I R 1903 Nag 230 (233) 71 Ind Cas 491 *Cunpat v Firm of Lisse sarial Goudram*
 (1904) A I R 1904 Nag 354 (355) 78 Ind Cas 946 24 Nag L R 8 *Ganpat Samahaji v Mahadeo*
 (1905) A I R 1905 Nag 134 (135) 81 Ind Cas 273 *Varavan v Dharma*

Article 44
Note 6

ward³ But, it would seem that this only means that a transfer by the guardian which is not supported by necessity is capable of ratification by the minor on attaining majority and not that it is *binding on him until it is set aside*. Hence, the setting aside of the transaction is not a condition precedent to the ward recovering the property from the alienee. The ward can treat the alienation as a nullity and simply sue for possession of the property. Such a suit will be governed not by this Article but by Article 142 or Article 144.⁴

Under Muhammadan Law — A transfer of property by the *de facto* guardian of a Muhammadan minor is *void* and hence the latter is not bound to have it set aside within the period prescribed by this Article before he can recover the property from the alienee.⁵

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- (1910) 6 Ind Cas 638 (639) 12 Cal L Jour 586, *Adhar Chandra v Kirtibash Bauragee*
 [See (1882) 1882 Bom P J 267 *Mahadaj v Balaj* (A gift of a minor's immovable property by the *de facto* managers thereof cannot be regarded as an act of management and the minor is entitled to recover it within 12 years of his coming of age)]
 [But See (1926) A I R 1926 Nag 124 (125) 87 Ind Cas 1018, *Panjab Rao v Aimaram*
 (1926) A I R 1926 Nag 81 (83) 92 Ind Cas 121 22 Nag L R 5 (F B), *Kesheo v Jagannath*
 (1914) 27 Mad L Jour 47 (Jour) (Critical Note on 27 M L J 285 *Thayam mal v Kuppanna Goundan*)]
- 3 (1930) A I R 1930 Lah 136 (137) 115 Ind Cas 417 *Tapassi Ram v Raja Ram*
 (1928) A I R 1928 Mad 226 (232) 108 Ind Cas 529 *Ramasamy Pillai v Kasinatha Iyer*
 (1931) A I R 1931 Mad 274 (275 276) 131 Ind Cas 609 *Adeyya v Tamma lampudi Govindu*
 (1923) A I R 1923 Nag 230 (233) 71 Ind Cas 491 *Ganpat v Firm of Bisse sirlal Govindram*
 [But see (1919) A I R 1919 Nag 27 (28) 63 Ind Cas 397, *Shahu v Mohiddin* (Such transfer is *void*)
 (1914) A I R 1914 Nag 75 (77) 10 Nag L R 133 26 Ind Cas 818 *Husan v Raja Ram* (Do)
 (1926) A I R 1926 Nag 124 (126) 87 Ind Cas 1018 *Punjabrao v Alma Pam* (Do)]
- 4 See (1931) A I R 1931 Mad 597 (598) 133 Ind Cas 773, *Purshothama Patho v Brundatana Dass*
 (1930) A I R 1930 Mad 708 (710) 126 Ind Cas 632, *Sorimuthu Thoudeman v Perumal Ammal*
 (1915) A I R 1915 Bom 132 (133) 33 Ind Cas 441 *Anandappa v Totappa* (Alienation by natural father after adoption of minor)
- 5 (1918) A I R 1918 P C 11 (20) 45 Cal 878 45 Ind App 73 47 Ind Cas 513 (P C) *Imambandi v Haji Mutsaddi*
 (1912) 13 Ind Cas 976 (978) 34 All 213 39 In 1 App 49 15 Oudh Cas 49 (P C) *Matadin v Akmalullah*
 (1925) A I R 1925 All 36 (36) 78 Ind Cas 1074 *Ganeshu Lal v Nobin Chandra Bose*
 (1927) A I R 1927 All 807 (808, 809) 102 Ind Cas 135 *Lakshmee das v Mt Jalla*
 (1930) A I R 1930 All 879 (859) 52 All 979 132 Ind Cas 21, *Md Raza Ahmad v Zakoor Ahmad*

Other cases — A transfer of property by the *de facto* guardian of a minor who is an Indian Christian,⁶ or a person governed by the Burmese Buddhist law,⁷ is also void and need not be set aside before the property covered by the transfer can be recovered from the alienee

7. Suit by assignee or legal representative of ward.—There is a conflict of decisions as to whether an assignee from the ward can

- (1921) A I R 1921 Cal 572 (573) 62 Ind Cas 423 *Ialoo Karthar v Jagat Chand*
 (1920) A I R 1920 Cal 832 (832) 59 Ind Cas 306, *Ashur ud din Muhammad v Taher Mohammad*
 (1907) 29 Cal 473 (476) 1 Cal W N 667 *Moyra Bibi v Buntlee Behari Biswas*
 (1921) A I R 1921 Cal 818 (819) 57 Ind Cas 945 47 Cal 713 *Mohesenuddin Ibmmd v Kabiruddin Ahmed*
 (1913) 19 Ind Cas 235 (235) 1913 Pun Re No 15 *Uttam Singh v Barkat Ali*
 (1909) 1 Ind Cas 545 (545) 1909 Lun Re No 23 *Sardar Shah v Haji*
 (1912) 16 Ind Cas 847 (848) (Lah) *Rupa Shah v Irshad Ali*
 (1916) A I R 1916 Lah 247 (248) 33 Ind Cas 913 1916 Pun Re No 63 *Sajjad Ali v Muhammad Zulfikar Ali Khan*
 (1923) A I R 1923 Lah 601 (601) 79 Ind Cas 579 *Mt Tahar v Shah*
 (1929) A I R 1929 Lah 30 (31) 113 Ind Cas 540 *Din Muhammad v Safdar Ali*
 (1928) A I R 1928 Lah 250 (253) 113 Ind Cas 53 *Zinda v Mt Roshnai*
 (1926) A I R 1926 Lah 170 (171) 7 Lah 35 91 Ind Cas 25 *Rang Rishi v Mahbub Rishi*
 (1925) A I R 1925 Lah 509 (509) 85 Ind Cas 772 *Jhanda v Sajwan Singh*
 (1924) A I R 1924 Lah 200 (203) 4 Lah 467 79 Ind Cas 260 *Malomed Shafi v Mt Kalsumbi*
 (1924) A I R 1924 Lah 564 (564) 105 Ind Cas 655 *Md Saddiq v Ahuda Bakhs*
 (1925) A I R 1925 Nag 184 (135) 81 Ind Cas 273 *Narayan v Dharma*
 (1920) A I R 1920 Nag 279 (280) 52 Ind Cas 933 15 Nag L R 154 *Mt Amrbi v Mt Khaja*
 (1907) 11 Oudh Cas 1 (13) *Mata Din Sah v Sheikh Ahmad Ali*
 (1916) A I R 1916 Pat 323 (323) 34 Ind Cas 85 1 Pat L Jour 189 *Pajab Ali v Bazar Ali*
 (1917) A I R 1917 Lah 448 (450) 41 Ind Cas 932 1917 Pun Re No 59 *Mt Mehr Bibi v Chanam Din* (Cause of action for a suit by the widow of a lunatic Muhammadan for possession of her husband's property sold for legal necessity by his mother as his *de facto* guardian accrues not on the date of sale of the property but on the death of her husband)
 (But see (1907) 34 Cal 36 (38) 11 Cal W N 71 4 Cal L Jour 485 *Mafurzul Husun v Basid Sheikh* (Transfer which is for minor's benefit should be upheld)
 (1921) 64 Ind Cas 51 (52) (Lah) *Mahand v Bholi* (Do)
 (1914) A I R 1914 Mad 495 (496) 37 Mad 514 15 Ind Cas 576 *Anderman Kullu v Sied Ali* (Do)
 (1916) A I R 1916 All 130 (131) 32 Ind Cas 177 39 All 92 *Ibid Ali v Imam Ali* (Do)]
 6 (1931) A I R 1931 Mad 529 (531) 132 Ind Cas 120 *Sundara Nandan v Annamalai*
 7 (1931) A I R 1931 Rang 178 (178 179) 134 Ind Cas 214 *Pargat Ali v Ma Chit*

Article 44 Note 7

sue to set aside an alienation by the guardian. One view is that the ward has a mere right to sue as regards the property which has been alienated by his guardian and that as such right is not transferable under Section 6 of the Transfer of Property Act, the assignee from the ward cannot sue to set aside the alienation¹. The other view is that the ward's interest in the property transferred by his guardian is not a mere right to sue and that the assignee can therefore sue to set aside the transfer².

In any case, where the ward joins in the suit by the assignee as a co plaintiff, such suit is maintainable³.

Then as regards limitation, there is difficulty in applying the Article to suits by the assignees and legal representatives of the ward. The Article in terms refers to a suit by a ward who has attained majority and in the third column of the Article the starting point of limitation is stated to be the date on which the ward attains majority. Hence there is a conflict of decisions as to the applicability of the Article to a suit by the assignee from a ward. One view is that the Article does not apply to such a suit,⁴ while the other view is that the Article applies to such a suit and that the same must be brought within three years of the ward attaining majority.⁵

Note 7

- 1 (1933) A I R 1938 Bom 42 (44, 45) 141 Ind Cas 806 *Jhaverbhai Hathibhai v Kabhai Becher*
[Compare (1915) A I R 1915 Mad 296 (301) 88 Mad 867 24 Ind Cas 120 *Muthukumara v Anthoneyudayan* (The right is a personal one)]
- 2 (1929) A I R 1929 Mad 313 (319) 118 Ind Cas 481 *Ramaswamy v Govindammal*
(1924) A I R 1924 Mad 322 (322) 74 Ind Cas 1003 *Kamaraju v Gunnappa*
[See (1926) A I R 1926 Cal 653 (656) 92 Ind Cas 727, *Baikuntha Nath v Alhar Chanira* (The case proceeds on the footing that a creditor of the minor can challenge the sale)
(1917) A I R 1917 Mad 358 (361) 33 Ind Cas 696 *Venkateswara Aiyar v Raman Nambudri* (The expression mere right to sue can only apply to a case where the specific enforcement of the rights of the parties cannot be obtained and there is only a right to damages)]
- 3 (1925) A I R 1925 Bom 292 (293 294) 49 Bom 309 86 Ind Cas 879 *Hanmant Gurunath v Pamappa Lagunappa*
[See (1933) A I R 1933 Bom 42 (44) 141 Ind Cas 806 *Jhaverbhai Hathibhai v Kabhai Becher* (The suit will not be maintainable if the ward withdraws from the suit)]
- 4 (1933) A I R 1933 Bom 42 (44) 141 Ind Cas 806 *Jhaverbhai Hathibhai v Kabhai Becher*
[See also (1925) A I R 1925 Bom 292 (293) 49 Bom 309 86 Ind Cas 879 *Hanmant Gurunath v Raviappa Lagunappa*]
- 5 (1909) 2 Ind Cas 229 (230) 5 Nag L R 50 *Chandra Bhan v Maruti*
(1927) A I R 1929 Mad 313 (321) 116 Ind Cas 481, *Ramaswamy v Govindammal*
(1919) A I R 1919 Cal 404 (404) 52 Ind Cas 269 *Kanok Das v Sriharis Govaram*
(1918) A I R 1918 Bom 180 (180) 46 Ind Cas 22 (23) 42 Bom 626, *Laxmarama Huchappa v Bhachappa Chinnabappa*

A suit by the transferee in which the ward also is joined as a co plaintiff is, it has been held, governed by this Article ⁶

In the undermentioned case⁷ where the ward died *during* minority, it was held that the suit by the legal representative of the ward must be brought within three years from the death of the ward ⁸ The judgment proceeds on this reasoning This Article only illustrates the application of the provisions of Section 6 to the particular case of a ward suing to set aside the alienation by his guardian Hence, the principle embodied in the third clause of Section 6 applies to cases coming under this Article also

Where a ward died *after* three years of attaining majority, it was held that a suit brought thereafter by his legal representative to set aside an alienation by the guardian during the minority of the ward was barred ⁹

8. Burden of proof as to age. — Where a case falls within this Article the burden of proving that the suit is in time is on the plaintiff ¹

9. Several wards — Transfer of their joint property — Suit to set aside transfer — Limitation applicable. — See Note 19 under Section 7 *ante*

0 (1925) A I R 1925 Bom 292 (293) 49 Bom 309 86 Ind Cas 879 *Hanmanth Gurunath v Ramappa Lagamappa*

7 (1930) A I R 1930 Mad 821 (824) 127 Ind Cas 801 *Theletti Ramalah v Kenala Brahmiah*

8 See (1895) 18 Mad 193 (200) 4 Mad L Jour 275 *Sundarammal v Ranga swamy Mudaliar* (Alienation by mother in 1861—Minor dying before majority and mother succeeding—Reversioner suing after mother's death—Suit brought in 1891—Held suit barred—It was open to any next friend of the minor to have stepped forward during his minority and set aside the alienation on the ground that it was an act done without adequate necessity or in excess of the limited authority of a guardian As the alienation took place in 1861 and the present suit was brought in 1891 a suit to set it aside would be barred if the minor were still alive and his reversioners cannot take a higher position)

[But see (1879) 4 Cal 523 (576) 3 Cal L R 391 *Prosonna Nath Jloy Choudhury v Afsaknessa Begum* (No cause of action during ward's minority)]

9 (1920) A I R 1920 Bom 1 (6) 58 Ind Cas 257 44 Bom 742 (F 13) *Fakirappa Limanna v Lumanna Mahalan*

Note 8

1. (1924) A I R 1924 Cal 420 (422) 61 Ind Cas 650 *Prohlal Chandra v Lamsaran*

(1923) A I R 1923 Lah 254 (254) 70 Ind Cas 954 *Jagat Singh v Balaga Singh*

(1929) A I R 1929 Mad 313 (316) 118 Ind Cas 481, *Ramasamy v Govindaramal*

Article 45

45. To contest an award under any of the following Regulations of the Bengal Code:—

The Bengal Land-revenue Settlement Regulation, 1822.

The Bengal Land-revenue Settlement Regulation, 1825.

The Bengal Land-revenue (Settlement and Deputy Collectors) Regulation, 1833.

Three years. The date of the final award or order in the case.

Synopsis

1. Scope of the Article.
2. An award or order in the case.
3. Starting point of limitation.

1. Scope of the Article. — This Article applies to a suit the object of which is to contest an award given by the Revenue Authorities under the Bengal Regulations specified in the Article¹ The "award" contemplated presupposes a contest between the parties to the suit and a decision after proper investigation into the points at issue² The reason is that a decision by a Settlement Officer under

* Act of 1877, Article 45 ;
 Act of 1871, Article 44 ,
 Act of 1859, Section 1, Clause 6 (portion)
 Same as above

Article 45 — Note 1

- 1 (1863) 1663 Suth W R (Special Number) 128 (129) Beng L R Sup Vol App 5 (F B), *Komul Kishen v Bissonauth Chuckerbutty*
- (1867) 2 Agra 258 (261, 262), *Rai Hummut Singh v Collector of Bijnour*
- 2 (1927) A 1 R 1927 Cal 902 (903) 104 Ind Cas 655 55 Cal 201, *Mt Latifa Khatun v Tofer Ali*
- (1863) 1663 Suth W R (Special Number) 128 (129) Beng L R Sup Vol App 5 (F B), *Komul Kishen v Bissonauth Chuckerbutty* (In a suit by A against B, A is not bound by an award obtained by A and B against C)
- (1869) 11 Suth W R 389 (390), *Radha Prasad Singh v Ram Jeerun Singh* (An award supposes a contest between parties and decision after a proper investigation into the point at issue)
- (1865) 3 Suth W R 165 (165), *Purceag Singh v Shub Ram Chanders Mundul* (Plaintiff not party to award—Suit not governed by the corresponding Article under Act 13 of 1848)
- (See however (1868) 10 Suth W R 22 (23) 1 Beng L R A C 1, *Mahachandra Chuckerbutty v Raj Kumar Chuckerbutty* (Award

the Regulations mentioned in the Article, with respect to the possession and rights of parties in an estate, is final and binding as against them and has the force of an award,³ only when it is passed after opportunity given to them to establish their respective claims before him, or upon evidence taken by him.⁴

The Article applies to a suit the object of which is to contest an award, it does not apply when the suit is to recover possession of property subject to the payment of revenue settled by the Revenue Authorities,⁵ or where the object of the suit is to amend a settlement and establish the right of persons who were not before the Collector,⁶ or to a suit to avoid a *batnara* division by the Collector.⁷ But a suit to set aside an order of the Commissioner refusing to make a settlement of *khās mahāl* land with the plaintiff who claimed settlement of it as an accretion to his *jote* is governed by this Article and not by Article 14.⁸

2. An award or order in the case.—An award is an adjudication of rights between rival claimants made by a Revenue Officer in exercise of judicial powers conferred by the Regulations mentioned in the Article.¹ An order must have been passed after a trial in a

was given between plaintiff and defendant but plaintiff was not summoned and heard — *Held* the suit was governed by cl 6 of S 1 of the Act of 1859 which applied to suits brought by any person. These words are absent in the present Article.]

3 See (1865) 3 Suth W R 7 (8) *Hur Jai Roy v Sooraj Varain Poy* (A co proprietor of a joint undivided estate is bound by a survey award and compromise to which other joint proprietors were parties where notice of the survey proceedings was served on the proprietors jointly and not on him individually.)

4 (1881) 3 All 738 (742 743) 1881 All W N 48 *Dhaoni v Malharaja Singh* (1870) 2 N W P H C R 425 (426 427) *Mahomed Ali Khan v Oomrao Singh* (1881) 1881 Pun Re No 41 (page 97) *Lutf Ali v Khushnukt Rai*

5 (1907) A I R 1927 Cal 902 (904) 104 Ind Cas 655 55 Cal 201 *Mt Iatifa Khatoon v Tofer Ali*

(1922) A I R 1922 Cal 345 (347) 49 Cal 37 65 Ind Cas 833 *Midnapur Zamindary Co Ltd v Naresk Varajan Roy*

(1879) 5 Cal L R 452 (454) *Kanto Prasad Haary v Asad Ali Khan*

6 (1863) 1863 Suth W R (Special Number) 198 (129) Beng L R Sup Vol App 5 (F1) *Korinl Kishen v Bissonauth Chuckerbutty*

(1867) 2 Agr 259 (261 262) *Rai Hummat Singh v Collector of Dijnour*

7 (1871) 16 Suth W R 271 (273) *Oodej Singh v Patuck Singh*

8 (1900) 12 Cal W N 910 (911) 46 Ind Cas 14 *Haridra Vish*

Note 2

1 (1870) 2 N W P H C R 226 (227) *Hurree Mohun Choudal v Cole n ent* (1869) 11 Suth W R 389 (390) *Ladda Prasad Singh v Lari Jeevun Singh*

(An award supposes a contest between parties and a decision after a proper investigation into the point at issue.)

(1927) A I R 1927 Cal 902 (903) 104 Ind Cas 655 55 Cal 201 *Mt Iatifa Khatoon v Tofer Ali*

[See (1866) 10 Moo Ind App 511 (531 535) 2 Sar 189 (H C) *Jowala Baksh v Dharun Singh*]

[See also (1882) 1882 All W N 131 (131) *Zamulabhin v Durgu Das* (This Article does not apply to an order passed under N W 1 Land Revenue Act 19 of 1873)]

(1881) 1881 All W N 91 (91) *Shoo Das v Purnu* (Do.)

Article 45
Note 2

suit of the nature referred to in clause 2 of Section 23 of Regulation 7 of 1822² Thus, the order of Deputy Collector under Regulation 7 of 1822 declaring the lands in dispute to be *paykan jagheer* lands³ or an order of the Collector directing the entry of the defendants names as tenants with occupancy rights in the settlement record⁴ is an award. A *thalbust* survey award relating to boundaries is treated in Bengal as an award under Regulation 9 of 1825⁵

An award properly passed under the Regulations must be contested within three years as provided in this Article⁶

Where the award is not a judicial act but a determination of a purely executive character, this Article does not apply⁷ Thus the following have been held not to be awards within the meaning of this Article —

- 1 The proceedings of a Settlement Officer representing a cess as a source of income to the zamindar⁸
 - 2 An entry made by a Settlement Officer on the report of a co-sharer and on the strength of the report of the *putuorce* and *kanoongoe* in the absence of the party against whom it was made⁹
 - 3 An order passed by a Settlement Officer upon a reference made by some other officer on inquiries instituted by him¹⁰
- For other instances see the undermentioned cases¹¹

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- 2 (1867) 2 Agra 229 (229) *Madho Singh v Jehangeer*
 3 (1864) 1864 Suth W R Gp 140 (141) *Modhoooodun Singh v Pajah Peetlee Bullub Paul*
 4 (1921) A I R 1921 Cal 868 (371 372) C3 Ind Cas 161 *Madnapore Zamindari Co Ltd v Naresb Narayan Roy*
 5 (1869) 12 Suth W R G (19) 2 Beng L R 111 12 Moo Ind App 275 2 Suther 225 2 Sar 429 (P C) *Raja Sahib Prasad v Baboo Budhoo Singh*
 6 (1891) 3 All 738 (742 743) 1891 All W N 48 *Bhaoni v Maharaj Singh* (1864) 1864 Suth W R G 140 (141) *Modhoooodun Singh v Pajah Peetlee Bullub Paul*
 7 (1866) 1 Agra 228 (228) *Surdar Khan v Chundoo* (Suit is barred if not brought within three years)
 8 (1868) 9 Suth W R 564 (565) *Sreechund Baboo v Mullick Choolhun* [See also (1868) 3 Agra 140 (141) *Sait Snyjad v Syut Sabit Ali* (Suit to contest adjudication of boundaries by Revenue Court under Act 1 of 1817)
 (1871) 1871 1 un Re No 63 *Bunde Khan v Lall Das*
 (1871) 1871 Pun Re No 9 *Munsa Singh v Soollan*]
 9 (1896) 3 Cal W N 99 (105) *Kristo Moni Gupta v Secretary of State*
 8 (1866) 1 Agra 134 (135) *Ram Chund v Zaloor H Khan*
 9 (1868) 3 Agra 316 (317) *Kinhar Dansha v Chokrun*
 10 (1891) 3 All 738 (742 743) 1891 All W N 48 *Bhaoni v Maharaj Singh* [See also (1864) 3 Agra 140 (141) *Sait Snyjad v Syut Sabit Ali*]
 11 (1866) 10 Moo Ind App 511 (535) 2 Sar 189 (P C) *Jorala Dabsh v Dharmu Singh*
 (1891) 1891 All W N 122 (122) *Karita Prasad v Bihari Ali*
 (1912) 17 Ind Cas 891 (893 894) (Cil) *Fajani Kar v Ravi Dhal* (A decision by the Collector as to the title between two riyats is not an award)

3. Starting point of limitation.—Time runs from the final award or order in the case. Where an appeal is preferred against the award and allowed, time runs from the date of the passing of the appellate award or order. The fact that the Board of Revenue summarily dismissed the appeal does not make it any the less a final order¹. The period of limitation which bars the claim to a settlement does not begin to run so long as the proprietary right of the zamindar is formally recognised by the revenue authorities (e.g. by temporary settlement) and no permanent settlement is made with any other person². Where a survey award relates to land belonging to parties whose rights and interests are distinct and separate, and one of the parties appeals against the award, limitation runs against the other party not from the date of such appeal, but from the date of the survey award³.

Article 45
Notes 3

46. By a party bound by such award to recover any property comprised therein.	Three years.	The date of the final award or order in the case.
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Article 46

Synopsis

1. Legislative changes.
2. Scope of the Article.

1. Legislative changes.—The material portion of the corresponding clause 6 of Section 1 of the Limitation Act, 1859, ran thus: "To suits by any person to recover property comprised in such award—the period of three years from the date of the final award or order in the case." The words "any person" were ambiguous and admitted of an interpretation that a person whose remedy to bring

* Act of 1877, Article 46 and Act of 1871, Article 45

Same as above

Act of 1859, Section 1 clause 6 (portion)

See Note 1 Legislative changes

(1870) 2 N W P H C R 226 (227) *Hurree Mohun Ghoshal v Government* (An assessment for revenue or rent by a Collector was not a judicial award.)

Note 3

- 1 (1868) 10 Suth W R 51 (51) 1 Beng I R A C 10 *Krishna Chandra Das v Muhammad Isfak*
- 2 (1872) 17 Suth W R 145 (146-147) 8 Beng I R 521 *Krishna Chandra Sandyal v Harish Chandra Choudhry*
[See also (1872) 18 Suth W R 198 (199) *Bisnessuree Doss v Kallee Kumar Roy*
(1874) 22 Suth W R 520 (521) *Krishna Chunder Sanyal v Shamai Sundaree*]
- 3 (1868) 10 Suth W R 48 (49) 1 Beng L R A C 12, *Tularamdas v Mohanadas Isfak*

Article 46
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 1—2

a possessory suit was otherwise barred could under this clause institute such a suit. However, it was held in the undermentioned case¹ that this clause would not enable a person to come in within three years after the date of such award and recover possession of lands in respect of which his suit had become barred by the other provisions of the Limitation Act, e.g. under Articles 142 and 144.

2. Scope of the Article.—See Notes under Article 45 *ante*

By the words ‘such award’ is meant an award under the Regulations mentioned in Article 45¹. This Article applies to a suit brought by a party *bound* by such award,² and not to one instituted by a person who was *not* a party to the award³. The suit to recover any property comprised in the award must, under this Article, be instituted within three years from the date of the final award. A failure to bring such a suit by the person bound by the award bars the remedy.⁴

In order to attract the provisions of the Article the suit ought to be one wherein the plaintiff seeks relief to which he is entitled directly under or by reason of the survey award. In other words the cause which is the basis of the action must have arisen from the award itself. If the cause arises from any other circumstance independent of such award and an action is brought seeking relief in respect of *such* a cause the action will not be governed by this Article. Thus, where A sued for reversal of a survey award and for recovery of possession alleging dispossession *subsequent* to the date of the award, it was held that his claim to be restored to possession was not barred by reason of its not having been brought within three years of the award.⁵

Article 46 — Note 1

- 1 (1867) 8 Suth W R 209 (210) *Beer Chunder Jooobraj v Bani Guffy Dutt*
 [See also (1868) 10 Suth W R 249 (250) *Moula Dakh Khan v Kosi o ram Pandey*]

Note 2

- 1 (1883) 1883 Pan Re No 25 *Lachman v Hira*
 (1921) A I R 1921 Cal 277 (278 279) 66 Ind Cas 923 *Maharajah of Cooh Behar v Mahendra Ranjan* (An order under S 41 of the Bengal

DETERMINATION OF

- 2 (1863) 1863 Suth WR (Special Number) 128 (129) Beng L R Sup Vol of App 5 (F B) *Kosul Kishan v Bissonauth Chul erbutt*;
 [See (1879) 5 Cal L R 432 (434) *Kanto Prosad Hazari v Isad Ali Khan*
 (1867) 2 Agrs 8 (9) *Ramaiah Singh v Santa Zalut Singh*]
 3 (1866) 6 Suth W R 75 (76) *Rughoobur Singh v Hurce Pershad*
 (1867) 2 Agrs 8 (8) *Ramaiah Singh v Santa Zalut Singh*

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47. By any person bound by an order respecting the possession of immoveable property made under the Code of Criminal Procedure, 1898, or the Mamlatdars' Courts Act, 1906, or by any one claiming under such person to recover the property comprised in such order.	Three years.	The date of the final order in the case.	Article 47
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Synopsis

1. Legislative changes.
2. Scope of the Article.
3. "Person bound by an order"
- 3a Defendant not party to proceedings in which order was passed.
4. "Or by any one claiming under such person."
- 4a Order respecting trust property against trustee — Succeeding trustee, if bound.
5. "Order respecting the possession of immoveable property."
6. Order passed under the Mamlatdars' Courts Act respecting the possession of property.
7. "To recover the property."
8. Article 47 and limitation prescribed under local or special law.
9. Final order — The starting point of limitation.
10. Article 47 and Section 28.

* Act of 1877, Article 47.

47.—By any person bound by an order respecting the possession of property made under the Code of Criminal Procedure Chapter VII, or the Bombay Mamlatdars' Courts Act, or by any one claiming under such person to recover the property comprised in such order	Three years	The date of the final order in the case
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Act of 1871, Article 46.

46.—By any person bound by an order respecting the possession of property made under Act No. XVI of 1838, section one clause two or Act No. XXV of 1861 chapter twenty two or Bombay Act No. V of 1864 or by any one claiming under such person, to recover the property comprised in such order	Three years	The date of the final order in the case
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Article 47

Note 1

Other Topics

Article contemplates suit based on title	See Note 2 Pt 1
Conditions for applicability of Article	See Note 2
Lessor not bound by order against lessee	See Note 4 Pt 4
Order against person in representative capacity binds all persons represented	See Note 3 Pts 8 9
Orders under Sections 145 146 and 147 Criminal Procedure Code—When orders respecting possession	See Note 5
Order under Section 145 Criminal Procedure Code—Whether binds persons other than the actual parties	See Note 3 Pts 4 to 7 Notes 3a 4a
Order under Section 522 Criminal Procedure Code	See Note 1 Pt 2a
	Note 3 Pt 1
Suit for declaration of right—Article not applicable	See Note 7 Pts 1 2
Verbal order—Not governed by Article	See Note 9 Pt 5a

1 Legislative changes

1 Clause 7 of Section 1 of the Act of 1859 (corresponding to Article 47 of the present Act) was applicable to suits by a party bound by an order under Act 4 of 1840 (which contained provisions similar to Section 145 of the Criminal Procedure Code). This Act was repealed by Act 17 of 1862. The Criminal Procedure Code of 1861 did not contain a Section corresponding to Section 3 of the present Criminal Procedure Code. So the orders passed under Section 318 of the Criminal Procedure Code of 1861 (corresponding to Section 145) could not be treated as those passed under Act 4 of 1840. Thus during the period between 1862 to 1871 an order passed under Section 318 of the Criminal Procedure Code of 1861 did not fall within the provisions of clause 7¹

2 Under the Acts of 1871 and 1877, orders passed under a particular chapter of the Criminal Procedure Code (viz Chapter XVII of the Act of 1861 and Chapter XII of the Criminal Procedure Code of 1872) were governed by this Article. Hence a final order under those Acts meant the order of a Magistrate passed under those chapters and not an order passed in revision even where a revision was allowed². Under the present Article the order need not be under any particular

Act of 1859, Section 1 clause 7

Limitation of three years. Suits to recover property comprised in an order made under Cl 2 S 1 Act 16 of 1839 or Act 4 of 1840

To suits by any party bound by any order respecting the possession of property made under Cl 2 S 1 Act 16 of 1839 or Act 4 of 1840 or any person claiming under such party for the recovery of the property comprised in such order—the period of three years from the date of the final order in the case

Article 47 — Note 1

- 1 (1867) 8 Cal W R 490 (491) *Gobind Singh Salia v Asraf Ali Meah*
Chittur Dharoo Singh
v Shyba
Jurn Sha v Zomurrudon

chapter of the Criminal Procedure Code. The Article will apply where an order is passed under Section 522 of the Code.^{2a}

3 The doubt, if any, as to the meaning of the word "property" is removed in the present Act by the addition of the word "immoveable" before "property."

2. Scope of the Article.—The suit contemplated by this Article is one based on *title* to the possession of the property and not one based on the plaintiff's previous possession, such as is contemplated by Section 9 of the Specific Relief Act, 1877.¹ In other words, the Article contemplates a suit in ejectment.² The ordinary period of limitation prescribed for such a suit is 12 years but the period has, in suits coming under this Article, been shortened to three years, the policy of the law being that when there have already been judicial proceedings between the parties with reference to the rights in question in the suit, such rights should be settled as early as possible.³ In *Sardhari Lal v. Ambika Prasad*,⁴ where the applicability of Article 11 was in question, Lord Hobhouse observed, "The policy of the Act evidently is to secure the speedy settlement of questions of title raised at execution sales and for that reason a year is fixed as the time within which the suit must be brought."

Since the Article contemplates suits in *ejectment* it cannot apply where on the date of the order mentioned in the Article the plaintiff had no existing right to sue in ejectment. Where therefore an order is put an end to by the parties entering into a contract respecting the possession of the property in dispute^{4a} or where the

3 See (1881) 6 Cal 709 (711). 8 Cal L R 154, *Kangali Churn Sha v. Zomur rudonnissha Khatoon*.

Note 2

1 (1879) 6 Cal L R 249 (255). 7 Ind App 73. 4 Scr 127. 3 Suther 470 (P C). *Wise v. Ameerunnissa Khatoon*.

(1916) A I R 1916 Mad 370 (322). 34 Mad 432. 21 Ind Cas 564. *Tarasu ramayya v. Ramachandradu*. (See Judgment of Tassie J.)

[See also (1900) 27 Cal 913 (917-919). 27 Ind App 136. 4 Cal W N 597. 2 Bom L R 599. 5 Scr 714 (P C). *Tadhasam Datta v. Collector of Ahulna*.]

2 (1892) 19 Cal 646 (650), *Bolai Chaml Ghosal v. Samrudin Manul*.

3 (1916) A I R 1916 Mad 320 (322). 21 Ind Cas 564. 38 Mad 437. *Tarasu ramayya v. Ramachandradu*.

(1920) A I R 1920 Mad 545 (547). 36 Ind Cas 675. *Solai Amal v. Joy Chellu*.

(1936) A I R 1936 Ouh 357 (393). 164 Ind Cas 118. 12 Luck 371. *Iratib Bhabai Singh v. Jagatjit Singh*.

[See also (1896) 23 Cal 731 (731) (F B). *Jogendra Kishore Das v. Choudhury*. *Jogendra Kishore Das v. Choudhury*.]

4 (1888) 15 Cal 521 (527). 15 Ind App 123. 3 Scr 172. 12 Ind Jur 210 (P C).

4a (1899) 23 Ind 525 (527). 1 Bom L R 5. *Sajji v. Nalder*. (Order passed by Mamlatdar.)

Article 47 Note 1

Other Topics

Article contemplates suit based on title	See Note 2, Pt 1
Conditions for applicability of Article	See Note 2
Lessor not bound by order against lessee	See Note 4, Pt 4
Order against person in representative capacity binds all persons represented	See Note 3, Pts 8, 9
Orders under Sections 145, 146 and 147, Criminal Procedure Code—When orders respecting possession	See Note 5
Order under Section 145, Criminal Procedure Code—Whether binds persons other than the actual parties	See Note 3, Pts 4 to 7, Notes 3a, 4a
Order under Section 522, Criminal Procedure Code	See Note 1, Pt 2a, Note 3, Pt 1
Suit for declaration of right—Article not applicable	See Note 7, Pts 1, 2
Verbal order—Not governed by Article	See Note 9, Pt 5a

1. Legislative changes.

1 Clause 7 of Section 1 of the Act of 1859 (corresponding to Article 47 of the present Act) was applicable to suits by a party bound by an order under Act 4 of 1840 (which contained provisions similar to Section 145 of the Criminal Procedure Code). This Act was repealed by Act 17 of 1862. The Criminal Procedure Code of 1861 did not contain a Section corresponding to Section 3 of the present Criminal Procedure Code. So the orders passed under Section 318 of the Criminal Procedure Code of 1861 (corresponding to Section 145) could not be treated as those passed under Act 4 of 1840. Thus, during the period between 1862 to 1871, an order passed under Section 318 of the Criminal Procedure Code of 1861 did not fall within the provisions of clause 7¹.

2 Under the Acts of 1871 and 1877, orders passed under a particular chapter of the Criminal Procedure Code (viz Chapter XXII of the Act of 1861 and Chapter XII of the Criminal Procedure Code of 1872) were governed by this Article. Hence, a final order under those Acts meant the order of a Magistrate passed under those chapters, and not an order passed in revision, even where a revision was allowed². Under the present Article, the order need not be under any particular

Act of 1859, Section 1, clause 7

Limitation of three years. Suits to recover property comprised in an order made under Cl 2 S 1, Act 16 of 1839, or Act 4 of 1840

To suits by any party bound by any order respecting the possession of property made under Cl 2, S 1, Act 16 of 1839, or Act 4 of 1840, or any person claiming under such party, for the recovery of the property comprised in such order—the period of three years from the date of the final order in the case

Article 47 — Note 1

- 1 *1859-1860 v Ashraf Ali Meah
huttur Dharee Singh
Shibda
in Sha v Zomurrudon-*
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chapter of the Criminal Procedure Code. The Article will apply where an order is passed under Section 522 of the Code.^{2a}

Article 47
Notes
1—2

3 The doubt, if any, as to the meaning of the word "property" is removed in the present Act by the addition of the word "immoveable" before "property."

2. **Scope of the Article.**—The suit contemplated by this Article is one based on *title* to the possession of the property and not one based on the plaintiff's previous possession, such as is contemplated by Section 9 of the Specific Relief Act, 1877.¹ In other words, the Article contemplates a suit in *ejectment*.² The ordinary period of limitation prescribed for such a suit is 12 years but the period has, in suits coming under this Article, been shortened to three years, the policy of the law being that when there have already been judicial proceedings between the parties with reference to the rights in question in the suit, such rights should be settled as early as possible.³ In *Sardhari Lal v. Ambika Prasad*,⁴ where the applicability of Article 11 was in question, Lord Hobhouse observed "The policy of the Act evidently is to secure the speedy settlement of questions of title raised at execution sales and for that reason a year is fixed as the time within which the suit must be brought."

Since the Article contemplates suits in *ejectment*, it cannot apply where on the date of the order mentioned in the Article the plaintiff had no existing right to sue in *ejectment*. Where therefore an order is put an end to by the parties entering into a contract respecting the possession of the property in dispute,^{4a} or where the

2a (1925) A I R 1925 Mad 799 (799) 86 Ind Cas 744, *Adinarayana v. Nambura Suramma* (An order restoring possession under S. 522 of the Criminal Procedure Code is an order respecting possession of property within the meaning of Art. 47.)

3 See (1881) 6 Cal 709 (711) 8 Cal L R 154 *Kangali Churn Sha v. Zomur Rudonnissa Khatoon*.

Note 2

1 (1879) G C 1 L R 249 (255) 7 Ind App 73 4 Scr 127 3 Suther 370 (P C), *Wise v. Ameernunissa Khatoon*.

(1916) A I R 1916 Mad 920 (322) 49 Mad 432 21 Ind Cas 564, *Param ramayya v. Ramachandradu* (See Judgment of Triaip, J.)

[See also (1900) 27 Cal 943 (947-949) 27 Ind App 136 4 Cal W N 597 2 Bom L R 532 7 Scr 714 (P C) *Tadkhamoni Debi v. Collector of Khulna*.]

2 (1892) 19 Cal 646 (650) *Bolai Chand Ghosal v. Samrudin Mandal*.

3 (1916) A I R 1916 Mad 920 (322) 21 Ind Cas 564 49 Mad 432 *Param ramayya v. Ramachandradu*.

(1920) A I R 1920 Mad 545 (545) 56 Ind Cas 675 *Sadas Immal v. Joya Chetty*.

(1930) A I R 1930 Oudh 387 (393) 164 Ind Cas 116 12 Luck 371, *Pratibh Bahadur Singh v. Jagatjit Singh*.

[See also (1890) 23 Cal 731 (744) (F B) *Jogendra Kishore Jany Choudhury v. Jogendra Kishore Jany Choudhury*.]

4 (1888) 15 Cal 521 (526) 15 Ind App 123 5 Scr 172 12 Ind Jur 210 (P C)

4a (1897) 24 Bom 525 (527) 1 Bom L R 5 *Sajji v. Samder* (Order passed by Mamlatdar).

Article 47 Note 1

Other Topics

Article contemplates suit based on title	See Note 2, Pt. 1
Conditions for applicability of Article	See Note 2
Lessor not bound by order against lessee	See Note 4, Pt. 4
Order against person in representative capacity binds all persons represented	See Note 3 Pts 8 9
Orders under Sections 145 146 and 147, Criminal Procedure Code—When orders respecting possession	See Note 5
Order under Section 145 Criminal Procedure Code—Whether binds persons other than the actual parties	See Note 3, Pts 4 to 7, Notes 3a, 4a
Order under Section 522, Criminal Procedure Code	See Note 1, Pt. 2a, Note 3, Pt. 1
Suit for declaration of right—Article not applicable	See Note 7, Pts 1, 2
Verbal order—Not governed by Article	See Note 9 Pt. 5a

1. Legislative changes.

- 1 Clause 7 of Section 1 of the Act of 1859 (corresponding to Article 47 of the present Act) was applicable to suits by a party bound by an order under Act 4 of 1840 (which contained provisions similar to Section 145 of the Criminal Procedure Code). This Act was repealed by Act 17 of 1862. The Criminal Procedure Code of 1861 did not contain a Section corresponding to Section 3 of the present Criminal Procedure Code. So the orders passed under Section 318 of the Criminal Procedure Code of 1861 (corresponding to Section 145) could not be treated as those passed under Act 4 of 1840. Thus, during the period between 1862 to 1871, an order passed under Section 318 of the Criminal Procedure Code of 1861 did not fall within the provisions of clause 7¹.
- 2 Under the Acts of 1871 and 1877, orders passed under a particular chapter of the Criminal Procedure Code (viz Chapter XVII of the Act of 1861 and Chapter XII of the Criminal Procedure Code of 1872) were governed by this Article. Hence, a final order under those Acts meant the order of a Magistrate passed under those chapters, and not an order passed in revision, even where a revision was allowed². Under the present Article, the order need not be under any particular

Act of 1859, Section 1, clause 7

Limitation of three years. Suits to recover property comprised in an order made under Cl. 2 S. 1, Act 16 of 1838 or Act 4 of 1840

To suits by any party bound by any order respecting the possession of property made under Cl. 2, S. 1, Act 16 of 1838 or Act 4 of 1840 or any person claiming under such party, for the recovery of the property comprised in such order—the period of three years from the date of the final order in the case

Article 47 — Note 1

- 1 (1867) 8 South W. R. 490 (491) *Cobind Sundar Saha v. Iskruf Ali Meah*
(1868) 12 S. W. R. 490 (491) 37—11—1867—*Chuttur Dharee Singh*
Shibla

2

iru Sha v. Zomurindon.

- (1908) 12 C. L. W. N. 840 (841) *Jaganmuth Maru ar. v. Ondal Coal Co. Ltd*

Article 47
Notes
 2—3

right to sue for possession accrues to the plaintiff only *subsequent* to the date of the order,^{4b} this Article will not apply. *X*, a zamindar, agreed to let certain lands on lease to *A* and his co sharers and on failure to perform the agreement, *A* and his co sharers obtained a decree against *X* for specific performance of the agreement. In execution of the decree the Court ordered *X* to execute a *pottah* in favour of *A* and his co sharers. The *pottah* was executed on 19.12.1881. In 1880, however, *A* instituted a proceeding under Section 530 of the Criminal Procedure Code (corresponding to the present Section 145) and the application was dismissed. *A* instituted a suit in 1888 against *X* for recovery of the property basing his right on the *pottah*. It was held that until the *pottah* was executed in 1881, *A* did not get any right to the possession of the property, that therefore he had no right to sue for ejectment in 1880 when the order under Section 530 was passed and that the suit was not therefore governed by this Article.⁵

The following are further essential conditions for the applicability of the Article —

- 1 The suit must be by a person *bound* by the order or by a person claiming under him
- 2 The order should be one passed under the Criminal Procedure Code or under the Mamlatdars' Courts Act.⁶
- 3 The order should be respecting the possession of immovable property

3. "Person bound by an order." — The Article applies only where the plaintiff is *bound* by an order such as is referred to in the Article, or is a person claiming through a person so bound.

The ordinary rule is that an order is not binding on a person who is not a *party to the proceedings*. Thus, an order respecting the possession of immovable property made under Section 522 of the Criminal Procedure Code,¹ or under Mamlatdars Courts Act² binds only the parties thereto and not third parties, who therefore are not bound to bring a suit for recovery of property within three years of the order. There is a conflict of opinion as to whether an order under Section 145 of the Criminal Procedure Code binds any persons other than the actual parties to the proceedings. According to the

4b (1922) 19 Cal 646 (650), *Bolan Chand Ghosal v. Samiruddin Mondal*
 (1927) 1 I R 1927 Mad 586 (591) 109 Ind Cas 360 *Subbalakshmi Bai v. Narasimha*

5 (1897) 19 Cal 646 (650) *Bolan Chand Ghosal v. Samiruddin Mondal*

6 (1873) 10 Bom H C R 479 (481) *Babaji v. Ima* (Order of Mamlatdar under Bombay Act 5 of 1861 is not order under Act 16 of 1839—Article does not apply)

Note 3

1 (1925) 1 I R 1925 Mad 799 (800) 86 Ind Cas 744 *Unnarayana v. Suramma*

(1912) 17 Ind Cas 589 (591) (M) *Srinivasachari v. Durlabha Sultani*

2 (1891) 18 L M 419 (451) *Nathel v. H Lal Ali*

High Courts of Bombay,³ Calcutta⁴ and Madras,⁵ the order is binding not only on the actual parties to the proceedings but also on all persons concerned in the dispute and who have notice of the proceedings. The High Court of Lahore⁶ and the Judicial Commissioner's Court of Nagpur⁷ have, on the other hand, held that the order binds only the parties to the proceedings and none else.

Where an order is passed against a person in a *representative* capacity, it will be binding on all persons so represented.⁸ The reason is that such persons are constructively parties. Thus, where an order is passed against the manager of joint Hindu family as such, all the members represented by him will be bound by the order against the manager.⁹ But an order against a person in his *private* capacity is not binding on him in his capacity as the manager of a *math*.¹⁰

A person cannot be bound by an order passed without jurisdiction.¹¹ Nor can a person in whose favour an order has been passed

3 (1903) 10 Cri L Jour 64 (61-65). 2 Ind Cas 513 (Bom) *Nathubhai Dnyalal v Emperor*.

4 (1930) A I R 1930 Cal 63 (64). 1930 Cri Cas 15. 125 Ind Cas 859. 31 Cri L Jour 915, *Satya Charan De v Emperor*.

5 (1930) A I R 1930 Mad 48 (49). 52 Mad 787. 122 Ind Cas 171. *Venkatasommaraju v Varadalaraju*.

6 *priced* did not bind D)

7 (1918) A I R 1918 Nag 242 (243), *Paghu v Gujar*.

8 (1930) A I R 1930 Mad 48 (50-51). 112 Ind Cas 171. 52 Mad 787. *Venkatasommaraju v Varadalaraju* under S 145 and session of the proceedings is binding on his proceedings).

(1923) A I R 1923 All 151 (152). 71 Ind Cas 402. 45 All 308. *Laxi Sultani v Dinode Behara Ghosh*.
[See also (1935) A I R 1935 Lah 115 (116). 1935 Cri Cas 181. *Mt. Maya v Dusan Chand* (2 I C 513 (517) (Bom) Discontinued from it).

9 *priced* did not bind D)

10 (1903) 28 Bom 215 (226). 5 Bom L R 932. *Labaji Rao v Furriandas*.

11 (1920) A I R 1920 Cal 820 (821). 60 Ind Cas 660. *Bharat Chandra v Jam Sunder Choudhury*.

(1926) A I R 1926 Cal 1022 (1025). 97 Ind Cas 73. *Jodha Nand Lal Choudhury v Jadunath Choudhury* (An order declaring a mortgage or mode or enjoyment of possession is without jurisdiction).

(1871) 3 N W P H C R 171 (171-173). *Deeraj Singh v Shikha*. (A Master is not to go on to inquire into the rights of parties in possession, or to interfere with the exercise of any rights of such parties).

(1921) A I R 1921 Lam 207 (207). 45 Lam 3135. 52 Ind Cas 224. *Venkatasommaraju v Varadalaraju*. (Injunction granted by Master of the Court—Injunction order set aside in revision by District Deputy Collector—

Article 47
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right to sue for possession accrues to the plaintiff only *subsequent* to the date of the order,^{4b} this Article will not apply. *X*, a zamindar, agreed to let certain lands on lease to *A* and his co sharers and on failure to perform the agreement, *A* and his co sharers obtained a decree against *X* for specific performance of the agreement. In execution of the decree the Court ordered *X* to execute a *pottah* in favour of *A* and his co sharers. The *pottah* was executed on 19.12.1881. In 1880, however, *A* instituted a proceeding under Section 530 of the Criminal Procedure Code (corresponding to the present Section 145) and the application was dismissed. *A* instituted a suit in 1888 against *X* for recovery of the property bising his right on the *pottah*. It was held that until the *pottah* was executed in 1881, *A* did not get any right to the possession of the property, that therefore he had no right to sue for ejectment in 1880 when the order under Section 530 was passed and that the suit was not therefore governed by this Article.⁵

The following are further essential conditions for the applicability of the Article —

- 1 The suit must be by a person *bound* by the order or by a person claiming under him
- 2 The order should be one passed under the Criminal Procedure Code or under the Mamlatdars' Courts Act.⁶
- 3 The order should be respecting the possession of immovable property

3. "Person bound by an order." — The Article applies only where the plaintiff is *bound* by an order such as is referred to in the Article, or is a person claiming through a person so bound.

The ordinary rule is that an order is not binding on a person who is not a *party to the proceedings*. Thus, an order respecting the possession of immovable property made under Section 522 of the Criminal Procedure Code,¹ or under Mamlatdars Courts Act,² binds only the parties thereto and not third parties, who therefore are not bound to bring a suit for recovery of property within three years of the order. There is a conflict of opinion as to whether an order under Section 145 of the Criminal Procedure Code binds any persons other than the actual parties to the proceedings. According to the

^{4b} (1892) 19 Cal 646 (650), *Dolas Chand Ghosal v Samirud in Mandal*
(1927) 1 I R 1927 Mad 596 (591) 107 Ind Cas 360 *Subbalakshmi Ammal v Narasimiah*

⁵ (1992) 19 Cal 646 (650) *Dolas Chand Ghosal v Samirud in Mandal*
⁶ (1873) 10 Bom II C R 479 (481) *Dabaji v Iuna* (Order of Mamlatdar under Pottah Act 5 of 1861 is not order under Act 16 of 1839—Article does not apply)

Note 3

- 1 (1925) 1 I R 1925 Mad 739 (700) 86 Ind Cas 744, *Idumarayana v Suramma*
- (1912) 17 Ind Cas 5-9 (591) (Mad) *Srinivasachari v Dirlabha Subbithi*
- 2 (1891) 18 Bom 449 (451) *Nathel v Abid Ali*

The Courts of Bombay,³ Calcutta⁴ and Madras⁵ the order is binding not only on the actual parties to the proceedings but also on all persons concerned in the dispute at which I have notice of the proceedings. The High Court of Lahore⁶ and the Judicial Commissioner's Court of Nagpur⁷ have, on the other hand, held that the order is binding only on the parties to the proceedings and none else.

Where an order is passed against a person in a *representative* capacity, it will be binding on all persons so represented.⁸ The reason is that such persons are constructively parties. Thus, where an order is passed against the manager of joint Hindu family as such, all the members represented by him will be bound by the order against the manager.⁹ But an order against a person in his *private* capacity is not binding on him in his capacity as the manager of a *trust*.¹⁰

A person cannot be bound by an order passed without jurisdiction.¹¹ Nor can a person in whose favour an order has been passed

3 (1909) 10 Cri L J 404 (41-62) 2 Ind Cas 513 (Bom) *Nathubhai Trystal v. Trystal*.

4 (1920) A I R 1930 Cal 67 (64) 1930 Cri Cas 15 125 Ind Cas 858 31 Cri L J 917, *Salga Charan De v. Empress*.

5 (1920) A I R 1930 Mad 49 (40) 52 Mad 787 122 Ind Cas 171, *Venkateswaramaraju v. Varalalaraju*.

6 (1927) A I R 1935 Lah 115 (118) 1935 Cri Cas 181 *Mt. Maya Deras v. Dircan Chand* (M made application under S. 115 against D's brother of D, in respect of property that stood in name of D—Order passed in favour of M—D instituted a suit for possession after three years—Held order passed did not bind D).

7 (1918) A I R 1918 Nag 212 (213), *Paghn v. Gujari*.

8 (1930) A I R 1930 Mad 49 (50-51) 112 Ind Cas 171 52 Mad 787, *Venkateswaramaraju v. Varalalaraju* (In proceedings taken under S. 145 an adverse order passed against a Hindu father in possession of the property bought on behalf of the joint Hindu family is binding on his undivided sons though they were not parties to the proceedings).

(1923) A I R 1923 All 151 (152) 71 Ind Cas 402 45 All 306, *Ram Sahai v. Binode Behari Ghosh*.

(See also (1935) A I R 1935 Lah 115 (118) 1935 Cri Cas 181, *Mt. Maya v. Dircan Chand* (2 I C 513 (513) (Bom), Dissented from)).

10 (1903) 29 Bom 215 (226) 5 Bom L R 932 *Babaji Pao v. Laxmidas*.

11 (1920) A I R 1920 Cal 820 (821) 60 Ind Cas 860, *Bharat Chandra v. Ram Sunder Choudhury*.

(1926) A I R 1926 Cal 1022 (1025) 97 Ind Cas 73 *Rohini Nandan Chau*.

(1921) A I R 1921 Bom 207 (207) 45 Bom 1135 62 Ind Cas 224 *Venkatesh Rajal v. Bhul Venkatesh* (Injunction granted by Mamlatdar—Injunction order set aside in revision by District Deputy Collector—

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be said to be bound by the order within the meaning of this Article ¹² Thus, where an order is passed in favour of *A*, *B* and *C* as against *D*, and subsequently on a dispute between *A* and *B*, *A* files a suit against *B* in respect of the property, this Article does not apply as *A* cannot be said to be a person bound by the order ¹³

A person cannot also be said to be bound by an order which is not subsisting on the date of the suit ¹⁴ Further, the suit being practically to set aside the order passed, the Article will not apply where there is nothing to set aside

3a. Defendant not party to proceedings in which order was passed.—In *Jogendra Kishore Roy Choudhry v Brojendra Kishore Roy Choudhry*,¹ where the plaintiff who was bound by an order under Section 145 of the Criminal Procedure Code in favour of *A*, instituted a suit for recovery of the property against *B* who was the adopted son of *A*, it was observed by the Full Bench that the three years rule of limitation "applies to all persons bound by, or parties to the order and to any other persons who may claim the property through any such persons under a title derived subsequent to the order," and it was accordingly held that the suit against *B* who claimed through *A* who was a party to the proceedings in which the order was passed, was governed by Article 47 Where the defendant is neither a party nor claims through a party to the prior proceedings, the suit is not governed by this Article even though the plaintiff is bound by the order The reason is that the only possession which the plaintiff is bound to respect is that of the individual in whose favour the order was passed ²

Order passed by District Deputy Collector held to be without jurisdiction

- (1872) 9 Bom H C R 424 (426) *Isaanatharav Kacheshwar v Narayan Gopal* (Case under Bombay Act—Mamlatdar passed an order in favour of one who was not a proper party)
- (1889) 1889 Bom P J 55, *Hazaubhas v Lakshman* (Decision under Pombay Mamlatdars' Courts Act—Mamlatdars have no jurisdiction to take cognizance of suits arising out of disputed claims to redeem mortgage) {See also (1918) A I R 1918 Cal 901 (902-903) 42 Ind Cas 768 18 Cri L Jour 1021, *Yar Muhammad v Hayat Muhammad* (1911) 12 Cri L Jour 47 (48) 9 Ind Cas 285 (Mad) *Gangadharan Nayan v Sankarappa Nandan*}
- 12 (1880) 1 Cal L R 219 (255) 7 Ind App 73 4 Str 127 3 Suther 370 (P O), *Wise v Ameerunnissa Akatoon*
- (1927) A I R 1927 Mad 301 (305) 99 I C 532 *Ismaila Routhier v Sadania*
- 13 (1927) A I R 1927 Mad 50 (52) 98 Ind Cas 442 *Pratap Simha Raja Sahel v Siriji Raja Sahel*
- 14 (1880) 6 Cal L R 93 (95) *Ankhi Chander v Mirza Delawar Hossein* (1926) A I R 1926 Cal 1022 (1025) 97 Ind Cas 73 *Polini Nandan v Jadu Nandan Choudhury* (1912) 16 Ind Cas 755 (756) (Cal) *Thakur Choudhury v Manrup Mahlon* (No order passed in proceedings under S 145 the proceedings being dismissed or dropped)

Note 3a

- 1 (1896) 23 Cal 731 (733-734) (P B)
- 2 (1880) 6 Cal L R 93 (95), *Ankhi Chander v Mirza Delawar Hossein* (1891) 1891 Bom P J 339 *Nyalechanl v Ahandu* (obtaining order against *B*—*B* filing suit against *C* who does not derive title from *A*—Suit is not governed by this Article)

4. "Or by any one claiming under such person." — A person may claim under another when he derives his title through the other by assignment or otherwise¹. But his title must have arisen *subsequent to the order passed*². I mortgaged his property to B and subsequently therefrom A in the Mamlukdar's Court for possession and the suit was dismissed on 2nd September 1896. B subsequently obtained a decree on his mortgage and the property was sold in execution of such decree and was purchased by C. C sued A for possession more than three years after 2nd September 1896. It was held that C derived his title not only from A but also from B, that that title so far as it was thus derived, must be taken as it stood on the date of the mortgage, i.e. before the order of the Mamlukdar's Court, that C was not a person bound by the order and that Article 47 did not apply³.

A lessor cannot be said to claim under his lessee and is therefore not bound by an order against the latter⁴.

4a. Order respecting trust property against trustee — Succeeding trustee, if bound. — S. 145 of the Criminal Procedure Code can be applied even to trust properties. There is no justification for the view that it is only the particular trustee who was a party to a proceeding under Section 145 that must be held bound by that order or by the limitation prescribed by this Article. If the trustee purported to act on behalf of the trust, the proper interpretation of the order will be that the trust itself was a party and must be held bound by the order, and whichever trustee may subsequently

Note 4

- 1 (1906) 29 All 1 (3) 3 All 1, Jour 644 1906 All W N 242 (F 11) *Sundar Lal v Chhitar Mal*
(1922) A 1 R 1922 Pat 63 (67, 68) 65 Ind Cas 266 1 Pat 174, *Kali Dayal v Umesh Pershad*
(1910) 7 Ind Cas 184 (185) (Mad), *Ramappaya v Astha Melanta*
(1893) 18 Bom 349 (354, 355) 1893 Bom P J 209, *Bapu Mahadaji v Mahadaji Vasudeo* (Assignee.)
- 2 (1896) 23 Cal 731 (737, 738) (1st 11) *Jogendra Kishore Poy Choudhury v Jogendra Kishore Loy Choudhry*
(1936) A 1 R 1936 Pat 629 (630) 15 Pat 491 166 Ind Cas 29, *Mungalai v Sagar Mal*
[See (1920) A 1 R 1920 Mad 545 (545) 56 Ind Cas 675, *Solai Ammal v Jogi Chetty* (Criticised in A 1 R 1929 Mad 38 (42))]
(1895) 22 Cal 364 (371), *Soshi Bhusan Guha v Gogaa Chunder Shaha*]
- 3 (1904) 6 Bom L R 305 (306) *Ann Dada v Dhondo*
- 4 See (1892) 11 Cal L R 122 (124), *Ranbrohmo Chuckerbutti v Banse Kurmarkar* (Case decided under Civil Procedure Code, S. 11)
(1875) 24 Suth W R 128 (129), *Shaukh Wahid Ali v Nauth Zorako*
[But see (1870) 14 Suth W R 395 (396) *Lekhraj Poy v Court of Wards* (Where a zamindar lets his estate in farm for a term of years and so delegates the whole of his rights, privileges and immunities to another person, he becomes himself bound by an adverse decision under Act 4 of 1840 to which the former was a party)]

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be said to be bound by the order within the meaning of this Article¹² Thus, where an order is passed in favour of *A*, *B* and *C* as against *D*, and subsequently on a dispute between *A* and *B*, *A* files a suit against *B* in respect of the property, this Article does not apply as *A* cannot be said to be a person bound by the order¹³

A person cannot also be said to be bound by an order which is not *subsisting on the date of the suit*¹⁴ Further, the suit being practically *to set aside the order passed*, the Article will not apply where there is nothing to set aside

3a. Defendant not party to proceedings in which order was passed.—In *Jogendra Kishore Roy Choudhry v Brojendro Kishore Roy Choudhry*¹ where the plaintiff who was bound by an order under Section 145 of the Criminal Procedure Code in favour of *A*, instituted a suit for recovery of the property against *B* who was the adopted son of *A*, it was observed by the Full Bench that the three years rule of limitation "applies to all persons bound by, or parties to the order and to any other persons who may claim the property through any such persons under a title derived subsequent to the order, and it was accordingly held that the suit against *B* who claimed through *A* who was a party to the proceedings in which the order was passed, was governed by Article 47 Where the defendant is neither a party nor claims through a party to the prior proceedings, the suit is not governed by this Article even though the plaintiff is bound by the order The reason is that the only possession which the plaintiff is bound to respect is that of the individual in whose favour the order was passed²

Order passed by District Deputy Collector held to be without jurisdiction)

- (1872) 9 Bom H C R 424 (426) *Vishwanatharai Kacheshwar v Narayan Copal* (Civ. under Bombay Act—Mamlatdar passed an order in favour of one who was not a proper party)
- (1889) 1889 Bom P J 55 *Hasanbhai v Lakhman* (Decision under Bombay Mamlatdars Courts Act — Mamlatdars have no jurisdiction to take cognizance of suits arising out of disputed claims to redeem mortgage)
 [See also (1918) A I R 1918 Cal 901 (902 903) 42 Ind Cas 768 18 Cri L Jour 1024, *Yar Muhammad v Hayat Muhammad*
 (1911) 12 Cri L Jour 47 (48) 9 Ind Cas 285 (Mad) *Gangadharan Aiyar v Sankarappa Naidu*]
- 12 (1880) 6 Cal L R 249 (255) 7 Ind App 73 4 Scr 127 3 Suther 370 (P C), *B 136 v Imecrunnissa Khatoon*
 (1927) A I R 1927 Mad 304 (305) 99 I C 532 *Ismalsa Rauter v Sadaswa*
- 13 (1927) A I R 1927 Mad 50 (52) 98 Ind Cas 442, *Pratapa Sinha Raja Sahab v Surji Raja Sahab*
- 14 (1880) 6 Cal L R 93 (95) *Akhil Chunder v Mirza Delawar Hossein*
 (1926) A I R 1926 Cal 1022 (1025) 97 Ind Cas 73 *Rohini Nanlan v Jaiu nandan Choudhury*
 (1912) 16 Ind Cas 35 (796) (Cal) *Thakur Choudhury v Manrup Mahlon*
 (No order passed in proceedings under S 145 the proceedings being dismissed or dropped)

Note 3a

1 (1896) 23 Cal 731 (733 734) (P B)

2 *Delawar Hossein*
du (A obtaining order
 not derive title from A

—suit is not governed by this Article)

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file a suit to set aside that order will really be acting on behalf of the trust.¹

8. "Order respecting the possession of immovable property."
— The order, so as to come within the scope of this Article should be one —

1 respecting possession of immovable property, and

2 passed under either of the two Acts mentioned in the Article

The jurisdiction to pass an order relating to possession is given under the Criminal Procedure Code by Sections 145, 146, 147 and 522, and under the Bombay Mamlatsdars' Courts Act by Sections 21 and 22 (for which see Note 6)

Order passed under Section 145 Criminal Procedure Code

Under Section 145 a Magistrate is required to give a definite finding as to which of the parties was in possession of the immovable property on the date of the preliminary order. Such a finding is to be based on proper inquiry and on a consideration of the effect of all available evidence.¹ Hence an order of a Magistrate which neither dispossesses the plaintiff (see proviso to sub section 4 of Section 145), nor maintains the defendant's possession to the exclusion of the plaintiff (see sub section 6 of Section 145), is not an order respecting the possession of immovable property and will therefore not fall within this Article.² Thus an order merely dismissing the complaint has been held not to amount to an order respecting the possession.³ Similarly, an order merely carrying out the decree of a Civil Court is not one respecting the possession of the property.^{3a} But an irregularity that does not occasion a failure of justice in passing an order does not render the order a nullity. A suit brought three years after such an order will be barred.⁴

Note 4a

- 1 (1916) A I R 1936 Ma I 183 (183) 161 Ind Cas 231 *Jagathambal Amri v Periyatharai Naidu*

Note 6

- 1 See the Authors' Code of Criminal Procedure Vol I, Section 145 Note 51
2 (1920) A I R 1920 Cal 1022 (1025) 97 Ind Cas 73 *Rohini Nandan Chaudhury v Jai lu Nan lan Chaudhury*
3 (1912) 16 Ind C.A. 735 (736) (Cal) *Tilakun Chaudhury v Manrup Mahlon* (1869) 11 Suth W R 177 (178) *Hurionath Choudhury v Huree Fall Shaha*
3a (1920) A I R 1920 Ma I 78 (40) 111 Ind Cas 132 *Alagarsami Theras v Iyambakka Ira Nair lu Caru*
4 (1918) A I R 1918 Cal 901 (902 901) 42 Ind Cas 763 18 Cri L Jour 1021 *Yar Muhammad I Saha v Hayat Mohammad Saha*
(1910) A I R 1910 Ma I 320 (321) 38 Ind 132 21 Ind Cas 561 *Parasu raiyay v Iyambakka Ira lu*
(1911) 9 Ind C.A. 285 (286) 12 Cri L Jour 47 (Mad) *Gangalaram Iyer v* (1922)

*Order under Section 146, Criminal Procedure Code**

If in the inquiry under said section 4 of Section 145 the Magistrate decides that none of the parties was in actual possession of the plot of the land on the date of the preliminary order, or if the Magistrate is unable to satisfy himself as to which of them was in such possession, the Section 146 attach the property. And where a Magistrate passes an order for attachment it is not an order respecting possession and therefore this Article is not applicable⁸. The reason is that the order contemplated by this Article is an order whereby one of the parties is *adjudged to be* in possession and is maintained in possession until evicted in due course of law⁹. The possession of the Magistrate is in such cases a possession on behalf of such of the rival claimant as might establish a right to possession on his own account⁷.

Order under Section 147, Criminal Procedure Code

While Section 145 deals directly with possession of land and water Section 147 deals with disputes regarding rights of user of land and water and the order passed by the Magistrate after inquiry is an order not of possession but of prohibition of either interference or exercise of such right. It is, therefore, doubtful whether such an order will fall under this Article⁸.

- 5 (1864) 3 Agra 65 (66) *Chuj Mull v Khyrtee*
 (1897) 20 All 120 (122) 1897 All W N 214 *Goswami Ranchor Lalji v Sri Girdharaji* (Property would not be forfeited to Government)
 (1877) 1 Mad 309 (311) 2 Ind Jur 99, *Akilandammal v Periasamy Pillai*
 (1902) 29 Mad 410 (413) *Rajah of Venkatagiri v Isakapalli Subbiah*
 (1901) 28 Cal 86 (88) 5 Cal W N 160 *Deo Narain Chowdhury v Webb* (In the case the question whether Art 47 would apply was not decided)
 See A I R 1921 Cal 594
 (See (1874) 7 W P H C R 35 (37, 38) *Durga v Mangal*
 (1911) 11 Ind Cas 58* (587) 12 Cri L Jour 403 (Lab) *Mohar Singh v Emperor*)
- 6 (1897) 20 All 120 (122) 1897 All W N 214 *Goswami Ranchor Lalji v Sri Girdharaji*
 (1936) A I R 1936 Oudh 397 (393) 164 Ind Cas 118 12 Luck 371 *Pratal Baladur v Jagatjit Singh* (When there is no such order Art 47 does not apply)
- 7 (1923) A I R 1923 Mad 88 (41 42) 111 Ind Cas 152 *Alagarswami Therasan v Ramabhadra Naidu Garu* (A I R 1920 Mad 545 Criticised and Not followed)
 (1926) A I R 1926 Cal 782 (786) 95 Ind Cas 117, *Abinash v Tarini Chara* (Case of attachment under S 145 (4))
 (1916) A I R 1916 Cal 751 (752) 31 Ind Cas 242 *Brojendra Kisore v Bharat Chandra*
 (1921) A I R 1921 Cal 584 (586) 66 Ind Cas 433 *Sarat Chandra Ma Biblabati Debi* (28 Cal 86 explained and held obsolete)

[See (1922) A I R 1922 Cal 419 (421) 49 Cal 544 65 J 1 -
Panna Lal Biswas v Panchu Buidas]

8 See however (1897) 20 All 120 (123) 1897 All W N 214 *Goswami Ranchor Lalji v Sri Girdharaji*

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6. Order passed under the Mamlatdars' Courts Act respecting the possession of property.—An order which a Mamlatdar can, under the Bombay Act 2 of 1906, pass on the question of possession may, having regard to the different Sections of the Act, be divided into the following classes

- 1 Orders restoring possession to a plaintiff who has been dispossessed otherwise than in due course of law within six months before the suit, or, where a plaintiff's possession has been obstructed by a defendant within that period, orders issuing injunction to the defendant and thereby confirming the plaintiff in possession,
- 2 Orders rejecting the plaint for default, and
- 3 Orders rejecting the plaint on the ground that the plaintiff has failed to prove all or any of the issues laid down in Section 19, clauses (a), (b) and (c)

Section 22 provides that where a party is either restored to possession or confirmed in possession by means of an injunction by the Mamlatdar, such party shall continue in possession until ousted by a decree or order of a Civil Court. This Section has reference only to the first class of these orders. The second proviso to the said Section makes it clear that it is an order of this kind only which, according to the Act falls within the category of the Mamlatdar's decision respecting the possession of any property. This Article, as seen in Note 5 *ante* requires two conditions to be fulfilled before it can be applied, namely

- 1 that the party suing should be bound by the order under the Mamlatdars' Courts Act, and
- 2 that the order should be respecting possession

And Section 22 of the Bombay Act explicitly points out the orders to which these two conditions apply. They must belong to the first of the three classes mentioned above. It follows from this that the three years' period of limitation prescribed in Article 47 does not apply to orders belonging to the second and the third classes¹

7. "To recover the property"—This Article applies where the suit is one to *recover* the property comprised in the order. A suit for the declaration of right to the property is not governed by the Article¹. Where property has been attached under Section 146 of the Criminal Procedure Code, or a receiver has been appointed for

Note 6

- 1 (1904) 28 Bom CO1 (609 610 611 614) 6 Bom L R 612 (F B), *Tukaram v Hars* (25 Bom 82, Overruled)
(1921) A I R 1921 Bom 207 (207) 45 Bom 1135 62 Ind Cas 224, *Venkatesh v Bhiku*
(1931) A I R 1931 Bom 256 (256) 135 Ind Cas 427, *Bullappa v Tippan Gorda* (Order denying a right of way is an order respecting possession)
[But see (1893) 1683 Bom P J 131, *Chinto v Vishnu* (Impliedly overruled by 28 Bom CO1 (F B))]

Note 7

- 1 (1906) 35 Cal 651 (657), *Eshan Chandra Samanta v Nilmoni Singh*

the said property under the same Section, the property is in *custodia legis* on behalf of the rightful owner. The rightful owner is not in such cases, under any obligation to bring a suit for possession of the property. It is sufficient if he establishes his right to the property, and if he does so, the attaching Court is bound to deliver the property to him. This Article will not apply to such cases.² The expression to recover really points to and implies that the recovery of the property must be the relief that is claimed in the action against the other party to the suit, namely the defendant, and, taking into consideration the whole of the language of that clause, it is abundantly clear that this Article was intended to apply only to cases where by the order of the Magistrate possession has been confirmed or given to the other party to the suit, and it therefore becomes necessary for the intending plaintiff to institute a suit for the recovery of that property from the opposite party.³

A and B are joint owners of properties X and Y. An order is made against A and in favour of B in respect of property Y confirming B's possession. A sues three years thereafter for partition of his share in properties X and Y. Is the suit barred? It has been held that it is not barred, on the ground that a claim for a share in properties X and Y is not a suit for the recovery of the property Y in respect of which the order was passed.⁴

Suppose now the order was passed in respect of both the properties X and Y. It has been held by the High Court of Bombay that even in such a case the suit is not barred.⁵ It was observed as follows —

"A suit for the partition of property comprised in the Mamlatdars order is not properly designated as a suit to recover such property, and whether that property is the *only one* of which partition is claimed or whether it is *only one of such properties* is not a material question in this connection.

The High Court of Calcutta has, on the other hand, dissented from the Bombay view and has held that the suit will be barred under this Article.⁶ It has been held by the Judicial Commissioners

2 (1929) A I R 1929 Mad 88 (41) 111 Ind Cas 152 *Alagarswami Thetian v Ramabhadra Naidu Garu*

3 (1929) A I R 1929 Mad 88 (41) 111 Ind Cas 152 *Alagarswami Thetian v Ramabhadra Naidu Garu*

4 (1880) 5 Bom 25 (26) *Bhaguj v Anisaba*

(1880) 5 Bom 27 (29) *Shriram v Narayan*

[See (1901) 26 Bom 146 (149) 3 Bom L R 594 *Bhimappa v Irappa*

Criminal Court in respect of a *part* of the property has not been challenged by suit within three years.}}

5 (1890) 15 Bom 299 (305) *Parashram Jathmal v Rakhma*

6 (1930) A I R 1930 Cal 612 (614) 128 Ind Cas 106, *Atale Sunarti v Talib Hussain Usa*

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Court of Nagpur⁷ that the expression "right to such property" in Section 28 *ante* includes the right to joint possession and that a person whose right to joint possession is extinguished by the expiry of the period fixed by this Article read with Section 28, cannot evade the operation of this Article by framing the suit as one for damages of his share of the produce, inasmuch as the right to claim damages is not separate from the right to claim possession or joint possession. The High Court of Allahabad has also held that the words "to recover property" would include the recovery of property both as full owner and also as joint owner⁸.

8. Article 47 and limitation prescribed under local or special law. — Under Section 29 *ante*, where any special or local law prescribes for any suit a period of limitation different from the period prescribed therefor by the Limitation Act, the suit is governed by such special or local law. For cases wherein the special or local law has been applied, see the undermentioned cases¹.

Where an ouster of the plaintiff takes place under the provisions of the Bengal Tenancy Act, 1885, on a date *antecedent* to the date on which the Magistrate makes his order, the limitation prescribed by Article 3, Schedule 3 of the Bengal Tenancy Act begins to run against the plaintiff from the date of the actual ouster. The limitation, which thus has begun to run against the plaintiff, does not cease to run and the plaintiff cannot have a fresh start of the limitation from the date of the Magistrate's order².

9. Final order, the starting point of limitation. — Before the amendment of the Criminal Procedure Code in 1923, orders under Section 145 were not subject to appeal, review or revision. Hence, under the unamended Code it was held that for a suit to recover property in respect of which an order under Section 145 had been passed, the period of limitation ran from the date of the order

(1935) 163 Ind Cas 370 (371) 39 Cal W N 853 (855 856) *Jogesh Chandra v Suresh Chandra* (A I R 1930 Cal 612 Followed)

7 (1930) A I R 1930 Nag 142 (143) 122 Ind Cas 270 20 Nag L R 160, *Jagatram v Pitala*

8 (1937) A I R 1937 All 300 (303) 169 Ind Cas 125, *Mt Jaidar v Kuari v Dakshin Din*

Note 8

1 (1865) 2 Suth W R 162 (162) *Lyons v Raj Chunder Shikheressur Roy* (Dispossession under Act 4 of 1840—Case falling under Bengal Rent Act, 10 of 1849, S 23 Cl 6—One year's period of limitation under

2 (1900) 28 Cal 66 (89) 5 Cal W N 160, *Deo Narain Chowdhury v Webb*
 [See also (1933) A I R 1933 Pat 221 (228) 12 Pat 261. 140 Ind Cas 661, *Jurawan Singh v Ramsarekh Singh*]

of the Magistrate¹ Now by the Amending Act of 1923, a revision by the High Court is allowed on an order passed by a Magistrate under Section 145 Hence the expression "the final order" will cover an order passed in revision

A final order, so far as Section 145 of the Criminal Procedure Code is concerned, should embody a definite finding as to which of the parties was in possession of the subject of the dispute on the date of the preliminary order² Hence, where no final order in this sense is passed,³ but only an order is passed whereby the proceedings are merely struck off the file⁴ or the complaint is dismissed,⁵ it will not be a 'final order' within the meaning of this Article Similarly, it has been held that a verbal order will not be governed by this Article⁶

The suit to recover the property, the subject of the dispute, must be brought within three years from the date of the final order in the case⁶ A party cannot, by taking the law into his own hands and forcibly ejecting the other party who was successful in the proceedings under Section 145, enable himself to bring a suit for declaration or enlarge the period of limitation prescribed by this Article An order in favour of the defendant was passed on the 9th of March 1914 under Section 145 against A After his death, the plaintiff, who was claiming through A, forcibly dispossessed the defendant The plaintiff was convicted and the defendant was restored to possession on 8th September 1919 under Section 522 On 9th March 1920, plaintiff brought the present suit for a declaration of his right It was held that the plaintiff could not by bringing a suit for merely a declaration, enlarge the period of limitation⁷

Note 9

- 1 (1908) 12 Cal W N 840 (841) *Jagannath Maricari v Ondal Coal Co Ltd*
(1918) A I R 1918 Pat 504 (506) 43 Ind Cas 955, *Lachman Singh v Diljan Ali*
- 2 (1923) A I R 1923 Mad 24 (24) 71 Ind Cas 503 21 Cri L Jour 156, *Shukulathu Rowther v Gulam Moideen*
(1923) A I R 1923 Mad 180 (181) 71 Ind Cas 112 24 Cri L Jour 64, *Virappa v Kathayee Ammal*
(1908) 7 Cri L Jour 836 (337) 7 Cal L Jour 369, *Arju Mea v Arman Mea*
- 3 (1878) 20 Suth W R 316 (817), *Mosahab Ali v Nund Ashore*
- 4 (1963) 3 Suth W R 174 (174), *Dgram Sahoo v Debee Sograh*
- 5 (1912) 16 Ind Cas 785 (786) (Cal), *Thakun Chaudhury v Manrup Mahton* (Proceedings under S 145—Complaint dismissed as plaintiff failed to prove possession—No other order passed—Art 47 does not apply to such dismissal order)
(1869) 11 Suth W R 477 (478), *Hurronath Chowdhury v Huree Lall Shaha*
- 5a (1867) 2 Agra 26 (29), *Hukeem Ganga Pershad v Moulvi Mahomed Kootob Ali*
- 6 (1921) A I R 1921 Cal 277 (279) 66 Ind Cas 923, *Maharajah of Cooh Behar v Mahendra Ranjan Rai* (Suit filed within three years)
(1921) A I R 1921 Bom 207 (207) 45 Bom 1135 62 Ind Cas 221, *Venkatesh Petal v Bhihi Venkatesh* (Do)
- 7 (1923) A I R 1923 All 151 (152) 45 All 303 71 Ind Cas 402, *Ram Sahai v Binode Behari Ghosh*

Article 47
Note 10

10. Article 47 and Section 28.—Section 28 enacts that at the determination of the period limited by the Act, to any person for instituting a suit for possession of any property, his right to such property shall be *extinguished*. If a person, therefore, fails to bring a suit to recover the property within three years of the order against him, his right to possession is extinguished.¹ In *Wise v Ameerrunnissa*,² their Lordships of the Privy Council held that possession for three years under an order of a Magistrate in a proceeding under Act 4 of 1840 did not create a title by prescription. This decision was given when the Limitation Act of 1859 was in force. That Act did not contain any provision like or analogous to the provision of the present Section 28. Hence, the successful party in the proceeding before the Magistrate did not acquire a title good against all the world by the mere lapse of three years. For, except by application of Section 28, there is no extinguishment of right of property vested in one person by a mere lapse of time.³

As to the effect of not bringing a suit by a person against whom an order under Act 16 of 1838 was passed, within the period prescribed by clause 7, Section 1 of the Limitation Act of 1859, see the cases cited below.⁴

Section 28 does not apply to parties who rely on actual possession which has never been disturbed. Thus, where in spite of an order a party remains in actual possession, the Article has no application and consequently the non institution of a suit will not extinguish the right of the party under that Section.⁵

Note 10

- 1 (1912) 15 Ind Cas 24 (25) (Mad) *Devasihamam v Muthian Chetty*
(1920) A I R 1920 Mad 545 (545) 56 Ind Cas 675 *Solar Ammal v Joga Chetty*
- (1912) 14 Ind Cas 566 (567) 1912 Pan Re No 84 *Bhagandas v Bhanamal*
- (1930) A I R 1930 Nag 142 (143) 122 Ind Cas 270 26 Nag L R 160 *Jagat ram v Pytas*
- (1935) A I R 1935 Pat 164 (165, 166) 155 Ind Cas 1094 14 Pat 424 *Nando Kahar v Sri Bhup Narain Singh* (Proceedings under S 145 Cr P O between A and B—Order in favour of B—After three years C, landlord of B, getting possession from B under Civil Court decree—A brought suit against C—Held barred)
- (1937) A I R 1937 All 300 (303) 169 Ind Cas 125 31t *Jaidet Kuari v Dal-shini Din*
- 2 (1879) 6 Cal L R 249 (255) 7 Ind App 73 4 Sar 127 3 Suther 370 (F C)
[See also (1891) 5 Bom 357 (390, 392), *Lillu v Annaji*]

- 4 (1890) 15 Bom 299 (303, 304) *Parashram Jethmal v Ralhma*
(1899) 14 Bom 372 (376, 377) 1889 Bom P J 305 *Bapu Khanlu v Bajji Jiraji*
- 5 (1895) 20 Bom 270 (277) 1895 Bom P J 39, *Krishnacharya v Lingava*
[See also (1911) 9 Ind Cas 285 (296) 12 Cri L Jour 47 (Mad) *Ganga dharam Iyer v Sanjarajpa Naidu* (This point was not allowed to be argued)]

48.* For specific moveable property lost, or acquired by theft, or dishonest misappropriation or conversion, or for compensation for wrongfully taking or detaining the same.	Three years.	When the person having the right to the possession of the property first learns in whose possession it is.
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Article 48

Synopsis

1. Legislative changes.
2. Scope of the Article.
3. Specific moveable property.
4. Specific moveable property lost.
- 4a. Suit to recover specific moveable property.
5. Acquired by theft.
6. Acquired by conversion.
7. Wrongfully taking or detaining the same.
8. Conversion by a carrier.
9. Starting point of limitation.
10. Having the right to possession.
11. "In whose possession it is."

Other Topics

Article 48 or Article 49 — Which applies — Test	...	See Note 7
Conversion need not be dishonest		See Note 6, Pt 4
Government Promissory Notes and share certificates are specific moveable property		See Note 8, Pts 11, 13
Money — Whether specific moveable property		See Note 9, Pts 9 to 7a
Standing trees or standing crops		See Note 3, Pts 15, 16

1. Legislative changes.*Act 9 of 1871*

Article 48 of the Act of 1871, corresponding to the present Article, prescribed the limitation for suits "for moveable property acquired by theft, extortion, cheating or dishonest misappropriation or conversion" which were all offences under the

* **Act of 1877, Article 48.**

Same as above.

Act of 1871, Articles 47, 48.

47. — For lost moveable property not dishonestly misappropriated or converted	Three years	When the property is demanded and refused.
48. — For moveable property acquired by theft, extortion, cheating or dishonest misappropriation or conversion	Ditto	Ditto

Act of 1859.

No corresponding provision

Article 48
Notes
1—2

Penal Code. It was held that the Article provided for a case in which a suit was brought to recover moveable property acquired by a *criminal offence*¹

Further, the starting point of time for such suits was the date "when the property was demanded and refused" See the undermentioned case.²

Act 15 of 1877 :

Column 1.

- (a) The word "specific" was added before the words "moveable property"
- (b) The words "or for compensation for wrongfully taking or detaining the same" were added
- (c) The words "extortion, cheating" were deleted

Column 3.

The words "when the property is demanded and refused" were deleted and the words that now occur in the third column were substituted therefor

2. Scope of the Article.—This and Article 49 apply to suits for reliefs in respect of *specific moveable property*¹ Further, they apply only where such property has been *wrongfully taken or wrongfully detained*² But they differ in two important respects

1 Article 48 applies to suits for reliefs in respect of *particular kinds of property*, namely property which has been *lost or acquired by theft or dishonest misappropriation or conversion*,³ while Article 49 applies to suits for reliefs in respect of specific moveable property *other* than those specified in Article 48⁴

2 Article 48 applies only where the plaintiff has a *right to the possession* of the property in respect to which relief is

Article 48 — Note 1

- 1 (1877) 2 Cal 393 (394), *Raghunoni v Nilmoni* (Suit for money obtained by collusion and fraud)
- 2 (1872) 1872 Pun Re No 23, *Gyan Chand v Mohumda*

Note 2

- 1 See Note 3 *infra*
- 2 See Note 7 *infra*
- 3 (1920) 4 I R 1920 Pat 393 (403) 55 Ind Cas 118, *Lodna Colliery Co Ltd v. Depin Behary*
- (1910) 7 Ind Cas 447 (447) (Bom), *Maganlal Bhukan Das v Thakurdas Virjibhukandas*
- 73 114 Ind Cas
 Sen
afazul Khan v.
- 4 (1932) 4 I R 1932 All 256 (258) 136 Ind Cas 809 54 All 467, *Kripa Ram v. Kunicar Bahadur*
- (1936) 4 I R 1936 Bom 322 (325, 326) 60 Bom 818 165 Ind Cas 181, *Aakhusroo Manekshah Talwar Khan v Ganga Das Dwarka Das*

claimed.⁵ Article 19, on the other hand, is not confined to such cases. The plaintiff need not necessarily be a person entitled to the possession of such property.⁶

Article 48
Notes
2—3

3. Specific moveable property.—It has been held in a number of cases that the word "specific" applies to property of which one may demand the delivery *in specie*.¹ In some cases it has been held that the word "specific" merely means "that can be specified".² A share in specific moveable property cannot be said to be itself a "specific" moveable property in either of these senses.^{3a}

⁵ See Note 10 *infra*.

⁶ See Note 10 *infra*.

Note 3

- 1 (1856) 11 Fcm 133 (137) *Farooq Bhaiya v Steam Ship "Sauria"*
(1898) 25 Cal 692 (699) 2 Cal W N 265 (F B), *Mangun Jha v Dolhin Golab Koer*
(1920) A I R 1920 Sind 92 (93) 14 Sind L R 137 63 Ind Cas 685, *Ram Das v Ajulhadas*
[See (1936) A I R 1936 P O 171 (173) 162 Ind Cas 454 17 Lah 557 63 Ind App 279 (P C), *Md Akbar Khan v Attar Singh* (Where their Lordships use the word 'specific' as meaning 'returnable in specie')]
(1907) 6 Cal L Jour 535 (539) *Lal Gobind v Chairman of Patna Municipality*
(1895) 22 Cal 877 (882 893) *Surat Lal v Umar Haji* (Per Norris J)
(1933) A I R 1933 Cal 253 (257) 143 Ind Cas 402 *Suarnamoyee v Probodh Chandra*
(1907) 11 Cal W N 862 (864) *Agandh Mahto v Khajah Ahlullah*
(1914) A I R 1914 Mad 572 (573) 37 Mad 881 14 Ind Cas 254, *Sankunni Menon v Gounda Menon* (Specific property is that which is recovered in specie i.e. the very property itself, not any equivalent or reparation))
- 2 (1912) 17 Ind Cas 906 (906) 6 Low Bur Rul 75, *Sithambaram Chetty v Usha Gyn*
(1936) A I R 1936 Mad 250 (250) 161 Ind Cas 538 *Manga Reddi v Venkataraghaya* (Suit for damages is not governed by Art 48 or Art 49)
- 3a (1933) A I R 1933 Cal 253 (257) 143 Ind Cas 402 *Suarnamoyee Das v Probodh Chandra*
(1934) A I R 1934 Cal 87 (91) 61 Cal 119 150 Ind Cas 393 *Bibhu Dhusan v Anadi Nath* (G F Notes belonging to joint family of two brothers given as security for service of one of members — Suit by heirs of latter against heirs of the other brother for recovery of their share of the G F Notes is governed by Art 145 and not either by S 10 or by Art 49)
(1922) A I R 1922 All 525 (525) 44 All 244 64 Ind Cas 974 *Bashir un nissa Bibi v Abdur Fahman*
(1917) A I R 1917 Lah 181 (182) 40 Ind Cas 374 1917 Pun Re No 92, *Muhammad Hamid Ullah Khan v Muhammad Wajid Ullah Khan*
(1893) 21 Cal 157 (163) 20 Ind App 155 6 Sar 374 17 Ind Jur 494 R & J 133 (P C) *Muhammad Riasat Ali v Hasin Danu* (To such a suit Art 120 will apply)
(1897) 1897 Pun Re No 16 *Mt Satara Begam v Mt Hussain Khanam*
(1920) A I R 1920 Sind 92 (93) 63 Ind Cas 685 14 Sind L R 137 *Ramdas v Ajulhadas* (Suit by heir for recovery of a share in the moveable property of a deceased person)
(1903) 31 Cal 262 (272) 14 Mad L Jour 8 31 Ind App 10 8 Cal W N 146 8 Sar 575 6 Bom L R 1 (P C) *Ganesh Dutt v Jerrach* (Suit by a

Article 48
Note 3

It seems to be clear that *money* cannot be considered to be "specific" moveable property³ though it may be moveable property⁴. It cannot be demanded to be returned *in specie*^{4a}. It was however assumed by the High Court of Allahabad in the undermentioned case⁵ that money was specific moveable property within the meaning of this Article. In later cases the said High Court felt itself bound to follow the above ruling though it expressed its doubts about the correctness of the view⁶. The High Court of Calcutta also has in one case⁷ held the same view as the earlier decision of the Allahabad High Court. It is submitted that the Allahabad view is not correct. The said decisions do not advert to the fact that the Legislature has used the expression "specific moveable property" in some Articles and the expression "moveable property" in other Articles, and that it cannot be said that it has done so without any purpose. As to the Madras view, see the undermentioned case^{7a}.

The view was expressed in some cases that property which becomes moveable only by the act of the defendant is not the

Hindu widow for recovery of immovable and moveable properties being her deceased husband's share in the family properties under a partition, is not barred by limitation so far as the moveable property is concerned even when such suit is brought after lapse of three years from the cause of action.)

(1921) A I R 1921 Cal 77 (78) 66 Ind Cas 876 *Bhubaneswar v Duarheswar*

(1922) A I R 1922 All 525 (525) 44 All 244 64 Ind Cas 974, *Mt Bashir un Nissa Bibi v Abdul Rahman* (Suit for partition of moveables)

3 (1907) 11 C 11 1888 (cc) 14 All 1111 8 Ind Jur 200 *Jagjnan v Gulam Jilani*

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(See also (1883) 3 Bom 17 (19) 8 Ind Jur 200 *Jagjnan v Gulam Jilani*

(1888) 1888 Pun Re No 59 *Kashi Ram v Secretary of State*]

4 (1901) 28 Ind App 227 (238) 24 All 27 3 Bom L R 576 8 Sar 142 (P O), *Asghar Ali v Kurshed Ali* (Moveable property in Article 89 includes money)

(1883) 3 Bom 17 (19) 8 Ind Jur 200, *Jagjnan v Gulam Jilani* (Moveable property in Article 29 includes money)

4a See cases cited in Foot Note (3)

6 (1907) 29 All 579 (581) 1907 All W N 181 4 All L Jour 671, *Ram Lal v Ghulam Hussain*

(1930) A I R 1930 All 397 (398) 124 Ind Cas 33, *Jaganj v Bandan*

(1930) A I R 1930 All 573 (575) 124 Ind Cas 180, *Benares Bank Ltd v. Ram Prasad*

7 (1910) 7 Ind Cas 5 (6) (Cal), *Tula Ram v Mohr Lal* (Money deposited in Court has been held to be included in "specific moveable property" within the meaning of Art. 49)

7a (1931) 1931 Mad W N 1231 (1233) *Veerayya v Bajiraju* (Suit for value of machine wrongfully withheld—Art. 49 was applied)

moveable property referred to in this and the next Article⁸. The general trend of opinion is to the contrary⁹. Where coal was cut and carried away by the defendant from the plaintiff's mines, it was held by the Privy Council that such coal was moveable property within the meaning of this Section¹⁰.

Government Promissory Notes,¹¹ title deeds of property,¹² share certificates,¹³ and books, mortgage deeds and other documents¹⁴ are specific moveable property. Standing trees,¹⁵ standing crops¹⁶ unless severed,¹⁷ the idol of Thakur,¹⁸ huts¹⁹ and fixtures²⁰ are not moveable property.

4. Specific moveable property lost.—*B* kept certain ornaments belonging to *A* under a promise to return them to *A* and died without doing so. *A* sued *B*'s sons for the recovery of the ornaments or their value but did not allege any misappropriation against *B* or his sons. It was assumed that the suit was for compensation for specific moveable property lost and Article 48 was applied¹.

8 (1893) 22 Cal 877 (889) *Surat Lal v Umar Haji*

(1893) 25 Cal 692 (702) 2 Cal W N 265 (F B) *Mangun Jha v Dolhin Golab Koer* (Per Rampini J)

(1909) 1 Ind Cas 788 (789) 36 Cal 141 *Jadunath v Hari Kar* (Per Rampini J)

9 See the opinion of the other Judges in the cases cited in Foot Note (8)

10 (1929) 4 I R 1929 P O 69 (71) 56 Ind App 93 114 Ind Cas 601 8 Pat 516 (P C) *Lewis Pugh v Ashutosh Sen*

(1936) A I R 1936 Pat 179 (183) 161 Ind Cas 655, *Shrish Chandra Nandy v Ramji Dechar*

11 (1908) 12 Cal W N 1010 (1013) *Gopal Chandra Dose v Surendra Nath Dutt*

12 (1892) 15 Mad 157 (160) 2 Mad L Jour 54, *Subbappa v Maruppakkala* (Suit to recover title deeds left with a mortgagee after redemption)

13 (1910) 7 Ind Cas 447 (448) (Bom) *Magan Lal v Thakurda Virjibhukandas*

14 (1919) A I R 1919 Lah 47 (49) 1919 Pun Re No 85 52 Ind Cas 580 *Vi Durga Devi v Ram Nath* (Basis and documents)

15 (1883) 5 All 564 (565) 1883 All W N 157 (F B) *Umed Ram v Dawlet Ram*

(1906) A I R 1906 All 462 (463) 94 Ind Cas 336, *Jagadish Prasad v Raghu bir* (Trees when cut down become specific moveable property)

(1924) A I R 1924 Nag 125 (126) 20 Nag L R 80 80 Ind Cas 769 *Narbada prasad v Akbar Khan*

16 (1882) 6 Bom 592 (593) *Sadu v Sambhu*

(1878) 4 Cal 665 (667) 2 Cal L R 526 3 Ind Jur 515 2 Shome L R 28, *Pandah Gazi v Jennuddi*

(1915) A I R 1915 Nag 69 (70) 27 Ind Cas 935 11 Nag L R 18 *Murlidhar v Mulu*

17 (1898) 25 Cal 692 (699) 2 Cal W N 265 (F B) *Mangun Jha v Dolhin Golab Koer*

(1924) A I R 1924 Nag 125 (127) 20 Nag L R 80 80 Ind Cas 769 *Narbada prasad v Akbar Khan*

18 See (1889) 17 Cal 3 (22) 16 Ind App 137 5 Sar 850 13 Ind Jur 211 (P C), *Gossami Sri Gridharaj v Itamanlal Gossami*

(1910) 7 Ind Cas 475 (476) 38 Cal 284 *Bals Panda v Jadu Mony Santra*

19 See (1868) 10 Sush W R 416 (417) 8 Beng L R 510 Note 2 Beng L R A O 77 *Rajchunder Bose v Dharmo Chunder Bose*

20 (1879) 4 Cal 946 (947) 4 Cal L R 460 4 Ind Jur 210 *Miller v Brindaban* (Flour and oil mills steam engine and boiler)

Note 4

1 See (1929) A I R 1929 All 208 (208) 116 Ind Cas 783, *Raghubar Saran v Jumna Prasad*

Article 48
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3 (1907) 11 Cal W N 862 (864) *Agandh Mahto v Klajah Ahlullah*

(1914) A I R 1914 Mad 381 (372) 37 Mad 381 14 Ind Cas 954 *Sankunnu v Sankunnu* not as

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(1883) 8 Bom 17 (19) 8 Ind Jur 200 *Jagjwan v Gulam Jilani* (Moveable property in Article 29 includes money)

4a See cases cited in Foot Note (3)

5 (1883) 5 All 341 (342) 1883 All W N 48 *Rameshar Chandra v Mata Bhikh* (Rsued M for a certain sum of money on the ground that he had not deli R and he told that Art 48) m Lal v

Ghulam Hussain

(1930) A I R 1930 All 397 (398) 124 Ind Cas 33 *Jaganji v Bandan*

(1930) A I R 1930 All 573 (575) 124 Ind Cas 160, *Denares Bank Ltd v Ram Prasad*

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- 8 (1933) 22 Cal 577 (579), *Surat Lal v Umar Haji*
 (1930) 25 Cal 692 (702) 2 Cal W. N. 265 (F B. *Moghan Lal v Lal in G. Lal Koer* (P. Rampini J))
 (1909) 1 Ind Cas 789 (793) 36 Cal 141 *Joshi v. Eern For* (P. Rampini J)

- 9 See the opinion of the other Judges in the case cited in F. B. N. 265.
 10 (1929) A I R 1929 P C 69 (71) 55 Ind App 111 112 Ind Cas 101 (P C) *Lewis Pugh v. Shikhar Singh*
 (1937) A I R 1936 Pat 170 (1-3) 161 Ind Cas 103, *Sun. Cawthra v. Dandji v. Lamji Dechar*
 11 (1909) 12 Cal W. N. 1010 (1013) *G. P. Chatterjee v. S. S. Chatterjee*
 12 (1922) 15 Ind 157 (160) 2 Ind L J 111, *Sarabhai v. Morapalkhale* (S. J. Chatterjee J.)
 13 (1910) 7 Ind Cas 417 (419) (B. M.) *Moghan Lal v. The Central Bank of India*
 14 (1919) A I R 1919 Lah 47 (49) 1 Ind Cas 101, *Durga Devi v. L. S. Datta*
 15 (1919) A I R 1919 Lah 47 (49) 1 Ind Cas 101, *Durga Devi v. L. S. Datta*
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 18 (1919) A I R 1919 Lah 47 (49) 1 Ind Cas 101, *Durga Devi v. L. S. Datta*
 19 (1919) A I R 1919 Lah 47 (49) 1 Ind Cas 101, *Durga Devi v. L. S. Datta*
 20 (1919) A I R 1919 Lah 47 (49) 1 Ind Cas 101, *Durga Devi v. L. S. Datta*

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 (1930) 25 Cal 692 (702) 2 Cal W. N. 265 (F B. *Moghan Lal v Lal in G. Lal Koer* (P. Rampini J))

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Notes

- 1 (1933) 22 Cal 577 (579), *Surat Lal v Umar Haji*
 (1930) 25 Cal 692 (702) 2 Cal W. N. 265 (F B. *Moghan Lal v Lal in G. Lal Koer* (P. Rampini J))

Article 48
Notes
4a—7

4a. Suit to recover specific moveable property.—See Note 4 to Article 49

5. Acquired by theft.—A suit against a person to recover stolen property which had come into his hands or its value as damages is governed by this Article ¹

6. Acquired by conversion.—A conversion is the act of wilfully interfering with moveable property, without lawful justification, whereby any person entitled thereto is deprived of the possession of it ¹ A wrongful taking and a wrongful detention will be a conversion if it amounts to a deprivation of possession of the person entitled to it ² But a mere removal without a "taking," that is, without any intention of asserting any dominion over the property, is not a conversion In *Fouldes v Willoughby*,³ A went on board B's ferry boat having with him two horses, B wrongfully refused to carry the horses and told A that he must take them ashore, A refused to do so and B thereupon took the horses from him and put them ashore "It has never been held," said Lord Abinger, "that the single act of removal of a chattel independent of any claim over it, either in favour of the party himself or any one else, amounts to a conversion"

In order that this Article may apply to suits for relief in respect of property acquired by conversion, it is not necessary that the conversion should have been a *dishonest* one ⁴

7. Wrongfully taking or detaining the same.—This Article as well as Article 49 apply only to cases where property has been *wrongfully taken* or *wrongfully detained* ¹ Where the defendant merely causes the deprivation of possession of the property in the hands of the plaintiff, but does not himself take or detain the property, as where he gets the property attached by a process of the

Note 5

- 1 (1911) 11 Ind Cas 416 (447) (Lab) *Sohan Singh v Mui Singh*

Note 6

- 1 Salmond on Torts 6th Edition, Page 374
2 Salmond on Torts, 6th Edition, Pages 376 377
3 (1811) 8 M & W 540 (545 548 519) 10 L J Ex 354 1 Dowd (N S) 86 5 Jur 531 58 R R 803 (807, 810)
4. (1929) A I R 1929 P C 69 (71) 56 Ind App 93 114 Ind Cas 601 8 Pat 516 (P O), *Lewis Pugh v Anshor Sen*
(1930) A I R 1930 P C 113 (114) 123 Ind Cas 726 57 Ind App 141 57 Cal 1841 (P O), *Aljani Coal Co Ltd v Panna Lal*
[See however (1881) 10 Cal 860 (861) 11 Ind App 59 4 Sar 518 8 Ind Jur 322 (P O) *Gurudas v Ram Narain* (Where their Lordships observed there was no dishonest misappropriation or conversion ')]

Note 7

Court, there is no wrongful *taking* or *detention* and a suit for damages for causing the deprivation of possession is not governed either by this Article or Article 49²

Article 48
Note 7

Where the suit is for compensation for wrongfully taking or wrongfully detaining specific moveable property, the test whether this Article or Article 49 applies is to see whether at the time of the *taking* or *detention* the property can be said to be lost property or to have been "acquired" by theft or dishonest misappropriation or conversion. The word "acquired" must be taken to have reference to the possession of the property and not to the title thereof. This is clear from the fact that the Article speaks of property *acquired* by theft though the person who acquires it can have no title to the property.

Where A acquires property in a *lawful* manner, but subsequently misappropriates it dishonestly or converts it to his own use, it cannot be said that at the time of the *taking* or *detention*, which constitutes the misappropriation or conversion, the property had been acquired by misappropriation or conversion. To such cases Article 48 has no application³. But the taking or detention being wrongful, a suit for

2 (1903) 6 Bom L R 701 (707) *Surajmal v Manekchand* (Property simply got attached but not taken by defendant)

(1907) 29 All 615 (617) 4 All L Jour 548 1907 All W N 194, *Ram Narain v Umrao Singh*

1909 L R 1008 (1111) 106 F R 275 F C 1271 C bert
nee
by

(1926) A I R 1926 Cal 177 (177) 90 Ind Cas 509 *Ananda Chandra v Barada Kanta Dey* (Art 36 and not Art 49 applies to a suit for compensation for deterioration of plaintiff's oranges owing to their detention at the Police Station)

(1925) A I R 1925 Mad 185 (186) 84 Ind Cas 1026, *Krishnaswamy Iyengar v Gopalachariar*

(1917) A I R 1917 Mad 500 (503) 35 Ind Cas 93, *Veeramma v Subba Rao*

(1920) A I R 1920 Mad 397 (399) 55 Ind Cas 786, *M R M V L Firin v Krishnaswamy*

(1930) A I R 1930 Mad 635 (642 644) 53 Mad 621 126 Ind Cas 721, *Pannaji Deuchand & Co v Sanaji Kapurchand*

3 (1923) A I R 1923 Cal 42 (45) 106 Ind Cas 885 *Bupendra Nath v Gopendra Nath* (Possession lawful at first and subsequently becoming adverse)

(1900) A I R 1920 All 353 (354) 42 All 45 52 Ind Cas 382 *Mt Laddo v Jamaluddin* (Deposit of moveables for certain fixed period — Limitation begins from date of refusal to hand them back)

(1915) A I R 1915 All 449 (449 450) 27 I C 637, *Singer Manufacturing Co v Mrs Felyun* (Hire purchase system—Suit to recover article sold)

(1880) 5 Bom 554 (560) 6 Ind Jur 92 *Dhondiba Krishnaji Patel v Waman Ramchandra*

(1883) 9 Cal 79 (81) *Issur Chunder Doss v Juggut Chunder Shaha*

(1891) 15 Mad 157 (160) 2 Mad L Jour 54 *Subbakkla v Maruppalakala* (Refusal to return title deeds by the mortgagor after mortgage satisfied)

(1916) A I R 1916 Cal 869 (870) 34 Ind Cas 959 *Gangahari v Nabin Chandra*

(1919) A I R 1919 All 102 (103) 41 All 643 55 Ind Cas 45, *Kalyan Mal v Kushen Chand*

Article 48
Note 7

compensation in respect thereof or for the recovery thereof, would be governed by Article 49⁴

It must be noted that where the defendant had no possession before the wrongful taking, and the *taking itself constitutes the theft or misappropriation or conversion*, it must be regarded as a wrongful taking in respect of property *acquired* by theft, misappropriation or conversion. Thus, where *A* and *B* are owners of adjoining coal mines, and *B* trespasses into *A*'s mine and cuts and appropriates the coal to his own use, it has been held by their Lordships of the Privy Council that this Article applies to a suit for compensation in respect of such wrongful taking of the coal⁵. The wrongful taking of the coal is itself the acquisition as well as the conversion. And if this Article applies it must be so because the case is regarded as a wrongful taking of property *acquired* by conversion. See also the

(1928) A I R 1928 Oudh 47 (47) 105 Ind Cas 224 *Kali Charan v Ganesh Lal*

(1925) A I R 1925 Rang 146 (147) 2 Rang 555 85 Ind Cas 10 *Ma Mary v Ma Hla Wan*

(1910) 7 Ind Cas 447 (448) (Bom) *Magan Lal v Thakurda Virjibhukandas* (Refusal to deliver shares bought—Fall in value—Suit for loss)

(1911) 12 Ind Cas 207 (208) 35 Mad 636 *Gopalaswamy Iyer v Subramanya Sastry* (Where a defendant who was entrusted with a jewel to pledge and raise a loan on it does so, but retains the jewel even after repayment of the loan though a demand was made for its return, he is a trespasser in possession of the jewel on behalf of the plaintiff so that Art 49 of the Limitation Act would be applicable)

(1912) 18 Ind Cas 921 (921) (Mad), *Narayanawamy Thevar v Aiyasamy Iyengar* (Rubies given to defendant for being worked upon—Suit for the price of)

714

Art 62 applied)⁴

(1917) A I R 1917 Mad 665 (666) 34 Ind Cas 751 40 Mad 678, *Seshazhayer v Subramanya Chettiar* (Pledge by a commission agent of jewel given to him for sale—Suit to recover—Art 48 applied)

(1914) A I R 1914 Mad 470 (471) 38 Mad 783 23 Ind Cas 174,

y

4 (1917) A I R 1917 Lah 22 (23) 42 Ind Cas 72, *Uttam Singh v Ram Kunwar Ganesh Das*

[See also (1935) A I R 1935 All 915 (915, 916) 158 Ind Cas 1014,

(1925) A I R 1925 All 131 (132) 81 Ind Cas 1038, *Manga v Changa Mal*]

See the cases cited in Foot Note (3)

5 (1929) A I R 1929 P C 9 (70) 57 Ind App 93 114 Ind Cas 604 8 Pat 516 (P C), *Lewis Pugh v Austen Sen*

(1930) A I R 1930 P C 119 (114) 123 Ind Cas 726 57 Ind App 141 57 Cal 1311 (P C), *Idjas Coal Co Ltd v Panna Lal Ghose*

undermentioned cases ⁶ Where *B* enters on the land of *A* and cuts and carries away the crops on *A*'s land, a suit for compensation in respect of such cutting and carrying away of the crops must, on the principles above stated, be governed by this Article ⁷ A contrary view has, however, been held in the undermentioned cases ⁸ It is submitted that the view that Article 48 does not apply to such cases cannot be accepted as correct after the Privy Council decisions referred to above

See also Notes 6 and 8 to Article 49

Article 48 Note 7

6 (1931) A I R 1931 Pat 436 (437) 133 Ind Cas 453 *Daylath Jugalkishore v Manjira Chandra* (Action for damages for the pass to mine and removing coal)

(1920) A I R 1920 Pat 353 (403) 55 Ind Cas 113 *Londa Colliery Co Ltd v Bepin Behari* (Do)

7 See (1895) 22 Cal 617 (653 655) *Surat Lal v Umar Haji* (Per Norris J., Ghose J held that Art 49 applied to the case)

8 (1926) A I R 1926 All 462 (463) 94 Ind Cas 336 *Jagdish Prasad v Paghur* (Defendant under an agreement not to cut standing trees on land—If he cuts and carries them away after such cutting they become specific moveable property—Suit for compensation for carrying these comes under Art 49)

(1934) A I R 1934 Cal 461 (465) 61 Cal 45 151 Ind Cas 813 *Arjun Kaibarta v Manoranjan De Bloumick* (Suit for damages for the wrongful appropriation by the defendants of the fish in certain waters to which the plaintiffs are exclusively entitled is governed by Art 49)
a v Dolhin

me L R 26

(1907) 80 Mad 12 (14) 1 Mad L Tim 397 16 Mad L Jour 511 *Ramaswamy Iyer v Muthuswamy Iyer* (Do)

(1896) 19 Mad 80 (82) 6 Mad L Jour 11 *Mana Fakhran v Atulan Koya* (Do)

(1897) 20 Mad 449 (451) 7 Mad L Jour 225 *Raja Goundan v Rengayya Goundan* (Suit to recover jewel and a brass pot wrongfully distrained)

(1888) 11 Mad 333 (335) *Passanha v Madras Deposit and Benefit Society* (Art 49 applied)

(1923) A I R 1923 Rang 11 (12) 70 Ind Cas 841 *Pun Chung v Dris Lal* (Do)

(1909) 1 Ind Cas 788 (89) 36 Cal 141 *Jadu Nath v Hari Kar* (Per

(1924) A I R 1924 Lah 71 (71) 73 Ind Cas 33 *Bir Sen v Raja Pasi*

(1917) A I R 1917 Mad 354 (354) 33 Ind Cas 661 *Charu v Ana Pattar* (Paddy taken possession of in pursuance of an unstamped agreement—Consideration failing—Suit for value or return of paddy—Suit is one either for conversion or detinue)

(1913) 18 Ind Cas 253 (254) (Cal) *Jadu Nath Dandapat v Hari Kar*

(1909) 3 Ind Cas 12 (15) (Cal) *Mina Kumari Fibi v Surendra Narain*

(1909) 2 Ind Cas 955 (956) (Cal) *Maharimad Hamidar Rahman Choudhury v Ali Fakir*

Article 48
Notes
8—10

8. Conversion by a carrier. — See Article 31 Note 8 *ante*, and the undermentioned cases¹

9. Starting point of limitation. — Time begins to run from the date when the plaintiff learns in whose possession the property is¹

The reason is that in cases where property is lost, or is acquired by a person by theft or misappropriation or conversion, the owner may not immediately know the whereabouts of his property. The knowledge referred to is the knowledge of the taking away of the property and a mistaken belief by the plaintiff that the property removed was not his, will not affect the running of time²

10. Having the right to possession. — It has already been seen in Note 2 *ante* that these words show that this Article contemplates cases where the plaintiff's right to the possession of the property has been infringed. It follows that where the plaintiff has no right to the possession of the property at the time the wrongful taking or detention takes place, his suit for compensation in respect of such taking or detention is not governed by this Article, but may be governed by Article 49

Illustrations.

1 *B* trespassed into a coal mine and removed coal therefrom wrongfully. *A* had no title to the mine on that date but subsequently obtained title thereto. *A* sued *B* for damages for wrongful taking of the coal. It was held that since *A* had no title to the coal mine and no right to the possession thereof at the date of the wrongful taking, his suit was not governed by this Article¹

2 *A* contracts with *B* to deliver to him certain moveable property on a particular day. *A* fails to perform the contract. The

Note 8

- 1 (1937) A I R 1937 All 632 (633) 171 Ind Cas 537, *Secy of State v Daulat Ram Mahanlal*
(1933) A I R 1933 All 466 (467) 141 Ind Cas 703, *Alamgir Footwear & Co v Secy of State*
(1936) A I R 1936 Nag 21 (23) 31 Nag L R Sup 79 161 Ind Cas 867, *Ramlal v B N Ry Co Ltd Calcutta*

Note 9

- 1 (1917) A I R 1917 Mad 665 (666) 34 Ind Cas 751 40 Mad 678, *Seshappier v Subramaniya Chettiar*
(1919) A I R 1919 Pat 493 (424) 52 Ind Cas 361, *Tafazul Khan v Muham mad Balsh Khan*
(1911) 11 Ind Cas 446 (447) (Lah) *Sohan Singh v Mul Singh*
[See also (1904) 32 Cal 799 (814) 9 Cal W N 443, *Chandra Kall Deber v F P Chapman*]
2 (1936) A I R 1936 Pat 179 (183) 161 Ind Cas 855, *Srish Chandra v Ramji Dechar*
[See also (1936) A I R 1936 Bom 322 (324 325) 60 Bom 848 165 Ind Cas 184 *Kailashroo Vankeshwar v Gangadas Duarkadas* (Date of knowledge is starting point—Reasonable diligence in discovering in whose possession the property is, is not relevant)]

Note 10

- 1 (1931) A I R 1931 Pat 436 (439 442) 193 Ind Cas 453, *Pajinath Jugai Kishore v Manindra Chandra Nandi*

failure to perform the contract does not invest *B* with a right to the possession of the property and does not render *A*'s possession an unlawful detention. A suit for the property or for compensation for breach of the contract is therefore not one falling within this Article. Article 49 also will not apply as there is no wrongful taking or wrongful detention.²

3 *A* attaches moveable property and the same is left with a person appointed by the Court *B*, in collusion with the Court custodian, wrongfully takes the property and converts it to his own use. *A* sues *B* for damages. The case is not governed by this Article, as *A* was not entitled as an attaching creditor to the possession of the property. The taking is not also a *conversion*, as that term necessarily implies a deprivation of possession of the person *entitled to it*. The taking being however a wrongful one, and of property other than those specified in Article 48, Article 49 will apply.³

4 *A*, who was a tenant in common with *B*, mortgaged her interest to the plaintiff who filed a suit on the mortgage against *A*, and pending the suit *B* cut down all the trees on the land and appropriated the same to himself, whereupon the plaintiff instituted a suit against *B* for damages for the wrongful taking of the trees, it was held that the suit was not governed by this Article.⁴ Mr Justice Subrahmanya Ayyar observed as follows: "No doubt the case cannot be held to fall within Article 48 of the Second Schedule to the Limitation Act as the District Judge decided, the plaintiff never having had a right to the possession of the wood. But he having been entitled to have the wood sold as part of his security, the taking of the wood by the defendant which interfered with such right of the plaintiff was one to which the next Article 49 applies.

11. "In whose possession it is." — It has been held that these words imply that the Article applies only when the moveable property is still in the possession of the defendants, and not when the property cannot be traced.¹ This seems to be opposed to the Privy Council decisions which hold that a suit for compensation for wrongful taking of coal from the plaintiff's mines and disposing of it, is one falling within this Article.

2 (1916) A I R 1916 Mad 486 (487) 31 Ind Cas 335, *Tirumalanadharai Surayya v Tirumalanadham Bapiraju*
[See also (1903) 9 Cal W N 679 (683), *Roma Nath Das v Molei Chunder Pal*]

Article 48A

48A. To recover moveable property conveyed or bequeathed in trust, deposited or pawned, and afterwards bought from the trustee, depositary or pawnee for a valuable consideration.	Three years.	When the sale becomes known to the plaintiff.
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Synopsis

1. Legislative changes.
2. Scope of the Article.
3. "Bought."

1. Legislative changes. — Section 5 of Act 14 of 1859 corresponded to this Article and Article 134, *infra*, in a combined form with the difference that it applied only to *bona fide* purchasers¹ and that the period of limitation was *thirty* years in the case of moveable property, and sixty years in the case of immovable property from the date of purchase

The subject-matter of the said provision of the Act of 1859 was divided into two separate provisions in the Act of 1871, namely Articles 133 and 134, the former applying to moveable property and the latter to immovable property. Further, the period of limitation

* Act of 1877, Article 133

133 — To recover moveable property conveyed or bequeathed in trust, deposited or pawned and afterwards bought from the trustee depositary or pawnee for a valuable consideration	Twelve years	The date of the purchase
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Act of 1871, Article 133

133 — To recover moveable property conveyed in trust, deposited or pawned and afterwards bought from the trustee, depositary or pawnee, in good faith and for value	Twelve years	The date of the purchase
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Act of 1859, Section 5

Computation of period of limitation in suits to recover property purchased from depositaries, pawnees or mortgagees	5 In suits for the recovery from purchaser or any person claiming under him of any property purchased <i>bona fide</i> and for valuable consideration from a trustee, depositary pawnee or mortgagee the cause of action shall be deemed to have arisen at the date of the purchase
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Provided that in the case of purchase from a depositary, pawnee or mortgagee, no such suit shall be maintained unless brought within the time limited by clause 15, section 1

Note — The time under clause 15 of section 1 is a period of thirty years if the property be moveable and sixty years if it be immovable²

Article 48A — Note 1

Pungasami Iyengar
 v Salehoomissa Khatoon,
 gut v Guneshee Mahtoon

was reduced to twelve years from the date of purchase. Article 133 of the Act of 1877 repeated the provisions of Article 133 of the Act of 1871, except that the requirement of good faith in the purchaser was deleted.

By Section 3 of the Indian Limitation (Amendment) Act (1 of 1929) Article 133 was deleted and re enacted as Article 48A, with this difference that the period of limitation is now three years from the date *when the sale becomes known to the plaintiff*. As regards the reasons for the amendment, see Gazette of India, 1927, Part V, page 258.

2. Scope of the Article. — In *Radanath Doss v Gisborne & Co*,¹ which was a case under Section 5 of the Act of 1859, their Lordships of the Privy Council observed as follows:

' Their Lordships desire to say that the provision of this Section is founded, no doubt upon considerations of high policy — of a policy which their Lordships do not at all doubt is one which is extremely beneficial to India, having regard to the circumstances of that country. But their Lordships cannot fail to observe that the provisions of this Section are of an extremely stringent kind. They take away and cut down the title, which *ex hypothesi* is a good title of a *cestui que trust*, or of a person who has deposited, pawned or mortgaged property, they cut down that title as regards the number of years that the person would have had a right to assert it from a very great length of time sixty years they cut it down to twelve years. It is, therefore, only proper that any person claiming the benefit of this Section should clearly and distinctly show that he fills the position of the person contemplated by this Section, as a person who ought to be protected. Their Lordships think that in order to claim the benefit of this Section a defendant must show three things — first, that he is a purchaser according to the proper meaning of that term; second, that he is a *bona fide* purchaser; and third, that he is a purchaser for valuable consideration.

These observations of their Lordships would equally apply to the present Article also except in respect of the requirement that the purchase should be *bona fide*.

3. "Bought." — The word purchase was used in the corresponding Section of the Act 14 of 1859 and in *Radanath's case*¹ above referred to, their Lordships of the Privy Council in reference to that word made the following observation —

"Now, what is the meaning of the term 'purchaser' in this Section? It cannot be a person who purchases a mortgage as a

Article 48A
Notes
1—3

Note 2

1 (1871) 11 Moo Ind App 1 (15) 6 Beng L R 530 15 Suth W R 24 2 Suther 397 2 Sar 636 (P C)

[See also (1875) 23 Suth W R 99 (102) 14 Beng L R 346 2 Ind App 43 3 Suther 61 3 Sar 419 (P C) *Juggurnath Sahoo v Syud Shah Mahomed Hossein* (15 Suth W R 24 (P C), Followed)]

Article 48A
Note 3

mortgage, because that would be merely equivalent to an assignment of a mortgage, it would be the case of a person taking a mortgage with a clear and distinct understanding that it was nothing more than a mortgage. It, therefore, must mean, in their Lordships' opinion, some person who purchases that which *de facto* is a mortgage upon a representation made to him, and in the full belief that it is not a mortgage, but an absolute title."

It was accordingly held in a case arising under Article 133 that where an executor pledged trust property with a Bank and the beneficiary sued the Bank for recovery thereof, Article 133 did not apply as it did not include a case of pledge or mortgage.¹

Article 48B

48B. To set aside sale of moveable property comprised in a Hindu, Muhammadan or Buddhist religious or charitable endowment made by a manager thereof for a valuable consideration.	Three years.	When the sale becomes known to the plaintiff.
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NOTE — This provision also was introduced by the Indian Limitation (Amendment) Act of 1929 (1 of 1929) See Note 1 to Article 48A *ante*

Article 49

49. For other specific moveable property, or for compensation for wrongfully taking or injuring or wrongfully detaining the same.	Three years.	When the property is wrongfully taken or injured, or when the detainer's possession becomes unlawful.
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* Act of 1877, Article 49.
Same as above.

Act of 1871, Articles 33, 34 and 35.

33. — For wrongfully detaining title deeds	Two years	When the title to the property comprised in the deeds is adjudged to the plaintiff, or the detainer's possession otherwise becomes unlawful
34. — For wrongfully detaining any other moveable property	Ditto	When the detainer's possession becomes unlawful
35. — For specific recovery of moveable property in cases not provided for by this schedule, numbers 48 and 49	Ditto	When the property is demanded and refused

Note 3

1. (1923) A. I. R. 1923 Bom 155 (162). 67 Ind Cas 761, *Bank of Bombay v. Tansibhoy Ibrahim*

Synopsis

Article 49
Notes
1—2

1. Legislative changes
2. Scope of the Article.
3. Specific moveable property.
4. Suit to recover specific moveable property.
5. Compensation.
6. "Wrongfully taking."
7. Wrongfully injuring the property.
8. Wrongful detention.
9. Suit for title deeds.
10. Successive conversions by the same person.
11. Successive conversions by more than one person.

1. Legislative changes

Act of 1869

There was no specific provision directly corresponding to the present Article 49 but the nearest approach to it was contained in the following words of Section 1 clause 2 to suits for damages for injury to the personal property — the period of one year from the time the cause of action arose. For the meaning of the term personal property and the cases to which the clause applied see the undermentioned decisions ¹

Act of 1871

The corresponding Articles were 33 34 and 35 and the period prescribed thereunder was two years

2. Scope of the Article — See also Note 2 to Article 48 *ante*

Where a case falls within this Article and another Article which is more specific then according to general principles the specific

Act of 1859

See Note 1. Legislative changes

Article 49 — Note 1

- 1 (1865) 2 Suth W R 235 (236) *Sheikh Ahmedulla v Hur Churn Pandah* (A suit for damages to recover the value of personal property plundered and other consequent damages is in no sense a suit for damages on account of injury to personal property)
- (1865) 4 Suth W R 76 (77) *Pajel under Chesi v Jog Kishen Mukerji* (Suit for compensation for injury to land resulting in the loss of crops is not a suit in respect of personal property)
- (1866) * * * * * *Huro Chunder Roy*
 * * * * * onal property belong
 such property (dhan)
- (1867) * Suth W R 499 (499) *Kasee Nussatollah v Loop Sona Dibee* (A suit to recover moveable property seized under a sham decree against another is governed by the limitation prescribed by Cl 16 S 1)

Article 49 Note 2

Article will prevail over this Article. Thus, where property deposited with A is wrongfully detained by A, the case is not one within Article 48 (the property not being one acquired in the manner specified in Article 48), but may fall within this Article as well as Article 145. The latter Article being a specific Article will prevail over this Article¹. The same principle will apply where a case falls both under this Article and Article 29² or Article 126³. This Article is inapplicable where the plaintiff has not a *personal* claim to the moveable property. Thus a shebait's claim to the custody of the idol or consecrated portrait and the valuables belonging to it falls under Article 124 or Article 120 rather than under Article 49, as the nature of the suit is for the proper conduct of the *Thakur's* worship. Such a claim rests quite as much on the right of the *Thakur* to have

Note 2

- 1 (1902) 26 Bom 430 (432) 4 Bom L R 72, *Shital v Bhatanishankar*
- (1904) 31 Cal 519 (535, 536) 8 Cal W N 500, *Administrator General of Bengal v Kristo Kamini Dassee* (Suit to recover deposit of Government securities)
- (1909) 33 Mad 56 (57) 5 Ind Cas 1, *Gangimani Kondiah v Kondappa Naidu* (A suit for the recovery of a deposit of moveable property, whether there has been a demand and refusal or not is governed by Art 145 and not by Art 49)
- (1925) A I R 1925 Mad 185 (185) 84 Ind Cas 1026 *Krishnaswamy Iyengar v Gopalachariar* (The reason on which the judgment proceeds, it is submitted, is stated too broadly, though the decision itself is correct)
- (1921) A I R 1921 Cal 416 (418) 69 Ind Cas 900, *Promotho Nath v Prodyumna Kumar* (The fact of the possession by the depositary after demand being wrongful does not make Article 49 applicable instead of Article 145)
- (1928) A I R 1928 Rang 309 (309, 310) 6 Rang 547 116 Ind Cas 468, *Ma Shwe On v Ma Saw*
- (1923) A I R 1923 Mad 578 (580) 72 Ind Cas 842, *Aishtappa Chetty v Lakshmi Ammal*
- (1907) 6 Cal L Jour 535 (540, 541) *Lala Gobind Prasad v Chairman Patna Municipality*
- (1934) A I R 1934 Cal 87 (91) 61 Cal 119 150 Ind Cas 398 *Bibhu Bhusan v Anadi Nath*
- (1938) A I R 1938 P C 110 (112) 173 Ind Cas 612, *Mohammad Habibul Haq v Seth Tikam Chand*

[But see (1899) 9 Mad L Jour 51 (55) *Pamkrishna Peddy v Panaya Goundan* (Submitted not correct)]

(1919) A I R 1919 All 102 (103) 41 All 643 55 Ind Cas 45, *Kalyan Mal v Kishan Chand* (Do)]

- 2 (1908) 31 Mad 431 (439) 18 Mad L Jour 590 4 Mad L Tim 271, *Dimaraju Narayana Rao v Thadinada Gangaraju*
- (1900) 23 Mad 621 (626), *Murugesu Mudaliar v Jattaram Dair*
- (1937) A I R 1937 Rang 523 (524) *Mg Hla Han v Delta Trading Co*

- 3 (1902) 26 Bom 430 (432) 4 Bom L R 72, *Shital v Bhatanishankar* (A suit to set property of Article 126

the conduct of his worship and his own custody placed in the right hands, as upon the personal right of the plaintiff to the property.⁴

Article 49
Notes
2—7

3. Specific moveable property. — See Note 3 to Article 48

4. Suit to recover specific moveable property. — The suit "to recover specific moveable property" referred to by this Article is the same as that contemplated by Sections 10 and 11 of the Specific Relief Act, 1877.¹ Under those Sections, the person entitled to the immediate possession of specific moveable property may sue for the recovery thereof from any person in possession or control of it without being its owner. To such a suit this Article may apply if the possession of the defendant is unlawful. Where the defendant is not in possession or control of the property claimed, a suit for recovery of the property is not maintainable against him.² A suit for damages may, however, lie against him and may fall within the latter part of the first column of this Article.³

5. Compensation. — Compensation includes value of goods as well as compensation by way of damages that are consequential on the wrongful taking, or injury or detention.¹

6. "Wrongfully taking." — It has been seen in Note 7 to Art 48 *ante* that where there is no wrongful taking or wrongful detention by the defendant, neither that Article nor this Article will apply. In order that the defendant may be held liable for a wrongful taking, it must be unequivocally shown that the plaintiff was entirely deprived of the use of such property. An entry on a piece of land is by itself no proof of any conversion of moveables lying upon the land at the time the entry takes place. In such a case notwithstanding the plaintiff's eviction from the land, possession of the moveables lying upon it should be presumed to have continued in him in the absence of proof of any act on the part of the defendant with special reference to such moveables.¹

7. Wrongfully injuring the property. — The meaning of the word "injury" is the popular one of loss or deterioration caused by a

4 (1899) 17 Cal 3 (29) 18 Ind App 137 5 Scr 350 13 Ind Jur 211 (P.C.)
Gossami Sri Gridharaji v. Lalulalji Gossami

Note 4

- 1 (1899) 22 Mad 478 (481) *Murugesu Mudali v. Jotharam Dairiy*
- 2 (1899) 22 Mad 478 (480) *Murugesu Mudali v. Jotharam Dairiy*
- 3 (1899) 22 Mad 478 (481) *Murugesu Mudali v. Jotharam Dairiy*

Note 5

- 1 (1900) 23 Mad 621 (676) *Murugesu Mudali v. Jotharam Dairiy*

Note 6

1. (1898) 22 Mad 197 (200), *Moya v. Aruthraman*
- (1845) L R 6 Q B 769 (772) 14 L J Q B 87 9 Jur 274 66 R R 567 (N. 1),
Thorogood v. Robinson
- (1873) 21 W R (Eng) 337 (339) 42 L J Fx 80 25 L T 67 L R 11 120
Engl v. Cowley (per Bramwell B. — To prevent the owner of goods from using them in a particular way does not amount to conversion the owner must be generally prevented from using them in any manner to entitle him to an action of trover)

Article 49
Notes
7—8

wrongful act¹ But the injury to the property mentioned in this Article is limited to property while in the custody of some person other than the owner Where the plaintiff's vessel was injured by collusion with the defendant's vessel, it was held that this Article was not applicable²

A mortgage of immovable property (which under Section 8 of the Transfer of Property Act passes also an interest in the things attached to the land) is merely a security for the payment of the debt In the case of a simple mortgage the mortgagor is and continues to be the owner of the property as an absolute owner³ He is entitled, among other rights, to cut and sell the timber standing on his land and appropriate the proceeds of the sale Such an act is not an alienation or conversion of the security But if the mortgagee is deprived of his security by or in consequence of the wrongful act of a third person, such as the cutting and carrying away of the timber, the remedy open to the mortgagee against such third person is only by an action for damages for the depreciation of the mortgage security And a suit for compensation for such depreciation would be governed by this Article⁴ Article 48 will not apply as the plaintiff had no right to the possession of the moveable property on the date of the suit See Notes to Article 48

8. Wrongful detention. — See also Note 7 to Article 48

Where a bailee merely holds over after the expiry of the period for which the goods were bailed to him, he may be liable for a breach of contract¹ but his possession cannot be called a *wrongful detention*

Note 7

1 (1866) 3 Mad H C R 165 (166 167) *Asurthammal v Ranganadha Pillai*

2 (1897) 11 Bom 133 (137) *Essoo Bhaya v The S S Savitri*

3 See Transfer of Property Act Section 66

4 (1917) A I R 1917 Mad 890 (891 891) 32 Ind Cas 901 *Surapudi Munappa v Seshayya* (The suit is not one to enforce payment of money

(1912) 17 Ind Cas 906 (906) 6 Low Rur Rul 75, *Sithambaram Chetty v U*

(See (1930) A I R 1930 Nag 139 (142) 26 Nag L R 312 124 Ind Cas 690 *Tretanath v Ajithyaprasad* (A mortgagor mortgaged his house to the plaintiff—Defendant purchased the equity of redemption and removed materials of the mortgaged house thereby diminishing mortgage security—Held that plaintiff's suit for damages against defendant having arisen out of tort was governed by Article 49))

Note 8

1 See Contract Act, Section 160

(1891) 15 Mad 157 (160) 2 Mad L Jour 51, *Subbaila v Maruppalala*,

until his possession becomes *adverse* to that of the bailor. The usual method of proving that the detention is adverse is to show that the plaintiff *demand*ed the delivery of the moveable property, and that the defendant *refused* to comply with the demand.² It is the *refusal*, which must be certain,³ that makes the detainer's possession unlawful.

Article 49
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9. Suit for title deeds. — A suit to recover the title deeds deposited with the mortgagee, after the mortgage has been redeemed, is governed by this Article, and time begins to run from the date of refusal of a demand to return the documents.¹ If a person is in rightful possession of land, such possession justifies the possession of the title deeds, and time for an action to recover the title deeds does not begin to run so long as the person is in such possession of the land.²

10. Successive conversions by the same person. — Where in respect of the same property two or more successive acts of conversion are committed by the same person, the cause of action being the first conversion, limitation begins to run from that time. In *Wilkinson v Verity*,¹ Willes, J., observed as follows —

"It is a general rule that where there has once been a complete cause of action arising out of a contract or tort, the statute begins to run, and that subsequent circumstances which would, but for the prior wrongful act, have constituted a cause of action, are disregarded."

But if the prior act of conversion is a *fraudulent one*, the period of limitation runs from the date of the subsequent discovery of the fraud by the plaintiff (see Section 18 *ante*). Thus, in *Wilkinson v Verity*,² where a bailor of goods for safe custody converted them to his own use and subsequently refused to deliver them up on demand to the bailor who then first learnt about the conversion, it was held

2 (1920) A I R 1920 All 353 (354) 42 All 45 52 Ind Cas 382 *Mt Laddoo Begum v Jasrat ul din* (It is only when a demand is made and there is a refusal to comply with the demand that possession becomes unlawful and the period of limitation for a suit for the return of the moveables or in the alternative for their value commences to run from the date of such refusal under Art 43)

[See (1845) L R Q B 769 ("72) 14 L J Q B 87 9 Jur 274 66 R R 507 (56J) *Thoroughgood v Robinson*

(1860) 23 Beav 145 (147) 126 R R 66 (68) *Eduards v Clay* (Property left by the owner in the defendant's possession is not wrongfully converted until the defendant refuses to give it up to the owner)]

3 (1899) 9 Mad L Jour 51 (56) *Pamakkrishna Peidya v Panaya Goundan*

Note 9

1 (1891) 15 Mad 157 (160) 2 Mad L Jour 54 *Subbappa v Maruppalala*

2 (1860) 120 R R 675 (678) 29 L J 1 x 195 5 H & N 430 2 L T (N S) 20 8 W R (Eng) 251, *Plant v Cotterill*

Note 10

1 (1871) 19 W R (Eng) C04 (605) L R G C P 206 24 L T 32 40 L J C P 141

2 (1871) 19 W R (Eng) C04 (605) L R G C P 206 24 L T 32 40 L J C P 141

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that the limitation for a suit for the wrongful detention ran only from the time of the demand. This decision was followed in the undermentioned case,³ where the defendant, who held certain promissory notes in deposit for the plaintiff, pledged them for his own purposes and later on when asked by the plaintiff refused to deliver them up. It was held that the detention of the notes became wrongful from the date of the refusal to deliver them up.⁴ "It has been held from a very early time," said Cockburn, C J in *Reeve v Palmer*,⁵ "that, where a chattel has been bailed to a person, it does not lie in his mouth to set up his own wrongful act in answer to an action of detinue, though the chattel has ceased to be in his possession at the time of the demand."

11. Successive conversions by more than one person.—Where the same property has been converted by more than one person, each of these acts of conversion is a *separate cause of action*, and hence the fact that one cause of action is barred by limitation does not affect the claim in respect of the other causes of action.^{1a} Thus, in *Miller v Dell*,¹ the plaintiff's son, having wrongfully obtained possession of a lease deed of certain premises of which the plaintiff was in possession, deposited it in 1881 with B to secure an advance. B having afterwards become bankrupt his assignee in 1889 transferred the deed to the defendant. The plaintiff demanded the return of the deed and the defendant refused to give it up. It was held that the mere receipt of the deed, either by B, or by his assignee in bankruptcy, or by the defendant was no conversion and there was no cause of action against defendant until he converted the property afresh by refusing to deliver it. Even if the cause of action against the son was then barred, this did not affect the new cause of action against the defendant.²

If B wrongfully takes the moveable property of A, retains it for three years, and then transfers it to C, who refuses to deliver it on demand by A, can A sue C for wrongful detention? No. The reason is that the suit being one for possession of property A's right to such property gets, by virtue of Section 28, extinguished after the lapse of three years.

3 (1908) 12 Cal W N 1010 (1013), *Gopal Chandra Bose v Surendra Nath Dutt*

4 See also (1920) 54 Ind Cas 159 (160) (Nag) *Bhao Singh v Bihari Lal*

(1919) A I R 1919 All 102 (103) 41 All 643 55 Ind Cas 45, *Kalyan Mal v Kishen Chaud*

5 (1858) 5 O B (N S) 84 (90) 116 R R 573 (576) 4 Jur (N S) 929

Note 11

1a (1936) A I R 1936 Bom 322 (327) 60 Bom 848 165 Ind Cas 184, *Aarkhusroo Manekshah v Gangadas Duarladas*

1 (1891) 99 W R (Eng) 842 (843) LR 1 Q B 469 63 L T 693 60 L J Q B 404

2 See also (1883) 31 W R (Eng) 548 (549) LR 11 Q B D 99 48 L T 670 47 J P 455 52 L J Q B 418, *Spackman v. Foster* (The facts were similar to those in *Miller v Dell*)

50.* For the hire of animals, vehicles, boats or household furniture	Three years	When the hire becomes payable	Article 50
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1. Scope of the Article — A "hiring" is a bailment for a reward or compensation¹. This Article deals with the hiring of a thing for use.

The liability to pay arises out of the contract of hiring. A suit for the hire of things specified in the Article will fall under this Article. A suit for the hire of things other than those mentioned in the Article, will be governed by the general Articles 115 or 116.

51.† For the balance of money advanced in payment of goods to be delivered	Three years.	When the goods ought to be delivered	Article 51
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Synopsis

- 1 Scope of the Article
- 2 "Money"
- 3 "Goods"
- 4 Starting point

1. Scope of the Article — This Article applies to suits for the balance of money advanced in payment of goods to be delivered¹. It does not apply to suits for *compensation* for breach of a contract to deliver goods. Where *A* contracted to deliver goods to *B* within a fixed period and the latter made him various advances from time to

* Act of 1877, Article 50 and Act of 1871, Article 49

Same as above

Act of 1859 Section 1 Clause 8

To suits to recover the hire of animals, vehicles, boats, or household furniture — the period of three years from the time the cause of action arose

† Act of 1877, Article 51 and Act of 1871, Article 50

Same as above

Act of 1859

No corresponding provision

Article 50 — Note 1

1 Wharton's Law Lexicon

Article 51 — Note 1

1 (1919) 1919 Mad W. N. 41 (S. N.)

Article 51
Notes
1—4

time but *A* did not deliver the entire quantity of goods at the stipulated time and *B* sued him for the difference between the sums advanced and the value of the goods delivered with interest, it was held that the claim was to all intents and purposes one for compensation for breach of the contract and so fell within Article 115 of the Limitation Act²

Where under a *bond* money was advanced in payment of goods to be delivered and the goods were not delivered, a suit for the money so advanced was held governed by Article 68 of the Act which provides limitation for suits on *bonds*³

2. "Money." — Money means and includes not only coin but also Bank Notes, Government Promissory Notes, Bank deposits and otherwise and generally any paper obligation or security that is immediately and certainly convertible into cash so that nothing can interfere with or prevent such conversion⁴

3. "Goods." — The word *goods* has been defined in the Sale of Goods Act as meaning "every kind of moveable property other than actionable claims and money, and includes stocks and shares, growing crops grass and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale"

4. Starting point. — Under clause 9 of Section 1 of the Limitation Act of 1859, a suit for the breach of any contract had to be brought within three years from the time the breach took place. A suit for the balance of money advanced in payment of goods to be delivered was regarded as one falling under this clause and the cause of action was held to accrue at the time when the goods ought to have been supplied¹

This view has been adopted in the later Acts. Where *no time is fixed* for the delivery of goods, the starting point will be the time at which, by reason of trade custom or some established usage well understood by both parties, the goods ought to have been delivered or in the absence of any such usage, a *reasonable time* after the advance of the money, having regard to all the circumstances of the case². Thus, where goods paid for in full are short delivered, limitation will begin to run from the time when such short delivery is

2 (1893) 1883 Pun Re No 22 *Seth Eluljee Bhranjee v Arjan Das*

3 (1911) 12 Ind Cas 616 (616) (Lab) *Dharm Singh v Illi Mard Khan*

Note 2

1 (1881) 3 All 788 ("93) 1881 All W N 74 (F B) *Reference by the Board of Revenue, North Western Provinces under S 46 of Act 1 of 1879*

Note 4

1 (1867) 7 Suth W R 164 (165), *Dond Ionath Shah v Lalunissa Dibee*
 (1868) 9 Suth W R 209 (210), *Tripp v Kubeer Mundul*

2 (1867) 7 Suth W R 164 (165), *Dond Ionath Shah v Lalunissa Dibee*
 (1915) A I R 1915 All 161 (161) 28 Ind Cas 669, *Shankar Singh v Mt Tel ha*

(1915) A I R 1915 Nag 8 (8) 11 Nag L R 171 31 Ind Cas 474 *Ill. Muham mal v G I P Ry Co* (Acce under Art 31 — If no time is fixed, reasonable time should be given)

made³ An acknowledgment would of course enlarge the period of limitation⁴

Article 51
Note 4

52. For the price of goods sold and delivered, where no fixed period of credit is agreed upon.	Three years.	The date of the delivery of the goods.
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Article 52

Synopsis

1. Legislative changes.
2. Scope of the Article.
3. "Price."
4. "Goods."
5. "Delivered."
- 6 Combination of claims.
7. Cantonments Act, Section 273.
8. Starting point.

Other Topics

Acknowledgment or part payment enlarges time	See Note 8 Pt 4
Article 85 and this Article—Distinction	See Note 8, Pt 3
Contract for payment in kind—Article not applicable	See Note 3, Pt 1
Goods supplied from time to time—No period of credit fixed—Starting point	See Note 8
Newspapers and medicines are goods	See Note 4, Pts 1, 2

1. Legislative changes.—The Act of 1859 made a special provision in Section 1 clause 8 for a suit for the amount of bills for any articles sold by *retail*, that is in small parts or quantities¹ A suit for the price of goods sold *wholesale* was held to fall under Section 1 clause 9 of that Act as being suits on a *breach of contract*² No such distinction has been made in the later Acts

* Act of 1877, Article 52 and Act of 1871, Article 51.
Same as above

Act of 1859.
No corresponding provision

- 3 (1887) 14 Cal 457 (460) *Atul Kristo Bose v Lyon & Co*
4 (1920) 1 I R 1920 Lah 359 (360) 1 Lah 357 58 Ind Cas 787, *Ganga Sahas v Khazan Chand*

Article 52 — Note 1

- 1 (1867) 7 Suth W R 101 (102) *Bucha Gope v Collector of Tirhoot*
2 (1864) 1 Suth W R 305 (305), *Shama Churn Lall v Collector of Tirhoot*
2 (1868) 9 Suth W R 193 (199) Beng L R Sup Vol 909 (F B) *Lal Mohan Holdar v Mahabab Katee* (Overruling 6 Suth W R 4 and 3 Suth W R S C C Ref 24)
(1864 65) 2 Mad H C R 6 (7), *Peraswamy Navak v Sayambabay Sahiba**

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2—4

2. Scope of the Article.—It is a general principle that in a sale of goods, the delivery of the goods and the payment of the price are, unless there is an agreement to the contrary, *concurrent conditions*¹. In the absence of a contract to the contrary, therefore, the liability to pay the price arises at the same time as the delivery of the goods sold. The limitation for a suit to enforce such liability is accordingly made to run under this Article from the date of the delivery of the goods.

Where there is an agreement to the contrary, namely to postpone payment, time will run under the next two Articles from the expiry of such period of postponement.

This Article will apply only if the suit is for the price of goods sold and delivered. Where a suit for the price of goods sold to the father of a Hindu family was decreed against the father and subsequently the plaintiff sued to enforce this decree debt against the sons, it was held that this Article was not applicable². Again, where A sold goods to B who however got C's name entered in the transaction as the purchaser and on A getting a decree for his price against C, the latter sued B for the decree amount, it was held that the suit was not one under this Article³.

3. "Price."—The word "price" has been defined in the Sale of Goods Act, 1930, as meaning the money consideration for a sale of goods. Where, therefore, goods are supplied on a contract that it should be repaid *in kind*, a suit to enforce such contract is not a suit for the price of any goods sold and is not within this Article. Article 65 or Article 115 may apply to such a case¹. A suit for the price of goods sold in the absence of any agreement to pay *in kind* is clearly within this Article².

4. "Goods."—The word "goods" has not been defined in this Act. It has been defined in Section 2 of the Sale of Goods Act, 1930, as meaning

"every kind of moveable property other than actionable claims and money, and includes stock and shares, growing crops, grass

Note 2

- 1 See Section 82 of the Sale of Goods Act (3 of 1930)
- 2 (1901) 27 Mad 243 (246) 14 Mad L Jour 81 (F B) *Periasamy Mudaliar v Seetharama Chettiar*
- 3 (1933) A I R 1933 Lah 401 (405) 147 Ind Cas 57, *Des Raj Hukam Chand v Lachhi Ram Prabh Dyal*

Note 3

- 1 (1922) A I R 1922 Lah 271 (271) 65 Ind Cas 691, *Mahomed Din v Sohan Singh*
- (1919) A I R 1919 Lah 103 (109) 49 Ind Cas 231 1918 Pun Re No 41, *Mengha Lam v Hassu*
 [See also (1916) A I R 1916 Cal 184 (187) 31 Ind Cas 335, *Tirumalanadham Surayya v Tirumalanadham Dayaraju* (This Article was not referred to—But Article 115 was applied)]
- 2 (1926) 95 Ind Cas 25 (25) (Lah), *Duran Singh Tirlok Singh v Saudagar Singh*
- (1919) A I R 1919 Lah 66 (66) 65 Ind Cas 687, *Ganga Ram v Nanda*

and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale"

The definition is applicable only for the purpose of construing the Sale of Goods Act, but that Act and this being both in *pari materia*, the definition can be applied to this Act also in so far as it is not repugnant to this Act. As regards the first portion of the definition, there is nothing repugnant thereto appearing in this Act. The second portion however will not apply. The reason is this. The definitions in the General Clauses Act 1897, which by force of Section 3 thereof apply to this Act also show that moveable property does not include things attached to the earth. This is also made clear by Article 55 separately dealing with suits for the price of *trees and growing crops* sold. It has however been held in the undecided case^{1a} by a single Judge of the Lahore High Court, that the word "goods" is wide enough to include fruit even before it has been gathered. No reasons have been given. It is submitted that it is not correct.

A newspaper comes within the category of goods. So also do medicines. A suit to recover the arrears of subscription to a newspaper¹ or for the recovery of the price of medicines² supplied, is governed by this Article.

5. "Delivered." — Unlike a bill of lading a railway receipt which is a mercantile document of title to goods when made over to a person gives the holder thereof the right to lawful possession of the goods and the *date of the delivery of the railway receipt* is the *date of the delivery of the goods* for the purposes of the starting point of limitation under this Article¹.

6. Combination of claims. — It has been seen in the Notes to the definition of the word "suit" in Section 2 sub section 10 *ante*, that where a suit consists of several distinct and independent claims which can be split up, the suit in respect of each claim is governed by its appropriate Article^{1a}. Thus where a suit consists of two parts, one for the price of medicines sold and the other for fees for medical

Note 4

1a (1922) 66 Ind Cas 120 (120) (Lah) *Wasu Ram v Pahim Bakhsh*

1 (1905) 7 Bom L R 190 (191) *Hormasji v Akharsetji*

2 (1931) A I R 1931 All 752 (753) 133 Ind Cas 537 *Baroda Kant Sen v Court of Wards*

Note 5

1 (1928) A I R 1928 Nag 181 (181, 182) 108 Ind Cas 801 *Sheoel araniat v Pamratian* (A I R 1916 Mad 750 Followed)

[But see (1930) A I R 1930 Lah 206 (207) 121 Ind Cas 721 *Gobind Prasad v Lam Nath* (The parties may agree that the delivery of the railway receipt does not amount to the delivery of the goods)]

Note 6

1a (1922) A I R 1922 Lah 195 (200) 66 Ind Cas 490 2 Lah 376 (F B) *Mahomed I Ghasia v Siraj Ud din*

(1931) A I R 1931 All 752 (753) 133 Ind Cas 537, *Baroda Kant Sen v Court of Wards*

Article 52
Notes
6—8

attendance, the former claim will be governed by this Article and the latter by Article 115¹

But where the two claims are not independent and cannot be split up, neither the Article applicable to one of the claims nor that applicable to the other will apply. *A* entered into a contract with *B* to do the work of flooring in a building. *A* was to supply marble for the flooring and also to do all the work necessary for constructing the floor. He was to be paid a certain sum of money for every square foot of flooring done by him. The rate did not separately specify the price of the materials supplied. *A* sued *B* for the recovery of the balance due on the contract. It was held that the claim for the price of goods supplied and for the price of work done could not be separated, that neither this Article nor Article 56 applied to the suit in its entirety, and that the suit was governed by Article 115 of the Act²

A agreed to purchase from *B* three motor cars for a lump sum of Rs. 14,000 without specifying the price of each car and paid an advance of Rs. 2,000. In due course he took delivery of one car but did not pay any more money and did not return the car either. In a suit by *B* for the balance of money alleged to be due for the car taken delivery of and for damages for breach of contract, it was held following *Macfarlane v Carr*,³ that the failure to return the car must be taken to imply a fresh contract to pay its price and that the claim to that extent was separable and governed by this Article⁴

7. Cantonments Act, Section 273. — A suit for the price of goods supplied to the Cantonments Board, is governed by this Article and not by Section 273 of the Cantonments Act¹

8 Starting point. — Time runs under the Article from the date of the delivery of the goods. The fact that the purchaser, not having all the money in his hands, agrees to pay the balance with interest does not prevent the running of time from the date of the delivery of the goods^{1a}. In the case of tradesman's accounts and

(1931) A I R 1931 Lah 309 (309-310) 130 Ind Cas 574 *Bhuma Mal & Sons v Rahmat Ullah*

1 (1931) A I R 1931 All 752 (753) 133 Ind Cas 537 *Baroda Kant Sen v Court of Wards*

2 (1922) A I R 1922 Lah 198 (200) 2 Lah 376 66 Ind Cas 490 (F B) *Mahomed Ghasita v Suroj Ud din*

(See also (1914) A I R 1914 Lah 250 (251) 22 Ind Cas 576 1913 Pun Re No 103 *Madha Kishan v Basant Lal*)

(1935) A I R 1935 Lah 222 (225) *Mahomed Bakhsh Hafliz v Naval Land Club Ltd* (D contracting with N to supply goods and perform duties for fixed sum—D breaking contract)]

3 (1872) 17 Suth W R 244 (253) 8 Eng L R 450

4 (1931) A I R 1931 Lah 309 (310) 130 Ind Cas 574, *Bhuma Mal & Sons v Rahmat Ullah*

Note 7

1 (1931) A I R 1931 All 436 (437) 149 Ind Cas 49 50 All 885, *Cantonment Board, Allahabad v Hazari Lal Ganga Prasad*

Note 8

1a (1931) A I R 1931 All 233 (231) 132 Ind Cas 422, *Mukut Lal v Gulab Singh Pran Mal*

also in cases where goods are supplied from *time to time*, and no period of credit is fixed, time will run in respect of each item from the date of delivery of such item¹. This is the general trend of opinion. Where payments are made by the customer from time to time without specifying the items of goods to which they are to be credited the supplier is entitled to credit them to the earlier of the items sold, and will, for the purposes of limitation, be taken to have done so, he is not entitled to credit them to the entire balance due on the dealings in the sense of saving limitation for each and every item*. Thus suppose a tradesman institutes a suit on 1 6 1938 for the balance due on the following dealings —

1-1-1933	Goods supplied	Rs 15 0 0	
1-2-1933	Do	Rs 10 0 0	
15-2-1933	Received		Rs 10 0 0
1-3-1933	Goods supplied	Rs 20 0 0	
15-3-1933	Received		Rs 5 0 0
1-1-1934	Goods supplied	Rs 15 0 0	
1-1-1935	Do	Rs 20 0 0	
1-1-1936	Do	Rs 15 0 0	
1-5-1936	Received		Rs 30 0 0

On the principles above stated the suit will be barred except in regard to the last item. The payments made will not be taken as part payments in respect of each item so as to save limitation in respect thereof but will be taken as having been credited to the earlier items. In the illustration above, the first three items are fully paid up and the dates of delivery of the next three items are beyond three years of the suit. The claim except as regards the last item is thus barred.

In *Kedar Nath Mitter v. Denobandhu Shah*,^{2a} Jenkins C J, quoted with approval the following passage from the decision in *Bonsey v. Woidsuorth*^{2b} —

Where a tradesman has a bill against a party for any amount in which the items are so connected together that it appears that the dealing is not intended to terminate with one

- 1 (1921) A I R 1921 All 325 (325) 63 Ind Cas 435 *Abdul Aziz v. Munna Lal*
 (1935) A I R 1935 All 53 (54) 155 Ind Cas 44 *Puttu Lal Kunji Lal v. Jagannath*
 (1869) 11 Suth W R 329 (530) *Satowree Singh v. Kristo Bangal*
 (1930) A I R 1930 Oudh 287 (288) 128 Ind Cas 2 6 6 Luck 7 *Lalji v. Ghazi Ram*
 (1925) A I R 1925 Pat 806 (807) 83 Ind Cas 47 *K. Dansford v. B. D. Shaw & Co*
- 2 (1921) A I R 1921 All 325 (325) 63 Ind Cas 435 *Abdul Aziz v. Munna Lal*
 (1935) A I R 1935 All 53 (54) 155 Ind Cas 44 *Puttu Lal Kunji Lal v. Jagannath*
 (1875) 24 Suth W R 390 (391) *Baboo Thakoor Pershad v. Baboo Moresh Lal*
 2a (1916) A I R 1916 Cal 580 (580 581) 31 Ind Cas 696 42 Cal 1043
 2b (1836) 25 L J C P 905 (908) 18 C B 325 2 Jur (N S) 494 4 W R (Eng) 500 107 R R 318

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Nota 8

contract, but to be continuous, so that one item, if not paid, shall be united with another and form one continuous demand, the whole together forms but one cause of action and cannot be divided "

The above view was followed by the High Court of Bombay and the Judicial Commissioner's Court of Sind in the undermentioned cases^{2c} but was dissented from by the High Court of Allahabad^{2d} It is submitted that the view of Jenkins, C J, adopted by the High Court of Bombay, cannot be accepted as correct, and it is opposed to the general trend of opinion referred to above

It may be noted that if the account between the parties could be considered to be a *mutual*, current and open account, limitation in respect of the balance due on the entire account will, under Article 85 of the Limitation Act, commence to run from the close of the year in which the last item admitted or proved is entered in the account Thus, in the case illustrated above, if it could be considered to be a *mutual*, open and current account (it has been held that it cannot be so considered), time will run for the balance from 31.12 1936 and the suit will not be barred This is the distinction between this Article and Article 85 *infra* *

An acknowledgment or part payment in respect of the item sold would, of course, enlarge the time * See Sections 19 and 20 *ante*

Article 53

53. For the price of goods sold and delivered to be paid for after the expiry of a fixed period of credit.	Three years.	When the period of credit expires.
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* Act of 1877, Article 53 and Act of 1871, Article 52.

Same as above

Act of 1859

No corresponding provision

2c (1923) A I R 1923 Bom 118 (116) 77 Ind Cas 943 *Najan Ahmed Haji Ali v Salemahomed Peer Mohamed*

(1922) A I R 1922 Sind 15 (16) 15 Sind L R 207 67 Ind Cas 44, *Firm of Lularam Madhandas v Firm of Huseinbhai Karimji & Sons*

2d (1935) A I R 1935 All 53 (55) 155 Ind Cas 44 *Puttu Lal Kunji Lal v Jagannath*

3 See (1935) A I R 1935 All 53 (54) 155 Ind Cas 44 *Puttu Lal Kunji Lal v Jagannath*

(1921) A I R 1921 All 325 (326) 63 Ind Cas 435 *Abdul Aziz v Munna Lal*

(1930) A I R 1930 Oudh 297 (288) 129 Ind Cas 276 G Luck T, *Lalji v Ghasi Ram*

(1925) A I R 1925 Pat 806 (807) 89 Ind Cas 717, W A Dinsford v. B D Shaw & Co

4 (1919) A I R 1919 P C 120 (121) 55 Ind Cas 513 (P C) *Raja Braja Sundar Deb v Bala Nath*

(1921) A I R 1921 Nag 1 (2) 65 Ind Cas 279 17 Nag L R 209 *Onkar Lal v Rafi Mohammad*

1 "Fixed period of credit"—Where the parties to a sale of goods intend that the goods delivered are not to be paid for until the end of a period of credit limitation runs not from the time of the purchase or delivery but from the expiration of the period of credit¹ Whether credit was intended to be given may be gathered from the conduct of the parties or from the terms of the contract they entered into Where a suit was brought by *A* against *B* for recovery of the price of wood supplied under two contracts each of which contained a clause by which the plaintiff contracted to indemnify the defendant for loss arising by reason of failure on his part to supply the wood as contracted for it was held that this Article and not Article 52 was applicable to the plaintiff's claim the intention of the parties being that the price of wood was not claimable as of right on the date of its being supplied but rather when the contract was completed or when the contract came to an end² The word *thatana* in Madras means a period of credit³

Article 53
Note 1

In a simple transaction of sale of goods the liability to pay full price accrues on the date of the sale and a mere promise on the part of the vendee to pay such price with interest does not amount to the giving of a period of credit⁴

<p>54. For the price of goods sold and delivered to be paid for by a bill of exchange, no such bill being given</p>	<p>Three years</p>	<p>When the period of the proposed bill elapses</p>
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Article 54

1 Scope of the Article —The Article seems to have been based upon the decision of *Helps v Winterbottom*¹ In that case goods were sold at six months credit payment to be then made by a bill at two or three months at the purchaser's option It was held that an action lay at the end of six months for not delivering the bill but that time for an action for the price of the goods sold did

* Act of 1877 Article 54 and Act of 1871 Article 53

Same as above

Act of 1859

No corresponding provision

Article 53 — Note 1

- 1 (1869) 11 Suth W R 529 (530) *Satcovee Singl v Kristo Bangal*
- 2 (1885) 7 All 984 (288) 1885 All W N 40 *Prags Lal v Maxwell*
- 3 (1905) A I R 1905 Mad 161 (163) 49 Mal 105 63 Ind Cas 999 A M P P
N M Firm v Soma ndaram Chett
- 4 (1931) A I R 1931 All 999 (931) 137 Ind Cas 47 *Mulak Lal v Gulab Singh Prun Mal*

Article 54 — Note 1

- 1 (1831) 2 R & Ad 431 (434 435) 36 R R 609 (C11 C12) 9 L J K B 258

**Article 54
Note 1**

not begin to run until the end of the time for which the bill was to be given

A bill of exchange includes a hundi (see clause 2 of Section 2) For this Article to apply to a suit, it must be alleged that the hundis were not executed as promised ²

Article 55

55. ¹ For the price of trees or growing crops sold by the plaintiff to the defendant where no fixed period of credit is agreed upon.	Three years.	The date of the sale.
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1. Scope of the Article. — Growing crops and standing trees are included in the definition of immovable property as given in the General Clauses Act 1897, and this is the definition that applies to this Act by virtue of Section 3 of the former Act. A suit for the price of trees or growing crops sold cannot therefore be a suit for the price of "goods" sold and delivered within the meaning of Article 52 *ante*. Hence this Article has been framed for such cases.

The Article applies only to suits for the price of trees and standing crops sold by the plaintiff to the defendant. A suit for the possession of a tree standing on defendant's land which the defendant has sold to the plaintiff will be governed by the twelve years limitation ¹

Limitation, under this Article, runs from the date of the sale and not from the time when the crops are gathered. This Article overrules the decision in *Boddonath Shah v Lalunissa Bibee*² as to the applicability of the principles laid down therein to the facts assumed by the Court ³

* Act of 1877, Article 55 and Act of 1871, Article 54
Same as above

Act of 1859
No corresponding provision

2 (1930) A I R 1936 Lah 329 (329) 162 Ind Cas 302, *Northern Forest Co v Parm Singh Kabuli & Co*

Article 55 — Note 1

1 (1931) 12 Bom 207 (203) *Salharam v Yashwanth*
(1891) 1891 Pun Il No 112, *Jaimal Singh v Jadhva*

2 (1867) 7 Suth W R 161 (165)

3 Stirling's Limitation Act, 6th Edition, Page 206

56.* For the price of work done by the plaintiff for the defendant at his request, where no time has been fixed for payment.	Three years.	When the work is done.
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Synopsis

1. Suit must be for price of work done.
2. "For the defendant at his request."
3. "Where no time has been fixed for payment."
4. Starting point of limitation.

1. **Suit must be for price of work done.** — It is an essential condition for the applicability of the Article that the suit should be *for the price of work done*. The following are illustrations of suits for the price of work done, governed by this Article —

- 1 Suit by a goldsmith to recover the price of labour for making certain ornaments for the defendant ¹
- 2 Suit for the recovery of a certain sum on account of the costs of printing certain receipts, etc for the defendant ²
- 3 Suit to recover a sum of money for having carried certain casks of beer under a contract with the defendant ³
- 4 Suit by a contractor against a District Board for the price of the work done, namely to make certain constructions ⁴

But a suit for the recovery of fees due for medical attendance has been held not to be a suit for the "price of work done" ⁵

Where the suit is not merely for the price of work done, but also for other reliefs, it must be seen whether the relief for the price of work done is *independent* of the other reliefs claimed, and can be separated from the others. If it can be so done, then this Article will

* Act of 1877, Article 56 and Act of 1871, Article 55.

Same as above

Act of 1859.

No corresponding provision

Article 56 — Note 1

1 (1885) 1885 Bom P J 252, *Ishnu v Gopal*

2 (1903) 30 Cal 697 (688) *Imbica Dal Vyas v Nityanund Singh*

3 (1887) 1887 Pun R. No 60 *Murree Brewery Co v Hazura Mal*

4 (1925) 4 I R 1928 Oudh 297 (298) 109 Ind Cas 639 3 Luck 591, *Mathura Prasad v Chairman District Board Sitapur*

5 (1931) 4 I R 1931 All 752 (753) 133 Ind Cas 537, *Baroda Kant v Court of wards*

[See also (1870) 13 South W R 96 (97) *Hurst Chundur Surmah v Dronath Chuckerbutty* (Case under the Act of 1859)]

Article 56
Notes
1—3

apply in so far as the claim for the price of work is concerned, the other reliefs being governed by their own appropriate rules of limitation. Where, on the other hand, the reliefs cannot be split up, this Article will not apply to the entirety of the suit. See Notes to Article 52 *ante*.

Under the Act of 1859, there was no specific provision for suits of this nature and such suits were governed by Section 1 clause 16 of that Act under which the limitation was six years from the date of the cause of action.⁶

2. "For the defendant at his request." — The work must have been done *at the defendant's request*. But the request may be implied from the circumstances of the case.¹

The work must have been done *for the defendant*. In the under mentioned case² where the plaintiff did some work at the request of the defendant as agent of a Ruling Prince, it was argued that though the work was done *at the request* of the defendant, it was not done *for the defendant* but for the Ruling Prince. The Court did not decide the point but expressed an opinion that the work must be taken to have been done *for the defendant* within the meaning of this Article.

3. "Where no time has been fixed for payment." — This Article would apply only where *no time has been fixed for payment*. Thus, in a suit by a zamindar to recover sums expended by him at the defendants' request for the repair of a tank for the irrigation of lands held by them in common with him where no time was absolutely fixed for the repayment to him of those sums, it was held that the suit was governed by this Article.¹

But in a suit by a village car enter
payment for work done by (
to him at the end of or
to be clearly inapplicable

or wages where
fixed to be payable
held

In a suit to r
cash of beer
among the
Brewer r

4. Starting point of limitation. — Time, under this Article, will run from the date when the work is done. The words "when the work is done" must be taken to mean "when the work is *fully* done or completed." Thus, where the work done was the repair of a tank and was spread over a period of three years, the suit for the price of such repair was held to lie within three years from the date when the work was fully completed.¹

Article 86
Note 4

57.* For money pay- | Three years. | When the
able for money lent. | | loan is
| | made.

Article 87

Synopsis

1. Scope of the Article.
2. Suit must be based on the loan.
3. Loan and deposit — Distinction between.
4. Loan on pledge or mortgage.
5. "Payable."
6. "Money."
7. Suit on money dealings.

Other Topics

Balance struck amounts to acknowledgment	See Note 7 Pt 4
Government securities are not money	See Note 6 Pt 1
Suit by principal against agent for money collected—Article is not applicable	See Note 2, Pt 2
Suit to enforce pledge — Article is not applicable	See Note 4 Pt 4

1. Scope of the Article. — This is a general Article applicable for the recovery of money payable for money lent^{1a}. Articles 58 and 59 are specific Articles. The distinction between this Article and Article 59 is that while the former applies to loans, where there is no express agreement made as to its repayment, Article 59 applies to

* Act of 1877, Article 57 and Act of 1871, Article 56

Same as above

Act of 1859, Section 1, clause 9

To suits brought to recover money lent —the period of three years
from the time when the debt became due

Note 4

1 (1886) 9 Mad 334 (342) *Sundaram v Sankara*

[See also (1864) 18C4 Suth W R Gap 68 (69), *Rajah Perladh Sen Bahadur v Unjeet Poy* (Case under the Act of 1859. The cause of action accrues from the time when the labour was performed)]

Article 57 — Note 1

1a (1938) A I R 1938 P C 66 (67) 172 Ind Cas 978 (P C) *Menmohan Das v. Baldeo Karam Tandon*

Article 56
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apply in so far as the claim for the price of work is concerned, the other reliefs being governed by their own appropriate rules of limitation. Where, on the other hand, the reliefs cannot be split up, this Article will not apply to the entirety of the suit. See Notes to Article 52 *ante*.

Under the Act of 1859, there was no specific provision for suits of this nature and such suits were governed by Section 1 clause 16 of that Act under which the limitation was six years from the date of the cause of action.⁶

2. "For the defendant at his request." — The work must have been done *at the defendant's request*. But the request may be implied from the circumstances of the case.¹

The work must have been done *for the defendant*. In the under-mentioned case,² where the plaintiff did some work at the request of the defendant as agent of a Ruling Prince, it was argued that though the work was done *at the request* of the defendant, it was not done *for the defendant* but for the Ruling Prince. The Court did not decide the point but expressed an opinion that the work must be taken to have been done *for the defendant* within the meaning of this Article.

3. "Where no time has been fixed for payment." — This Article would apply only where *no time has been fixed for payment*. Thus, in a suit by a zamindar to recover sums expended by him at the defendants' request for the repair of a tank for the irrigation of lands held by them in common with him where no time was absolutely fixed for the repayment to him of those sums, it was held that the suit was governed by this Article.³

But in a suit by a village carpenter (artisan) for wages where payment for work done by him was expressly stated to be payable to him at the end of every agricultural year, this Article was held to be clearly inapplicable.⁴

In a suit to recover a sum of money for having carried certain casks of beer under a contract with the defendant, the mere fact that among the terms thereof it was mentioned that for one year the Brewery Co. would not transfer their work to any lower tenderer, was held not to show that payment for the work done was not to be made till the close of the year.⁵

C (1872) 9 Bom II O N 280 (291), *Naro Ganes v Muhammad Khan*

Note 2

1 (1856) 9 Ma 1 331 (342) *Sun Iram v Sankara*

2 (1909) 4 Ind Cas 902 (905) 1910 Pun Re No 47, *Abdul Ali v Faton Goldstein*

Note 3

1 (1836) 9 Mad 331 (342) *Sun Iram v Sankara*

2 (1931) A I R 1931 Nag 260 (2 0) 152 Ind Cas 855, *Namdeo v Ramkrishna*

3 (1937) 1937 Pun Re No 60 *Murree Brewery Co v Hazura Mal*

4. Starting point of limitation. — The period of limitation will run from the date when the work is done. If the work is done in instalments, the period of limitation must be taken to mean "when the work is completed." Thus, where the work done was not completed and was spread over a period of three years, the period of such repair was held to be within three years from the date the work was fully completed.¹

57.* For money payable for money lent. Three years. Period of limitation for money lent.

Synopsis

1. Scope of the Article.
2. Suit must be based on the loan.
3. Loan and deposit — Distinction.
4. Loan on pledge or mortgage.
5. "Payable."
6. "Money."
7. Suit on money dealings.

Other Topics

Balance struck amounts to acknowledgment
Government securities are not money
Suit by principal against agent for money collected

Suit to enforce pledge — Article is not applicable.

1. Scope of the Article. — This is a provision for the recovery of money payable for money lent. It is a specific Article. The distinction between Article 59 is that while the former applies to a loan, this Article applies to a loan on express agreement made as to its repayment.

* Act of 1877, Article 57 and Act of 1859, Section 1, clause 1.

Act of 1859, Section 1, clause 1.

To suits brought to recover money lent, from the time when the debt became due.

Note 4

- 1 (1886) 9 Mad 334 (342), *Sundaram v Santaram*
[See also (1864) 1864 Suth W R Gap 69 (69),
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action accrues from the time when the

Article 57 — Note 1

- 1a (1938) A I R 1938 P C 66 (67) 172 Ind Cas 97,
Baldeo Narain Tandon

Article 57
Notes
1—4

loans where there is an agreement that it shall be payable on demand.¹ There is, however, no difference in effect inasmuch as in both cases time runs from the *date of the loan*, the words "on demand" in Article 59 not being regarded as a term of the contract to pay. See Note 6 to Article 59, *infra* for a discussion of the principles involved.

2. Suit must be based on the loan. — The Article applies only when the suit is based *on the loan*. A suit against a surety who on the date of the loan to the principal debtor held himself responsible for the same, is not a suit on the loan but on the contract of suretyship and is governed by Article 115 of the Act, though the time begins to run against him from the date of the loan, the surety's liability being co-extensive with the loan.¹ A suit by a principal against his agent for moneys collected and retained by the agent is not governed by this Article because the principal cannot be said to have *lent* the moneys to the agent within the meaning of this Article.² Where *A* advanced moneys to *B* under a registered bond on behalf of himself and as guardian of his minor daughter *C*, for meeting the expenses of a litigation in which *C* was interested, it was held that *B* could not contract on behalf of his daughter *C* that so far as *C* was concerned the registered document must be disregarded and that the suit as against *C* must be regarded as one for money payable for money lent within the meaning of this Article.³

3. Loan and deposit — Distinction between. — See Notes to Article 60 *infra*.

4. Loan on pledge or mortgage. — The fact that moveable property is pledged or immovable property is mortgaged as a collateral security for a loan advanced, does not render a suit for the recovery of the loan *personally* against the debtor, of any other description than a suit for money "payable for money lent".¹ A suit therefore to recover personally from the debtor the amount of the loan advanced,² or the balance of the amount due after crediting the

- 1 (1920) A I R 1920 Low Jur 74 (76) 57 Ind Cas 903 10 Low Bur Rul 161 *M M A K Chetty v Palaniappa Chetty*

Note 2

- 1 (1931) A I R 1931 Lah 691 (693) 132 Ind Cas 590 13 Lah 210 *Diyalu Mal v Nandu Shah Deb Ray*
2 (1909) 2 Ind Cas 118 (121) 31 All 429 *Rao Gurray Singh v Rani Raghunath Kunwar*
3 (1900) 10 Outh Cas 35 (40) *Nasrab Injuman Ara Begam v Nasrab Injuman Ara Begam*
[See also (1937) A I R 1937 Cal 317 (352) 171 Ind Cas 965 *Sasendra Nath v Keshab Chandra Chowdhury* (Registered documents — Registration invalid — Suit is governed by this Article or Art 60)]

Note 4

- 1 (1902) 24 All 251 (252, 253) 1902 All W N 43 *Sajid Ali Khan v Debi Prasad*
2 (1911) 17 All 281 (287) 1895 All W N 40 *Malan Mohan Lal v Kanhai Lal*
(1933) A I R 1933 B m 213 (214) 156 Ind Cas 531, *Percy F. Fisher v Indesur*

proceeds of the sale of the property pledged,³ is governed by this Article and time runs from the *date of the loan*. A suit to enforce the pledge is not governed by this Article but by Article 120.⁴

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5. "Payable." — The word "payable" means payable *at once* on the loan being made. Where a loan is on an agreement that it is repayable on a *future date*, it cannot be said to be payable immediately on the loan being made and a suit for recovery thereof is not for 'money payable for money lent' within the meaning of this Article.¹ Article 115 or some other Article may apply to a suit to recover the money due on such contracts.²

6. "Money." — The Article applies only to suits for money payable for money lent. Government Securities¹ and grain² cannot be said to be money and a suit in respect of a loan thereof is therefore not within this Article. A suit for moneys due on transactions between the parties in which each side supplied the other with goods is not within this Article.³

7. Suit on money dealings. — Where A borrows money from B from time to time and makes payments towards it from time to

(1895) 22 Cal 21 (21) *Nim Chand Baboo v Jagabundhu Ghose*

(1881) 1881 Pun Re No 116 *Dowlat Ram v Jivan Mal*

(1904) 27 Mad 528 (530-531) 13 Mad L Jour 445 (F B) *Mahalinga Nadar v Ganapati Subbien*

(1930) A I R 1930 Pesh 48 (45) 160 Ind Cas 986 *Saifullah Khan v Chaman Lal*

3 (1902) 24 All 251 (253) 1902 All W N 43 *Sayid Ali Khan v Debi Prasad*

(1906) 30 Bom 218 (220) 7 Bom L R 739 *Pellapa v Desayappa*

(1886) 1886 Bom P J 161 *Ramchandhra v Anaji*

(1927) A I R 1927 Nag 346 (347) 104 I C 641 *Debidian v Gaya Pershad*

4 (1895) 17 All 284 (287) 1895 All W N 46 *Madan Mohan Lal v Kunhas Lal*

(1918) A I R 1918 All 314 (314) 46 Ind Cas 373 40 All 512 *Deoks Nandan v Gupta*

(1935) A I R 1935 Bom 213 (215) 156 Ind Cas 531 *Percy F Fisher v Irdeshr*

(1895) 22 Cal 21 (21) *Nim Chand Baboo v Jagabundhu Ghosh*

(1881) 1881 Pun Re No 116 *Dowlat Ram v Jivan Mal*

(1904) 27 Mad 528 (530-531) 13 Mad L Jour 445 (F B) *Mahalinga Nadar v Ganapathi Subbien*

Note 5

1 (1884) 10 Cal 1033 (1034) *Rameshwar Mandal v Ramchand Roy*

(1892) 15 Mad 380 (381) 2 Mad L Jour 42 *Ramaswamy v Muthuswamy*

(1900) A I R 1920 Low Bur 74 (76) 57 Ind Cas 909 10 Low Bur Rul 161, *M V A K Chetty v Palaniappa Chetty*

[See also (1919) A I R 1919 Mad 146 (150) 52 Ind Cas 456 *Annamalai v Annamalai*]

2 (1884) 10 Cal 1033 (1035) *Rameshwar Mandal v Ramchand Roy*

(1919) A I R 1919 Mad 146 (150) 52 Ind Cas 456 *Annamalai v Annamalai*

Note 6

1 (1903) 7 Cal W N 476 (481) *Kristo Kamini Dass v. Administrator General of Bengal*

2 (1917) A I R 1917 Lah 166 (167) 37 Ind Cas 300 *Budh Ram v Palla Ram* (Suit on advances in cash and grain—Art 57 does not apply)

3 (1922) A I R 1922 Lah 316 (317) 66 Ind Cas 387, *Jucala Das v Hulam Chand*

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1—4

loans where there is an agreement that it shall be payable on demand¹ There is, however, no difference in effect inasmuch as in both cases time runs from the *date of the loan*, the words "on demand" in Article 59 not being regarded as a term of the contract to pay See Note 6 to Article 59, *infra* for a discussion of the principles involved

2. Suit must be based on the loan. — The Article applies only when the suit is based *on the loan* A suit against a surety who on the date of the loan to the principal debtor held himself responsible for the same, is not a suit on the loan but on the contract of suretyship and is governed by Article 115 of the Act, though the time begins to run against him from the date of the loan, the surety's liability being co extensive with the loan¹ A suit by a principal against his agent for moneys collected and retained by the agent is not governed by this Article because the principal cannot be said to have *lent* the moneys to the agent within the meaning of this Article² Where *A* advanced moneys to *B* under a registered bond on behalf of himself and as guardian of his minor daughter *C*, for meeting the expenses of a litigation in which *C* was interested, it was held that *B* could not contract on behalf of his daughter *C*, that so far as *C* was concerned, the registered document must be disregarded and that the suit as against *C* must be regarded as one for money payable for money lent within the meaning of this Article³

3. Loan and deposit — Distinction between. — See Notes to Article 60 *infra*

4. Loan on pledge or mortgage. — The fact that moveable property is pledged or immovable property is mortgaged as a collateral security for a loan advanced, does not render a suit for the recovery of the loan *personally* against the debtor, of any other description than a suit for money "payable for money lent"¹ A suit therefore to recover personally from the debtor the amount of the loan advanced,² or the balance of the amount due after crediting the

- 1 (1920) A I R 1920 Low Bur 74 (76) 57 Ind Cas 908 10 Low Bur Rul 161, *M M K K Chetty v Palaniappa Chetty*

Note 2

- 1 (1931) A I R 1931 Lah 691 (693) 132 Ind Cas 590 13 Lah 240, *Diyalu Mal v Nandu Shah Deb Ray*

- 2 (1903) 2 Ind Cas 118 (121) 31 All 429, *Rao Gurray Singh v Rani Paghurur Kunwar*

- 3 (1900) 10 Outh Cas 33 (40) *Nazab Injuman Ara Degam v Navab Injuman Ara Begam*

(See also (1937) A I R 1937 Cal 347 (352) 171 Ind Cas 965, *Sailendra Nath v Keshab Chandra Choudhury* (Registered documents — Registration invalid — Suit is governed by this Article or Art 65))

Note 4

- 1 (1902) 21 All 251 (252, 253) 1902 All W N 47, *Sayid Ali Khan v Debi Prasad*

- 2 (1915) 17 All 241 (247) 189, All W N 40, *Madan Mohan Lal v. Kanhai Lal*

- (1937) A I R 1935 Bom 217 (214) 156 Ind Cas 531, *Percival Fisher v Arledar*

proceeds of the sale of the property pledged,³ is governed by this Article and time runs from the *date of the loan*. A suit to enforce the pledge is not governed by this Article but by Article 120⁴.

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4—7

5. "Payable." — The word "payable" means payable *at once* on the loan being made. Where a loan is on an agreement that it is repayable on a *future date*, it cannot be said to be payable immediately on the loan being made and a suit for recovery thereof is not for 'money payable for money lent' within the meaning of this Article¹. Article 115 or some other Article may apply to a suit to recover the money due on such contracts².

6. "Money." — The Article applies only to suits for *money* payable for *money* lent. Government Securities¹ and grain² cannot be said to be *money* and a suit in respect of a loan thereof is therefore not within this Article. A suit for moneys due on transactions between the parties in which each side supplied the other with *goods*, is not within this Article³.

7. *Suit on money dealings.* — Where A borrows money from B from time to time and makes payments towards it from time to

(1895) 22 Cal 21 (24) *Nim Chand Baboo v Jagabundhu Ghosh*

(1881) 1881 Pun Re No 116 *Doulat Ram v Jivan Mal*

(1904) 27 Mad 528 (530-531) 13 Mad L Jour 445 (F B) *Mahalinga Nadar v Ganapathi Subbier*

(1936) A I R 1936 Pesh 43 (45) 160 Ind Cas 986 *Saifullah Khan v Chaman Lal*

8 (1907) 24 All 951 (253) 1907 All W N 43 *Sayid Ali Khan v Debi Prasad*

(1906) 30 Bom 218 (220) 7 Bom L R 789 *1 ellapa v Desayappa*

(1886) 1886 Bom P J 161 *Ramchandhra v Anaji*

(1927) A I R 1927 Nag 346 (347) 104 I C 641 *Debidian v Gaya Pershad*

4 (1895) 17 All 284 (287) 1895 All W N 46 *Madan Mohan Lal v Kunha Lal*

(1918) A I R 1918 All 344 (344) 46 Ind Cas 373 40 All 512 *Deoki Nandan v Gupta*

(1935) A I R 1935 Bom 213 (215) 156 Ind Cas 531 *Percy F Fisher v Ardeshr*

(1895) 22 Cal 21 (24) *Nim Chand Baboo v Jagabundhu Ghosh*

(1881) 1881 Pun Re No 116 *Doulat Ram v Jivan Mal*

(1904) 27 Mad 528 (530-531) 13 Mad L Jour 445 (F B) *Mahalinga Nadar v Ganapathi Subbier*

Note 5

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Iuthuswamy
7 Bur Rul 161,

456 *Annama*

lai v Annamalai]

2 (1884) 10 Cal 1033 (1035) *Rameshwar Mandal v Ramchand Roy*

(1919) A I R 1919 Mad 146 (150) 52 Ind Cas 456 *Annamalai v Annamalai*

Note 6

1 (1903) 7 Cal W N 476 (481) *Kristo Kaminis Dass v. Administrator General of Bengal*

2 (1917) A I R 1917 Lah 106 (107) 87 Ind Cas 300 *Budh Ram v Balli Ram*
(Suit on advances in cash and grain—Art 57 does not apply)

3 (1922) A I R 1922 Lah 316 (317) 66 Ind Cas 387, *Jwala Das v Hukam Chand*

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Note 7

time and *B* sues *A* on the balance due on such accounts between them and the account cannot be said to be a *mutual*, open and current account, this Article will apply¹ The fact that the payments by *A* towards the loan were in the shape of goods or in some other manner does not affect the nature of the suit² Each item of the loan must be considered separately and time will run in respect of that item from the date thereof³ In other words, the suit will be barred in respect of all items which are beyond three years (under the Punjab Limitation Act, six years) of the date of the suit^{3a} Where a balance has been struck for a certain amount in favour of the plaintiff, it may amount to an acknowledgment of liability and may extend the period of limitation⁴

Article 58

58.* Like suit when the lender has given a cheque for the money.	Three years.	When the cheque is paid.
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* Act of 1877, Article 58 and Act of 1871, Article 57.

Same as above

Act of 1859.

No corresponding provision

Note 7

- 1 (1923) A I R 1923 Lah 636 (637, 638) 79 Ind Cas 998 *Thakur Das v Bishan Das Mewaram*
(1931) A I R 1931 Lah 241 (243) 12 Lah 420 184 Ind Cas 513, *Ram Dhan v Mahomed Dost Khan*
(1922) A I R 1922 Lah 189 (186) 62 Ind Cas 809, *Patan Chand v Asa Singh* (Mutual, open and current account—Art 55 is applicable and not this Article)
(1907) 6 Cal L Jour 158 (163), *Pam Pershad v Harbans Singh*
(1893) 1893 All W N 34 (35), *Ballab Shanker v Ram Kuar*
(1934) A I R 1934 All 126 (126) 147 Ind Cas 29, *Abdul Aziz Khan v Niaz Ullah*
(1937) A I R 1937 Rang 340 (343) 172 Ind Cas 837 1937 R L R 254, *Bengal Burma Trading Co v Burma Loan Bank Ltd*
(See also (1922) A I R 1922 Lah 162 (183) 68 Ind Cas 815, *Firm Gurdas Ram Kotu Ram v Bhagwan Das*
(1922) A I R 1922 Lah 204 (204) *Nanak Singh v Mihan Singh*)
- 2 (1923) A I R 1923 Lah 636 (637) 79 Ind Cas 998 *Thakur Das v Bishan Das* (Grain given in repayment)
(1934) A I R 1934 Lah 126 (126) 149 Ind Cas 1010 *Puran Singh v Mathra Das* (Work done in repayment)
- 3 (1935) A I R 1935 Bom 213 (214) 156 Ind Cas 531, *Percy F Fisher v Ardeskar*

4 (1923) A I R 1923 Lah 636 (638) 79 Ind Cas 998 *Thakur Das v Bishan Das Mewaram*

1. **Scope of the Article.** — The Article prescribes a period of three years for a suit for the recovery of money lent, when the lender has given a cheque for the money lent by him. It, however, applies to a case in which the lender draws *his own cheque* and gives it to the borrower. It does not govern a suit in which he *transfers* to the borrower a cheque which had been drawn by another person and endorsed in his favour by the payee.¹

Article 58
Note 1

The period of three years prescribed by the Article begins to run from the date on which the cheque is *paid*, and a cheque is paid when it is cashed by the lender's bankers.² It is only then that the lender's money passes into the hands of the borrower, and the loan is made by the former to the latter: the mere handing over of a cheque by the lender to the borrower does not amount to a payment of the cheque. Nor does the period begin to run against the lender when the cheque received by the borrower is given by him to his own bank, and the amount is credited to him by the bank.³

59.* For money lent, Three years. When the loan under an agreement that it shall be payable on demand.

Article 59

Synopsis

1. Legislative changes.
2. Scope of the Article.
3. Suit must be based on the loan.
4. Interest accruing on a loan, if a "loan."
5. "Money."
6. "On demand."
7. Effect of stipulation to pay interest.
8. Starting point.

1. **Legislative changes** — Clauses 9 and 10 of Sect. 2 of the Act of 1859 applied to cases covered by this Article, and clauses time ran from the date *when the debt became due*

* Act of 1877, Article 59

Same as above

Act of 1871, Article 58

First two columns same as above Third column — When the debt became due

Article 58 — Note 1

- 1 (1938) A I R 1938 P C 66 (67) 172 Ind Cas 918 (P C), *Baldeo Narain Tandon*
- 2 (1868) 16 W R (Eng) 366 (366) 37 L J C P 112 L R 3 C 1, *Garden v Druce*
- (1905) 28 All 51 (57) 1905 All W N 181 2 All L J 222, *Savitri Bibi*
- 3 (1938) A I R 1938 P C 66 (67) 172 Ind Cas 978 (P C), *Baldeo Narain Tandon*

Article 59
Notes
1—4

Article 58 of the Act of 1871, corresponding to this Article, provided that time ran *from the date of demand*

Article 59 of the Act of 1877, corresponding to this Article, provided that time ran *from the date of loan*, and the Article has been retained in that form in the present Act

2. Scope of the Article.—See Note 1 to Article 57 and Notes *infra*

3. Suit must be based on the loan.—The suit must be based *on the loan*. See Note 2 to Article 57 *ante*. A suit against a surety who, on the date of the loan to the principal debtor, held himself responsible for the same, is not a suit *on the loan* and is not barred merely by reason of the fact that the principal debt is barred under this Article¹

For a loan to come into existence, there must be a lender and a borrower. Where the same person acts as the agent of two principals and uses the money of the one for the benefit of the other, there cannot be a loan as the lender and the borrower is the same person². *A* and *B* are joint mortgagees. *A* files a suit on the mortgage making *B* a defendant, and incurs expenses for such suit. He subsequently files a suit against *B* for contribution in respect of such costs. It cannot be said in such a case that *A* has *lent* any money to *B* or that *B* has agreed to pay such money on demand. This Article has therefore no application to the suit³.

A deposit of money may create the relationship of debtor and creditor, but a deposit involves the condition that it is not payable except when called for. A suit for the recovery of a deposit is not therefore governed by this Article, but by Article 60 *infra*. See Notes to that Article.

As to the distinction between a deposit and a loan, see Notes to Article 60.

4. Interest accruing on a loan, if a 'loan.'—Where *A* deposited money with *B* for interest and after having received back the principal sum advanced, sued for the interest due thereon, it was held

Act of 1859, Section 1, Clauses 9 and 10.

9. To suits brought to recover money lent, the period of three years from the time when the debt became due,

10. To suits brought to recover money lent in cases in which there is

“ . . . ”

Article 59 — Note 3

1 (1881) 5 Bom Cr 17 (C2). C Ind Jur 139, *Hajarimal v. Krishnarai*.

2 (1927) 1 I R 127 All 173 (174). 93 Ind Cas 1010 *Jaunpur Sugar Factory Ltd v. Upper Indus Ice Mills Ltd*.

3 (1923) 1 I R 123 Mad Ct (C7). 70 Ind Cas 405, *Sundara Iyer v. Ananthapriyanabha Iyer*.

that the interest could not be regarded as a loan and that the suit was not governed by Article 59 Article 63 was applied¹

5. "Money." — See Note 6 to Article 57 *ante*

6. "On demand."—It is a principle of jurisprudence that injury or wrong supposes unlawful intention or unlawful inadvertence¹ An exception to this is, however, furnished by the law of England By that law, in certain cases arising from contract, the performance of the obligation is due from the very instant at which the obligation arises, thus, if *A* deposits moveable property with *B* in order that *B* may keep it for safety, *B* is bound from the moment of the deposit to restore it to the bailor, if *A* sells goods to *B* and no time is fixed for the payment of the price, *B* is bound, from the moment of the delivery, to pay the price to the seller² On the same principle, where *A* lends money to *B*, *B* is bound from the moment of the loan to repay it to *A*.³ In *Norton v Ellam*,⁴ Baron Parke observed that "the debt which constitutes the cause of action arises instantly on the loan" and this view is the basis of Article 57 *ante* under which time for a suit for the recovery of the loan runs from the *date of the loan*

It is impossible in the above cases that the obligation should be broken through intention or inadvertence until the obligee desires performance and until the obligor is informed of the desire, and yet the law assumes that there is a breach of the obligation without any previous demand⁵

If in the above cases *B* promises to pay the amount to *A* on demand, it has been held that the words 'on demand' do not merely by themselves make a demand a term of the contract In *Ram Chunder Ghosaul v Juggutmonmohini Dabee*,⁶ Sir Richard Garth, C J, observed that "where a man promises to pay a sum of money &c, on demand, which it is his duty to pay, whether a demand be made or no, then the money becomes payable at once, and no demand is necessary before suing him for it, as for instance in the

Note 4

- 1 (1880) 3 All 325 (332), *Mahunda Kuar v Balkishen Das*

Note 6

- 1 Austin's Jurisprudence 3rd Edition, 1st Volume, Page 485
Also Austin's Jurisprudence, Students' Edition (1899) Pages 230 231
- 2 Austin's Jurisprudence 3rd Edition 1st Volume Page 485
- 3 (1844) 67 R R 671 (675, 676) 13 M & W 452 14 L J Ex 54 2 Dowl & L 410, *Wallon v Mascall*
- 1 Williams' Saunders 38 1871 Edition *Eurks v Truppel*
(1837) 46 R R 646 (649) 2 M & W 461 1 M & H 69 1 Jur 433 6 L J (N S) Ex 121 *Norton v Ellam*
- (1921) 87 T L R 534 (539) 90 L J K B 973 3 K B 110 125 L T 338
26 Com Cas 196 65 S J 431 *Jouchimson v Swiss Bank Corporation*,
- 4 (1837) 46 R R 646 (649) 2 M & W 461 1 M & H 69 1 Jur 433 6 L J (N S) Ex 121
- 5 Austin's Jurisprudence 3rd Edition, 1st Volume, Page 485
- 6 (1878) 4 Cal 2-3 (294) 3 Cal L R 336 2 Shome L R 2

Article 59
Notes
6—7

case of money lent, and money due for goods sold or for work done "In *Norton v Ellam*,⁷ where the question was as to when the statute of limitations began to run on a promissory note payable with interest on demand, Baron Parke observed as follows —

"It is the same as the case of money lent payable upon request, with interest where no demand is necessary before bringing the action. There is no obligation in law to give any notice at all. It is quite clear that a promissory note payable on demand is a present debt and is payable without demand and the statute begins to run from the date of it."⁸

But even in such cases the parties may, by the use of appropriate words (other than by merely using the words "on demand") stipulate that the amount shall be payable only on demand being made, in which case time will not run until a demand is made.⁹

In cases other than those falling within the classes of cases above referred to where A promises to pay money to B on demand, the question in each case will be whether the parties intended to make the demand a term of the contract. In *Joachimson v Swiss Bank Corporation*,¹⁰ Lord Justice Atkin, after a review of the authorities, observed —

"The question appears to me to be in every case, did the parties in fact intend to make the demand a term of the contract? If they did effect will be given to their contract, whether it be a direct promise to pay or a collateral promise, though in seeking to ascertain their intention, the nature of the contract may be material.

It will be clear from the above discussion that the words "on demand" in this Article have been used in the technical sense in which they are used in English law with reference to a promise to pay a debt.¹¹

7. Effect of stipulation to pay interest. — A stipulation to pay interest on the money lent does not make any difference in the applicability of the Article. In *Norton v Ellam*,¹ which was a case

7 (1837) 4 C. & R. 616 (C19) 2 M. & W. 151 1 M. & H. 69 1 Jur. 433 6 L. J. (N.S.) 1 x 121

⁸ See also the cases cited in Foot Note (1) to Note 3 of Art. 73 *infra*

8 (1837) 4 C. & R. 616 (C19) 2 M. & W. 151 1 M. & H. 69 1 Jur. 433 6 L. J. (N.S.) 1 x 121 *Norton v Ellam*

(1871) 10 South W. R. 164 (1C9) 7 B. & G. L. R. 492 *Brammings, Dist. v. Abhai*
(*Jaran Chaur Dhy*)

9 (1921) 37 T. I. R. 34 (579) 90 L. J. K. 1197 3 K. B. 110 125 L. T. 338 26 C. M. C. 126 65 S. J. 414

10 (1916) A. I. R. 1916 M. 148 (197) 11 Ind. Cas. 335 *Surappa v. Bajirazu*

(1917) A. I. R. 1917 Pat. 533 (535) 40 Ind. Cas. 750 2 Pat. L. Jour. 451 *Bishun*
Chand v. Bala Bihari Lal

(1920) A. I. R. 1920 Cal. 74 (77) 57 Ind. Cas. 903 10 Low. Bur. Rul. 161,
M. M. A. K. Chetty v. Palaniappa Chetty

Notes 7

1 (1837) 4 C. & R. 616 (C19) 2 M. & W. 151 1 M. & H. 69 1 Jur. 433 6 L. J. (N.S.) 1 x 121

of promissory note payable on demand with interest Baron Parke observed as follows —

Article 59
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7—8

“Where money is lent simply, it is not denied that the statute begins to run from the time of lending. Then, is there any difference where it is payable with interest? It is quite clear that a promissory note payable on demand is a present debt and is payable without any demand and the statute begins to run from the date of it. Then the stipulation for compensation in the shape of interest makes no difference except that thereby the debt is continually increasing *de die in diem*.”

8. Starting point.—As has been seen in Note 1, the starting point of limitation, under the Act of 1859 for suits for the recovery of money lent was the date when the debt *became due*.¹ It was held in some cases arising under that Act that where the money was payable on demand, the technical meaning of the words ‘on demand’ in English law did not apply to the *mofussil* in India, and that a demand was actually necessary before the debt could be said to become due.² The Act of 1871 apparently gave effect to this view, for both in Article 59 (now Article 59) and in Article 72 (now Article 73) time was made to run from the *date of demand*.³ The Act of 1877 adopted in Articles 59 and 73 the common law meaning of the words “on demand” when used with reference to debts, and time accordingly ran under these Articles from the *date of the loan*. The Articles have remained unaltered in the present Act in this respect and the same interpretation of the words ‘on demand’ will apply.

60. For money deposited under an agreement that it shall be payable on demand, including money of a customer in the hands of his banker so payable.	Three years.	When the demand is made
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Article 60

☆ Act of 1877, Article 60

60 —For money deposited under an agreement that it shall be payable on demand	Three years	When the demand is made
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Acts of 1871 and 1859,
No corresponding provision

Note 8

1 (1870) 14 *Suth W R* 87 (59) *Bibee Heerun v Bibee Varsum*

2 (1870) 14 *Suth W R* 224 (225) 6 *Bang L R* 160, *Tarinee Pershad v Pran Aishen*

3 (1872) 1872 *Pun Ra No* 17 *Jeecun Singh v Anwar Khan*

Article 60
Notes
1—2

Synopsis

1. Legislative changes.
2. Deposit and loan — Distinction.
3. Moneys of customer with banker.
4. Interest accruing on deposit, if a deposit.
5. Onus of proof.
6. "And includes."
7. Agreement to pay on demand.
8. Demand, what is.
9. Who should make a demand.
10. Starting point.

Other Topics

Banker and customer—Presumption as to transaction being deposit	See Note 5 Pt 4
Deposit does not necessarily involve creation of express or implied trust	See Note 2 Pt 6
Deposit does not necessarily involve relation of debtor and creditor	See Note 2 Pts 4, 5
Deposit for safe custody	See Note 2 Pt 4
Thavanas system	See Note 7 Pts 7 to 10

1. Legislative changes.

(a) There was no provision corresponding to this in the Acts of 1859 and 1871. A deposit of money was in many cases held to be money *lent* and in some cases as a deposit of moveable property for which a period of 30 years was provided in clause 15 of Section 1 of the Act of 1859¹

(b) Article 60 of the Act of 1877 did not contain the words "including money of a customer in the hands of his banker so payable". They were added in the Act of 1908.

2. Deposit and loan — Distinction. — In *Mahomed Akbar Khan v Attar Singh*,¹ their Lordships of the Privy Council observed as follows

"It should be remembered that the two terms (i. e. deposit and loan) are not mutually exclusive. A deposit of money is not confined to a bailment of specific currency to be returned *in specie*. As in the case of a deposit with a banker, it does not necessarily involve the creation of a trust, but may involve only the creation of the relation of debtor and creditor, a loan

Article 60 — Note 1

¹ (1855) 3 Suth W R 94 (94), *Fulton Money Debts v Cunga Money Debts*

Note 2

¹ (1926) A I R 1936 P C 171 (173) 162 Ind Cas 454 17 Lah 557 63 Ind App 279 (P C)

under conditions. The distinction which is perhaps the most obvious is that the deposit not for a fixed term does not seem to impose an immediate obligation on the depositee to seek out the depositor and repay him. *He is to keep the money till asked for it. A demand by the depositor would therefore seem to be a normal condition of the obligation of the depositee to repay.*

Where therefore A advances money to B, and the intention of the parties is that B should keep the money till asked for by A, the transaction is a deposit.² No obligation arises on the part of B to repay it until a demand is actually made for it. In the case of an ordinary loan the obligation to repay it arises, as has been seen in Note 6 to Article 59 immediately on the loan. In *Tidd v Oterell*,^{3a} where A handed over money to B stating "you may as well take care of it until I want it" and it was in the minds of the parties that in the meanwhile the money would be useful to B, it was held by Mr Justice North that the transaction was a deposit and not a mere loan payable without demand. His Lordship in coming to this conclusion relied upon the following passage from Pothier on Contracts by Evans —

'Where a man deposited money in the hands of another to be kept for his use, the possession of the custodee ought to be deemed the possession of the owner until an application and refusal or other denial of the right, for until then there is nothing adverse, and I conceive that upon principle no action should be allowed in those cases without a previous demand consequently that no limitation should be computed further back than such demand.

A deposit may involve the relation of debtor and creditor, but not necessarily so. Thus, the relation between a banker and customer who deposits money with the former involves the relation of debtor and creditor.³ But a deposit merely for safe custody,⁴ or for a

2 (1937) A I R 1937 Lah 81 (82) 171 Ind Cas 506 *Gurcharan Das v Ram Rakha Mal* (In the case of deposit it is the duty of the depositor to make a demand for it.)

[See also (1927) A I R 1927 Pat 91 (91) 98 Ind Cas 551 *Suraj Prasad v Bindhyachal Prasad* (Suit to recover balance money deposited every now and then and withdrawn from time to time—Art. 60 applies).]

(1934) A I R 1934 Lah 179 (179) 147 Ind Cas 338 *Allah Ditta v Sadhu Shah* (Where an advance is held to be a deposit an agreement to pay on demand must be implied.)

2a (1893) 42 W R (Eng) 25 (26) 3 Ch 154 62 L J Ch 915 3 R 657 69 L T 255

3 (1914) A I R 1914 Mad 51 (54) 37 Mad 175 24 Ind Cas 859 *Balarishnudu v Narayanaswamy Chetti* (Deposits with bankers payable on demand on a special class of loans.)

4 (1921) A I R 1921 Cal 644 (646) 66 Ind Cas 752 *Jeeendra Nath v Dinkar Ram*

(1919) A I R 1919 Lah 322 (323) 47 Ind Cas 597 1919 Pun Pe No 4 *Dilpa v Jadhav Lari* (Deposit with defendant to be kept by the latter for the plaintiff until demanded.)

Article 60
Notes
2—3

*specific purpose*⁵ does not involve the relation of debtor and creditor.

A deposit does not necessarily involve the creation of a trust express or implied.⁶ In the undermentioned cases⁷ the existence of a fiduciary relationship was regarded as the distinguishing feature of a deposit. This view cannot be accepted as correct in view of the Privy Council decision referred to above. Where an *express* trust is created by the deposit, however, the matter will be governed by Section 10 of the Act.⁸

It follows from the above discussion that the *substance of the transaction* must be looked to in every case. The mere use of the word "deposit" or "loan" cannot alter the substance of the transaction, though the use of the word by the parties must be given due weight in ascertaining the intention of the parties. If in substance a transaction is a "deposit" or a "loan," it must be treated as such even though it is given a different name by the parties.⁹

3. **Moneys of customer with banker.**— Before the decision in 1921 of the Court of Appeal in *Joachimson v Swiss Bank Corporation*,¹ there were in England conflicting expressions of opinion though there was no actual decision on the question whether the relation of a banker and customer involved an implied condition that the making of an actual demand was necessary before an action lay to recover money lent to a banker by a customer on current account. In *Foley v Hill*,² where the defendants were bankers who had

5 (1919) A I R 1919 All 102 (103) 41 All 643 55 Ind Cas 45 *Aalyan Val v Kishen Chand* (Suit for money deposited for a specific purpose)

(1886) 1886 Bom P J 239, *Dayabhai v The Firm of Udechand* (Deposit with firm with the intention that it should be kept distinct and not mixed up with the money of the firm)

6 (1889) 16 Cal 25 (31) *Ishur Chunder Bhaduri v Jibun Kumari Bibi*

(1891) 18 Cal 234 (241) *Secy of State v Izzat Ali*

7 (1879) 6 Cal L R 470 (472), *Ram Sukh Bhunjo v Brohmoy Das*

8 (1879) 6 Cal L R 470 (472), *Ram Sukh Bhunjo v Brohmoy Das*

9 (1879) 6 Cal L R 470 (472), *Ram Sukh Bhunjo v Brohmoy Das*

10 (1879) 6 Cal L R 470 (472), *Ram Sukh Bhunjo v Brohmoy Das*

11 (1879) 6 Cal L R 470 (472), *Ram Sukh Bhunjo v Brohmoy Das*

12 (1879) 6 Cal L R 470 (472), *Ram Sukh Bhunjo v Brohmoy Das*

13 (1879) 6 Cal L R 470 (472), *Ram Sukh Bhunjo v Brohmoy Das*

14 (1879) 6 Cal L R 470 (472), *Ram Sukh Bhunjo v Brohmoy Das*

15 (1879) 6 Cal L R 470 (472), *Ram Sukh Bhunjo v Brohmoy Das*

16 (1879) 6 Cal L R 470 (472), *Ram Sukh Bhunjo v Brohmoy Das*

17 (1879) 6 Cal L R 470 (472), *Ram Sukh Bhunjo v Brohmoy Das*

18 (1879) 6 Cal L R 470 (472), *Ram Sukh Bhunjo v Brohmoy Das*

19 (1879) 6 Cal L R 470 (472), *Ram Sukh Bhunjo v Brohmoy Das*

20 (1879) 6 Cal L R 470 (472), *Ram Sukh Bhunjo v Brohmoy Das*

21 (1879) 6 Cal L R 470 (472), *Ram Sukh Bhunjo v Brohmoy Das*

22 (1879) 6 Cal L R 470 (472), *Ram Sukh Bhunjo v Brohmoy Das*

23 (1879) 6 Cal L R 470 (472), *Ram Sukh Bhunjo v Brohmoy Das*

24 (1879) 6 Cal L R 470 (472), *Ram Sukh Bhunjo v Brohmoy Das*

25 (1879) 6 Cal L R 470 (472), *Ram Sukh Bhunjo v Brohmoy Das*

26 (1879) 6 Cal L R 470 (472), *Ram Sukh Bhunjo v Brohmoy Das*

27 (1879) 6 Cal L R 470 (472), *Ram Sukh Bhunjo v Brohmoy Das*

28 (1879) 6 Cal L R 470 (472), *Ram Sukh Bhunjo v Brohmoy Das*

29 (1879) 6 Cal L R 470 (472), *Ram Sukh Bhunjo v Brohmoy Das*

30 (1879) 6 Cal L R 470 (472), *Ram Sukh Bhunjo v Brohmoy Das*

31 (1879) 6 Cal L R 470 (472), *Ram Sukh Bhunjo v Brohmoy Das*

32 (1879) 6 Cal L R 470 (472), *Ram Sukh Bhunjo v Brohmoy Das*

33 (1879) 6 Cal L R 470 (472), *Ram Sukh Bhunjo v Brohmoy Das*

34 (1879) 6 Cal L R 470 (472), *Ram Sukh Bhunjo v Brohmoy Das*

35 (1879) 6 Cal L R 470 (472), *Ram Sukh Bhunjo v Brohmoy Das*

36 (1879) 6 Cal L R 470 (472), *Ram Sukh Bhunjo v Brohmoy Das*

37 (1879) 6 Cal L R 470 (472), *Ram Sukh Bhunjo v Brohmoy Das*

38 (1879) 6 Cal L R 470 (472), *Ram Sukh Bhunjo v Brohmoy Das*

39 (1879) 6 Cal L R 470 (472), *Ram Sukh Bhunjo v Brohmoy Das*

40 (1879) 6 Cal L R 470 (472), *Ram Sukh Bhunjo v Brohmoy Das*

41 (1879) 6 Cal L R 470 (472), *Ram Sukh Bhunjo v Brohmoy Das*

42 (1879) 6 Cal L R 470 (472), *Ram Sukh Bhunjo v Brohmoy Das*

43 (1879) 6 Cal L R 470 (472), *Ram Sukh Bhunjo v Brohmoy Das*

44 (1879) 6 Cal L R 470 (472), *Ram Sukh Bhunjo v Brohmoy Das*

45 (1879) 6 Cal L R 470 (472), *Ram Sukh Bhunjo v Brohmoy Das*

46 (1879) 6 Cal L R 470 (472), *Ram Sukh Bhunjo v Brohmoy Das*

47 (1879) 6 Cal L R 470 (472), *Ram Sukh Bhunjo v Brohmoy Das*

48 (1879) 6 Cal L R 470 (472), *Ram Sukh Bhunjo v Brohmoy Das*

49 (1879) 6 Cal L R 470 (472), *Ram Sukh Bhunjo v Brohmoy Das*

50 (1879) 6 Cal L R 470 (472), *Ram Sukh Bhunjo v Brohmoy Das*

51 (1879) 6 Cal L R 470 (472), *Ram Sukh Bhunjo v Brohmoy Das*

52 (1879) 6 Cal L R 470 (472), *Ram Sukh Bhunjo v Brohmoy Das*

Note 3

1 (1921) 75 T L R 731 (739) 75 K B 110 90 L J K B 973 125 L T 338 26 Com Cas 196 65 S J 431

2 (1814) 19 L J Ch 142 (151, 155) 1 Ph 329 8 Jur 347 81 R R 14

received from the plaintiff, many years before suit, a sum of money for which they agreed to pay 3 per cent interest, but of this only two payments had been made, both more than six years before suit, it was held by the Lord Chancellor, Lord Lyndhurst, that the case was merely one of a loan to the defendants, and that in the absence of special circumstances taking the case out of the statute of limitations the suit was barred. That decision was given in the year 1814. In the year 1817, in *Pott v Olegg*,³ the Court was of opinion that money in the hands of a banker was merely *money lent*, with the superadded obligation arising out of the custom of bankers to honour the customer's drafts. Chief Baron Pollock who delivered the judgment of the Court expressed, however considerable doubt whether there was not a special contract between a banker and customer as to the money deposited which distinguished it from the ordinary case of a loan of money. In the year 1818 *Foley v Hill*⁴ was confirmed on appeal by the House of Lords,⁵ the Lord Chancellor observing as follows —

Money when paid into a bank, ceases altogether to be the money of the principal it is then the money of the banker, who is bound to return an equivalent by paying a similar sum to that deposited with him when he is asked for it. The money paid into the banker's is money known by the principal to be placed there for the purpose of being under the control of the banker it is then the banker's money he is known to deal with it as his own he makes what profit of it he can which profit he retains to himself, paying back only the principal according to the custom of the bankers in some places, or the principal and a small rate of interest according to the custom of the bankers in other places. he is not bound to keep it or deal with it as the property of his principal but he is, of course, answerable for the amount because he has contracted having received that money, to repay to the principal when demanded a sum equivalent to that paid into his hands.

In this country, it was held in a number of cases purporting to follow the English cases of *Foley v Hill*⁵ and *Pott v Olegg*³ that moneys in the hands of a banker, for the payment of which no period was fixed, must be treated merely as money lent to be paid on demand and that a suit for the recovery of such moneys was governed by Article 59 and not by Article 60.⁶ A contrary view was

3 (1817) 73 R R 517 (599) 16 M & W 391 16 L J Ex 210

4 (1814) 1 Ph 399 13 L J Ch 182 8 Jur 347

5 (1818) 2 H L C 28 (36) 9 E R 1007 *Foley v Hills*

6 (1855) 1855 Pan Re No 95 *Chandu v Chanda Mal*

(1889) 13 Bom 338 (342) *Ichla Dhanj v Natha* (Case under the Act of 1871 when there was no Article corresponding to Article 60)

(1907) 29 All 773 (777) 4 All L Jour 678 190 All W N 263 *Dharam Das v Canga Devi*

(1909) 1 Ind Cas 712 (714) 32 Mad 68 *Official Assignee of Madras v Smith*

(1883) 1883 Bom P J 295, *Das Mahalashimi v Mogomal Dalalram*

Article 60 Note 3

taken in the cases noted below ⁷

In the year 1921, however, the question came up for decision in England in *Joachimson v Swiss Bank Corporation*,⁸ and it was held by the Court of Appeal after an exhaustive review of all the authorities, that in the relation of banker and customer, there are really quite a number of implied superadded obligations beyond the one specifically mentioned in *Foley v. Hill*⁵ and *Pott v Clegg*,³ and that among them there is an implied obligation on the part of the customer to actually make a demand as a condition precedent to the arising of the obligation on the part of the banker to repay the money. In other words, it was held that an actual demand was an implied term of the contract between a banker and customer.

The words "including money of a customer in the hands of his banker" which were newly added to the Article in 1908, are in accordance with the view held in *Joachimson's case*⁸ referred to above. Since, by virtue of the implied contract referred to above, the banker is to keep the money till asked for it, the transaction is really a deposit, as explained by the Privy Council in *Mahomed Akbar Khan's case*,^{9,10} and has consequently been properly included in this Article. The observations in the undermentioned cases⁹ that the word "deposit" has been used loosely, so as to include moneys in the hands of a banker, which in the strict sense would not be "deposits," do not seem to be sound. The observations in the undermentioned cases¹⁰ that the Article being a specific Article applicable to a particular class of loans should, where a case falls within both Article 59 and Article 60, be applied rather than Article 59, do not also seem to be correct. It cannot be that a case can fall both under this Article as well as under Article 59. Where a demand is an express term of the contract, Article 59 can have no application, and the word "deposit" necessarily involves such a term.

Under the present Act it is quite clear that a suit for the recovery of a deposit with a banker which is not for a fixed term, is governed by this Article and not by Article 59.¹¹

(1893) 1893 Bom P J 185 *Keshandas v Gopal*

[See also (1869) 1869 Pun Re No 17, *Dharam Dass v Dandgopal*]

7 (1893) 16 Cal 25 (29) *Ishur Chunder Bhaduri v Jiban Kumari Bibi* (Article 60 was applied)

(1893) 18 Mad 390 (393) 5 Ma L Jour 203 *Perundarayalar Ammal v Nannalayar Chetty* (16 Cal 25 Followed)

(1909) 15 C P L R 147 (150) *Bhagwati Prava I v Narlada Prava I*

8 (1921) 87 T L R 531 (539) 3 K B 110 90 L J K B 973 125 L T 838 26 Com Cas 196 65 S J 431

8, (1916) A I R 1936 P C 171 (179) 162 Ind Cas 454 17 Lah 557 63 Ind App 279 (P C) *Mahomed Akbar Khan v Illar Singh*

9 (1927) A I R 1927 Bom 362 (363) 102 Ind Cas 404 *Moti Gauri v Narayanji*

(1917) A I R 1917 Ma L 916 (918) 92 Ind Cas 905 39 Mad 1081, *Subramanyam Chettiar v Kathresan Chettiar* [Deposit has been used in this Section in a non legal sense]

10 (1892) 16 Cal 25 (2)

(1893) 19 Ik m 352

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11 (1915) A I R 1915

Ashen Tal

4. Interest accruing on a deposit, if a deposit. — Where *A* deposited money with *B* for interest and after having received back the principal sum, sued for the interest due thereon, it was held that the interest could not be regarded as a *deposit* and that the suit was not governed by Article 60. Article 63 was applied.¹

5. Onus of proof. — Where a question arises as to whether a transaction is a deposit or a loan, there is no presumption in law that it is a deposit.¹ Where *A* hands over money to *B* on the understanding that it is not a gift, it would be regarded in law as a loan, and if the plaintiff wants to make out that it is a deposit, the onus is on him to show that there were additional circumstances which converted the loan into a 'deposit'.² Where the plaintiff alleges a deposit and a deposit within limitation, then if the defendant wishes to defeat the claim on the ground of limitation, he must plead that on account of a particular demand made by the plaintiff the cause of action accrued, not on the date alleged in the plaint, but on some other previous date beyond limitation. If he does not *plead* it, he cannot, merely on the statement extracted from the plaintiff's witness in cross examination, decide that a demand was made beyond limitation.³

In the case of banker and customer, the law implies a demand being made as a term of the contract. See Note 3 *ante*. Where there fore in a transaction between a customer and banker the question arises as to whether such transaction is a deposit or a loan, the presumption has been held to be that it is a deposit and not a loan.⁴

(1919) A I R 1919 All 351 (353) 52 Ind Cas 25, *Lakshmiram Jani v Hari Ram Dube*

(1934) A I R 1934 Lah 42 (43) 15 Lah 242 151 Ind Cas 712, *Gulab Rai v Sandhi*

(1936) A I R 1936 Lah 718 (720) 165 Ind Cas 693 17 Lah 481 *Kantachandra Mukerji (Official Receiver) v Badri Das*

(1936) A I R 1936 Pat 539 (541) 165 Ind Cas 593 15 Pat 709 *Dalabuz v Inder Kumar*

(1936) 1936 Mad W N 948 (948), *Muthusamy Chettiar v Muthukumaranam Pillai*

(1938) A I R 1938 Mad 236 (239) *Ramasami Chettiar v Manicham Chettiar*.
[See also (1917) A I R 1917 Pat 273 (274) 40 Ind Cas 661, *Anagralal Ram v Sitaram Das*]

[But see (1920) A I R 1920 Low Bur 74 (76) 57 Ind Cas 908 10 L B R 161 *W U K A Chetty v Palanisappa* (After the expiry of the period of a fixed deposit the amount was held to continue as a *current deposit* and this was regarded as payable at once and Art. 57 applied)]

Note 4

1 (1881) 3 All 325 (332), *Yakundi Awar v Balkishen Das*

Note 5

1 (1928) A I R 1928 Mad 499 (499) 107 Ind Cas 290 *Murugiah Pillai v Pikkiriah Pillai*

2 (1934) A I R 1934 Bom 25 (29) 73 Ind Cas 975 *Govind Chintaman v Kachubhai Gulabchand*

3 (1934) A I R 1934 All 11 (12) 154 Ind Cas 415 *Mt Lugdi v Har Prasad*

4 (1917) A I R 1917 Mad 344 (346) 34 Ind Cas 347 *Narasimhan Chettiar v. Vellayappa Chettiar* (A I R 1915 Mad 807, *Relied upon*)

Article 60
Notes
6—7

6. "And includes."—The Article is not restricted to claims against bankers only¹ It is applicable to all kinds of deposits payable on demand, whether with bankers or with others, the only difference being, as has been seen already in Note 3, that in the case of a transaction with a banker, an actual demand will be implied as a term of the contract, while in other cases it must be shown having regard to circumstances that a demand is a term of the contract

Where a person has placed himself in the position of a banker with regard to a particular person, a suit for the recovery of moneys in the hands of the former will be regarded as a suit for the "money of a customer in the hands of his banker" within the meaning of this Article²

7. Agreement to pay on demand.—In order to bring a transaction under Article 60 it is necessary to show not only that there was a deposit but that the deposit was under an agreement that it shall be payable on demand¹ A deposit as security for the due performance of a certain act is not one payable on demand Article 120 will apply to such a case^{1a} Similarly, a deposit as earnest money for the purchase of certain property is not one repayable on demand and is not within this Article^{1b} Again, where A pays B money for the joint purchase of property, it cannot be said that there is any covenant to repay it on demand^{1c} The agreement to pay on demand need not be express but may be implied also² As

(1935) A I R 1935 Mad 784 (736) 157 Ind Cas 274, *Murugappa Chetty v Ramanathan Chetty* (Advances to Nattukottai Chetties who are Indian Bankers)

Note 6

- 1 (1921) A I R 1921 Cal 644 (647) 66 Ind Cas 752, *Jogendra Nath v Dinker Ram*
- 2 (1926) A I R 1926 Bom 168 (169) 93 Ind Cas 215, *Dhimanra Kumari v. Venischand Fattedchand*
- (1917) A I R 1917 Mad 916 (916) 32 Ind Cas 965 39 Mad 1081 *Subramanyam Chettiar v Kaduresan Chettiar* (Money in the hands of a trader, who is not a banker will be a deposit within Art 60 in the circumstances such as would make it the money of a customer where the depositor is a banker)
- (1936) A I R 1936 Pat 539 (541) 165 Ind Cas 593 15 Pat 700, *Dalabux v Inder Kumar*
- (1913) 19 Ind Cas 3 (4) (Mad), *Thangaswamy Thevar v Rajaram Naidu* (Person not a banker—Deposit with, is also a deposit)
- (1915) A I R 1915 All 78 (79) 37 All 292 23 Ind Cas 919, *Juggi Lal v Kishen Lal*
- (1927) A I R 1927 Bom 433 (431) 102 Ind Cas 145, *Hira Das v Dhanjibhai*

Note 7

- 1 (1928) A I R 1928 Mad 509 (511) 51 Mad 549 111 Ind Cas 210, *Immalu Immalu v Narayanan Nair*
- 1a (1895) 12 Cal 119 (11*), *Upendra Lal v Collector of Rayshahue*
- 1b (1929) A I R 1929 Cal 216 (217) 65 Cal 455 117 Ind Cas 700 *J C Gals laun v Vamooli Begum*
- 1c (1916) A I R 1916 Lah 472 (472) 33 Ind Cas 439 *Jetha Ram v Mehnga Lam* (It is not a deposit at all Defendant is acting as agent of plaintiff in such a case and so Art 60 will apply)
- 2 (1934) A I R 1934 Lah 42 (43) 15 Lah 242 151 Ind Cas 712, *Gulab Lal Gufir Mal v Sainthi*

has been seen already, it is implied in the relation of a banker and customer. In other cases it may be implied from the circumstances of each particular case.³

Article 60
Note 7

A deposit on condition that the depositor should return the same on the happening of a future contingent event is not an agreement to pay on demand within the meaning of this Article.⁴ Similarly, where money is payable at a specified time, i.e. at the expiry of a fixed period from the date of deposit, it cannot be said that it is payable on demand.⁵ The Article has no application to such cases, and the cause of action will arise on the expiry of the period so fixed.⁶ Where, however, the contract between the parties shows that after the period so fixed the deposit is to be regarded as a current one or as one payable on demand, a suit for the recovery thereof after the expiry of the period fixed will be governed by this Article.^{6a}

Where money is deposited with Nattukuttai Chetties on the *thavanas* system, the question whether this Article will apply will depend upon the question whether under the contract of the parties, the money is to be regarded as payable on demand. If it is to be so regarded, this Article will apply.⁷ If on the other hand, it is to be regarded as payable immediately after the period of *thavanas*, then Article 115 will apply.⁸ In the undermentioned case⁹ it was held that on the expiry of the *thavanas* the deposit must be taken to be

(1937) A I R 1937 Lah 81 (82) 171 Ind Cas 506, *Gurcharan Das v Ram Rakha Mal*

(1913) 19 Ind Cas 3 (5) (Mad) *Thangasamy Thevar v Rajaram Nasdu*

3 (1936) A I R 1936 Lah 587 (589) 164 Ind Cas 50 *Ram Rakha Mal v Har Narain Das Ram Chand* (Jama means deposit)

4 (1914) A I R 1914 Mad 4 (6) 22 Ind Cas 60 *Balakrishnudu v Aarayanaswamy Chetty*

5 (1931) A I R 1931 All 59 (62) 128 Ind Cas 772 *Bank of Upper India Ltd v Arif Husain*

6 See (1931) A I R 1931 All 59 (62) 128 Ind Cas 772 *Bank of Upper India Ltd v Arif Husain*

6a (1936) A I R 1936 Rang 338 (340) 164 Ind Cas 412 *I S Setti v R A Banerjee*

(1919) A I R 1919 Mad 525 (526) 47 Ind Cas 918 *Chellappa Chetty v Subramanya Chetty*

7 (1917) A I R 1917 Mad 1006 (1007) 42 Ind Cas 573 *Chellappa Chetty v Unnamalai Achi*

58 Ind Cas 639 *Aur*

Ind Cas 658 *J*

(It was held that the

deposit was on *thavanas* system the *thavanas* period for the calculation of interest and the amount was payable on demand))

8 (1917) A I R 1917 Mad 1006 (1007) 42 Ind Cas 573 *Chellappa Chetty v Unnamalai Achi*

(1919) A I R 1919 Mad 146 (149 150) 52 Ind Cas 457 *Unnamalai*

9 (1920) A I R 1920 Low Fur 74 (76) 57 Ind Cas 908 10 Low Fur 1 *M M A K Chetty v Palaniappa Chetty* (Put for to current deposits which is incorrect)

Article 60
Notes
7—10

held as a *current deposit*. In the case noted below¹⁰ it was held on the facts of that case that the deposit was made on the understanding that the money should remain with the Chetty until demand even after the expiry of the *tharavani*.

8. Demand, what is.—The demand must be an *unqualified* one for the *whole sum due*.¹ A request for money on account² or a request for the whole amount 'if it suits the convenience' to pay it or in any case for such money as can be spared,³ is not a 'demand' within the meaning of this Article.

9. Who should make a demand.—Where in the case of a Nattukottai Chetty the wife's *stridhan* was deposited with a firm in the name of the husband, a demand made by the latter would bind the wife, the real owner of the money, as, according to the proved custom of the community, he was to transact all business relating to it.¹

10. Starting point.—Time runs under the Article from the date when a *demand* is made for the amount due. The making of the demand is entirely dependent upon the volition of the plaintiff, and the period of limitation may be indefinitely prolonged by him by not making a demand.¹

Article 61

61. For money payable to the plaintiff for money paid for the defendant.	Three years.	When the money is paid.
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* Act of 1877, Article 61 and Act of 1871, Article 59

Same as above

Act of 1859

No corresponding provision

- 10 (1917) A I R 1917 Mad 1 (2) 49 Ind Cas 972 *Muthya Chettiar v Ramathan Chettiar*
(1935) A I R 1935 Mad 734 (737) 157 Ind Cas 274, *Murugappa Chetty v Pamanathan Chetty*

Note 8

- 1 (1932) A I R 1932 Mad 685 (687) 139 Ind Cas 104, *Subbiah Chetty v Visalakshi Achi*
2 (1921) A I R 1921 Cal 644 (646) 66 Ind Cas 752, *Joindra Nath v Dinkar Ram Krishna*
3 (1932) A I R 1932 Ma 1 693 (697) 139 Ind Cas 104 *Subbiah Chetty v Visalakshi Achi*.

Note 9

- 1 (1932) A I R 1932 Mad 685 (686) 139 Ind Cas 104, *Subbiah Chetty v Visalakshi Achi*.

Note 10

- 1 (1933) A I R 1933 Pat 701 (702) 147 Ind Cas 1094, *Baijnath Soti v Bishari Ram Sham Lal* (It was also observed that 'the suit may be filed without even making a demand'.)
(1926) A I R 1926 Mad 66 (68) 92 Ind Cas 405, *Naranyham v Narayana Lal*

Synopsis

Article 61
Note 1

1. Legislative changes.
2. Scope of the Article.
3. Plaintiff should have paid money.
 4. Deposit into Court, when amounts to a payment.
6. The payment must have been made for the defendant.
 6. A and B both liable to X — A paying off whole liability.
 7. A, interested in property, paying off charge liable to be paid by B.
 8. A depositing money with B to be paid to C — A paying it on failure of B to pay.
 9. A taking over liability of B and subsequently paying it.
 10. A liable to C — B not liable to C but to A — A paying off C.
 11. Suit for contribution by a co-owner in respect of repairs or improvement to common property.
 12. Co sharer incurring expenses for common benefit.
 13. Fine paid by A for misuse of land by B.
 14. Suit by receiver to recover money spent for estate.
 15. Suit by an agent against his principal.
16. "Defendant."
17. Claim for money charged on property.
18. Starting point.
19. Onus of proof.

Other Topics

Execution of bond or promissory note—Not payment	See Note 3, Pts 1, 2
Execution of usufructuary mortgage is payment	See Note 3 F N (1a)
Payment—Whether includes involuntary payment	See Note 3, Pts 4 to 6
— " " " " " "	See Note 7, Pt 1
" " " " " "	See Note 18, Pts 4, 5
" " " " " "	See Note 16
" " " " " "	See Note 18 F N (1)
Vendor paying off charge on property sold which vendee was bound to pay	See Note 7, Pt 3, Note 8, Pts 2, 3

1. Legislative changes. — *Act of 1859* — There was no corresponding provision in the Limitation Act of 1859. Suits of the nature governed by this Article were held to be governed by clause 16 of Section 1 of that Act providing a period of six years¹

Article 61 — Note 1

1 (1865) 5 Bom H C R O C 16 (22) *Umedchand Hulamchand v Sha Dulaladas Lalchand*

Article 60
Notes
7—10

held as a *current deposit*. In the case noted below¹⁰ it was held on the facts of that case that the deposit was made on the understanding that the money should remain with the Chetty until demand even after the expiry of the *tharana*.

8. Demand, what is.—The demand must be an *unqualified* one for the *whole sum due*¹. A request for money on account² or a request for the whole amount if it suits the convenience to pay it or in any case for such money as can be spared³ is not a 'demand' within the meaning of this Article.

9. Who should make a demand—Where in the case of a Nattukottai Chetty the wife's *stridhan* was deposited with a firm in the name of the husband, a demand made by the latter would bind the wife, the real owner of the money as according to the proved custom of the community he was to transact all business relating to it¹.

10 Starting point.—Time runs under the Article from the date when a *demand* is made for the amount due. The making of the demand is entirely dependent upon the volition of the plaintiff, and the period of limitation may be indefinitely prolonged by him by not making a demand¹.

Article 61

61. For money payable to the plaintiff for money paid for the defendant.	Three years.	When the money is paid
---------------------------------------------------------------------------------	--------------	------------------------

* Act of 1877, Article 61 and Act of 1871, Article 59

Same as above

Act of 1859

No corresponding provision

10 (1917) A I R 1917 Mad 1 (9) 43 Ind Cas 972 *Vuthia Chettiar v Ramathan Chettiar*

(1935) A I R 1935 Mad 734 (737) 157 Ind Cas 274, *Murugappa Chetty v Pananathan Chetty*

Note 8

1 (1937) A I R 1932 Mad 685 (687) 139 Ind Cas 164 *Subbiah Chetty v Vissalakshi Achi*

2 (1921) A I R 1921 Cal 644 (646) 66 Ind Cas 759 *Jogendra Nath v Dinkar Pam Krishna*

3 (1932) A I R 1932 Mad 685 (687) 139 Ind Cas 164 *Subbiah Chetty v Vissalakshi Achi*

Note 9

1 (1937) A I R 1932 Mad 685 (686) 139 Ind Cas 164 *Subbiah Chetty v Vissalakshi Achi*

Note 10

1 (1933) A I R 1933 Pat 701 (702) 147 Ind Cas 1094 *Bajjnath Soti v Bishari Ram Soti Lal* (It was also observed that the suit may be filed without even making a demand.)

(1936) A I R 1926 Mad 66 (69) 92 Ind Cas 405 *Narasimham v Narayana Rao*

Synopsis

Article 61
Note 1

1. Legislative changes.
2. Scope of the Article.
3. Plaintiff should have paid money.
 4. Deposit into Court, when amounts to a payment.
5. The payment must have been made for the defendant.
 6. A and B both liable to X — A paying off whole liability.
 7. A, interested in property, paying off charge liable to be paid by B.
 8. A depositing money with B to be paid to C — A paying it on failure of B to pay.
 9. A taking over liability of B and subsequently paying it.
 10. A liable to C — B not liable to C but to A — A paying off C.
 11. Suit for contribution by a co-owner in respect of repairs or improvement to common property.
 12. Co sharer incurring expenses for common benefit.
 13. Fine paid by A for misuse of land by B.
 14. Suit by receiver to recover money spent for estate.
 15. Suit by an agent against his principal.
16. "Defendant."
17. Claim for money charged on property.
18. Starting point.
19. Onus of proof.

Other Topics

Execution of bond or promissory note—Not payment	See Note 3, Pts 1, 2
Execution of usufructuary mortgage is payment	See Note 3 F N (1a)
Payment—Whether includes involuntary payment	See Note 3 Pts 4 to 6
— " " " " " "	See Note 7, Pt 1
— " " " " " "	See Note 18, Pts 4, 5
— " " " " " "	See Note 16
— " " " " " "	See Note 18 F N (1)
Vendor paying off charge on property sold which vendee was bound to pay	See Note 7, Pt 3, Note 8, Pts 2, 3

1. Legislative changes. — *Act of 1859* — There was no corresponding provision in the Limitation Act of 1859. Suits of the nature governed by this Article were held to be governed by clause 16 of Section 1 of that Act providing a period of six years¹

Article 61 — Note 1

1 (1868) 5 Bom II C R O C 16 (22), *Umaichand Hulamchand v. Sha Dulakadas Lalchand*

Article 61
Notes
2—3

2. Scope of the Article. — This Article is a *general* Article, governing all suits for the recovery of money payable to the plaintiff for money paid for the defendant. Articles 79, 81, 82, 83, 99, 100 and 107 *infra* may all be said to be *particular* Articles specifying various situations in which money is paid by the plaintiff for the defendant¹. On the principle of the maxim *generalia specialibus non derogant* applicable to the interpretation of statutes (see Preamble Note 24), where any of the said particular Articles apply, this general Article will not apply².

The question under what circumstances money paid by *A* can be recovered by him from *B* is a matter about which this Article or any other Article does not purport to lay down the law,³ the question is one of substantive law.

3. Plaintiff should have paid money. — This Article applies only when the plaintiff has made a "payment" of money. A payment means a payment in money or transfer of property which is equivalent to a payment of money^{1a}. The mere incurring of a pecuniary obligation in the shape of a bond or promissory note is not a "payment" within the meaning of this Article¹. Thus, the

- (1876) 1 Bom 305n (307) 1876 Bom P J 148 1 Ind Jur 183n, *Ramachandra v Soma* (Suits on implied contracts not otherwise specifically provided for by Act 14 of 1859 were held to fall within the general provision in cl 16 of S 1 of that Act, which prescribed the six years' limit)
 (1872) 9 Bom H O R 280 (281) *Naro Ganesh v Muhammad Khan* (Defendant employed plaintiff to do repairs—This created an implied contract to pay their value—Suit by plaintiff would fall under cl 18)
 (1864) 2 M H O R 21 (22), *Penuballi Subbaramareddi v Bhimaraju Ramayya*
 (1865) 3 Suth W R 134 (185), *Nabho Kristo Bhunj v Raj Bullubh Bhunj*

Note 2

- 1 (1903) 26 Mad 686 (718) 13 Mad L Jour 83 (T B) *Rajah of Visianagram v Rajah Setru Cherla*
 (1921) A I R 1921 Lah 335 (335) 67 Ind Cas 365, *Kunj Lal v Gulab Ram* (Between Arts 81 and 61, Art 81 applies)
 (1910) 5 Ind Cas 440 (442) 13 Oudh Cas 23, *Debi Sahai v Gauri Shankar*
 (1914) A I R 1914 Lah 407 (408) 1915 Pun Re No 23 26 Ind Cas 415, *Manghi Ram v Firm of Ram Saran Das* (Arts 83 & 61)
 (1921) A I R 1921 Lah 167 (167) 66 Ind Cas 900 *Kadari Pershad Chheda Lal v Har Dhagwan* (Of Arts 83 and 61 Art 83 was applied)
 (1927) A I R 1927 Lah 231 (232) 104 Ind Cas 418 *Abdul Qadir v Imam Din* (Do)
 2 See cases cited in Foot Note (1)
 See also (1923) A I R 1923 Mad 278 (279) 71 Ind Cas 466, *Kunhikuttilah v Kunhammad* (Art 61 and Art 85—Art 85 applies)
 3 (1910) 5 Ind Cas 440 (442) 13 Oudh Cas 23, *Debi Sahai v Gauri Shankar*

Note 3

- 1a (1829) 10 B & O 329 (346) 34 R R 432 (439) 5 M & Ry 327 8 L J (O 8) K B 217, *Power v Dutcher* (The giving of a security to pay is not equivalent to actual payment)
 (1904) 1904 Pun Re No 31 *Fitzgerald v Muni* (Execution of usufructuary mortgage is 'payment')
 See Note 5 to Art 81 and Note 12 to Art 83 *infra*
 1 See Note 5 to Art 81 and Note 12 to Art 83, *infra*

Article 61
Note 3

execution of a new bond to discharge a debt under an old bond will not amount to a payment²

The money must have been paid by the *plaintiff* and not by a *third person* against the will of the plaintiff³

There is a difference of opinion as to whether the word "payment" would include an *involuntary* payment as, for example, where money is recovered from a person under process of law. According to the High Court of Calcutta, where *A's* property is sold for a debt due by *A* and *B*, *A*, no doubt, has a claim against *B* for the amount paid in excess of his half share, but he cannot be said to have *paid* any amount for *B* in such a case⁴. In the undermentioned case⁵ the High Court of Madras also doubted whether in such a case there would be a "payment" within the meaning of this Article. In *Raja of Vizianagram v Raja Setru Cherla*⁶ however, a different view was taken by the Madras High Court. Mr Justice Bhashyam Ayyangar distinguished the Calcutta cases and the earlier Madras case, and observed as follows

'In my opinion this makes no difference either in regard to the plaintiff's right to claim contribution or even as to the application of Article 99 or Article 61 of the Second Schedule to Act 15 of 1877, in both of which the person bringing the suit is referred to as having 'paid' the amount sought to be recovered

I am unable to share in the doubt expressed in the above two cases as to the applicability of Article 99 or Article 61, as the case may be, to a case in which the amount was realised by sequestration or sale of the property of the person seeking contribution, and I cannot accede to the contention that, assuming that the plaintiff has no charge upon the defendant's share of the estate, the Article applicable to the case is Article 120 and not Article 61 or Article 99.'

Where *B*, while he was a trustee of a certain temple, took a certain sum for litigation expenses, and *A* on succeeding to *B* as trustee sued *B* to recover the said amount, it was held that this Article did not apply as it could not be said that *any money was paid* by the plaintiff for the defendant⁷. Similarly, this Article was held not to apply where

² (1879) 5 Cal 321 (324) 5 Ind Jur 135, *Sunkar Pershad v Goury Pershad*
(1927) 99 Ind Cas 271 (274) (Oudh), *Bhabhuti v Gur Das* (Mere execution of bond by plaintiff is not a payment)

³ (1914) A I R 1914 Cal 160 (162) 20 Ind Cas 24 (26), *Janki Koer v Domi Lal*

⁴ (1899) 26 Cal 241 (245, 246) *Kumar Nath Bhattacharyya v Nobi Kumar Bhattacharyya*

(1878) 4 Cal 529 (530, 531), *Fuckruddeen Mohamad Ahsan v Mohima Chunder*

(1921) A I R 1921 Cal 814 (815) 57 Ind Cas 684, *Gopenath Moonshi v Chandranath Moonshi*

(1914) A I R 1914 Cal 160 (162) 20 Ind Cas 24 (25, 26) *Janki Koer v Domi Lal (Quare)*

⁵ (1896) 20 Mad 23 (24), *Pattabiramayya Naidu v Ramayya*

⁶ (1903) 26 Mad 686 (693, 696) 13 Mad L Jour 83 (F B)

⁷ (1934) A I R 1934 Mad 542 (543) 152 Ind Cas 343, *Krishna Kudra v Sri Venkataramana Temple*

Article 61
Notes
2—3

2 Scops of the Article — This Article is a *general* Article, governing all suits for the recovery of money payable to the plaintiff for money paid for the defendant. Articles 79 81, 82, 83 99 100 and 107 *infra* may all be said to be *particular* Articles specifying various situations in which money is paid by the plaintiff for the defendant¹. On the principle of the maxim *generalia specialibus non derogant* applicable to the interpretation of statutes (see Preamble Note 24) where any of the said particular Articles apply, this general Article will not apply².

The question under what circumstances money paid by *A* can be recovered by him from *B* is a matter about which this Article or any other Article does not purport to lay down the law³ the question is one of substantive law.

3 Plaintiff should have paid money — This Article applies only when the plaintiff has made a payment of money. A payment means a payment in money or transfer of property which is equivalent to a payment of money^{1a}. The mere incurring of a pecuniary obligation in the shape of a bond or promissory note is not a payment within the meaning of this Article¹. Thus the

- (1876) 1 Bom 305n (307) 1876 Bom P J 148 1 Ind Jur 183n *Ramachandra v Soma* (Suits on implied contracts not otherwise specifically provided for by Act 14 of 1859 were held to fall within the general provision in cl 16 of S 1 of that Act which prescribed the six years limit)
 (1872) 9 Bom H O R 280 (281) *Naro Ganesh v Muhammad Khan* (Defendant employed plaintiff to do repairs—This created an implied contract to pay their value—Suit by plaintiff would fall under cl 16)
 (1864) 2 M H O R 21 (22) *Penuballi Subbaramareddi v Bhimaraju Ramayya*
 (1865) 3 Sath W R 134 (135) *Nabho Krisno Bhunj v Raj Bullubh Bhunj*

Notes 2

- 1 (1903) 26 Mad 886 (718) 13 Mad L Jour 83 (F B) *Rajah of Visanagram v Rajah Setru Cherala*
 (1921) A I R 1921 Lah 335 (335) 67 Ind Cas 365 *Kunj Lal v Gulab Ram* (Between Arts 81 and 61 Art 81 applies)
 (1910) 5 Ind Cas 440 (412) 13 Oudh Cas 23 *Debi Sahai v Gauri Shankar*
 (1914) A I R 1914 Lah 407 (403) 1915 Pan Re No 23 26 Ind Cas 415, *Manghi Ran v Firm of Ram Saran Das* (Arts 83 & 61)
 (1921) A I R 1921 Lah 167 (167) 66 Ind Cas 900 *Kadari Pershad Chhedi Lal v Har Bhagwan* (Of Arts 83 and 61 Art 83 was applied)
 (1927) A I R 1927 Lah 231 (232) 104 Ind Cas 418 *Abdul Qadir v Imam Din* (Do)
 2 See cases cited in Foot Note (1)
 See also (1923) A I R 1923 Mad 278 (279) 71 Ind Cas 466 *Kunhskuttilal v Aunhammad* (Art 61 and Art 85—Art 85 applies)
 3 (1910) 5 Ind Cas 440 (442) 13 Oudh Cas 23 *Debi Sahai v Gauri Shankar*

Note 3

- 1a (1829) 10 B & C 329 (346) 34 R R 432 (439) 5 M & Ry 327 8 L J (O S) K B 217 *Pouer v Butcher* (The giving of a security to pay is not equivalent to actual payment)
 (1904) 1904 Pan Re No 31 *Fitzgerald v Musa* (Execution of usufructuary mortgage is payment)
 See Note 5 to Art 81 and Note 12 to Art 83 *infra*
 1 See Note 5 to Art 81 and Note 12 to Art 83 *infra*

execution of a new bond to discharge a debt under an old bond will not amount to a payment²

The money must have been paid by the *plaintiff* and not by a *third person* against the will of the plaintiff³

There is a difference of opinion as to whether the word 'payment' would include an *involuntary* payment as, for example, where money is recovered from a person under process of law. According to the High Court of Calcutta, where *A's* property is sold for a debt due by *A* and *B*, *A*, no doubt, has a claim against *B* for the amount paid in excess of his half share, but he cannot be said to have *paid* any amount for *B* in such a case⁴. In the undermentioned case⁵ the High Court of Madras also doubted whether in such a case there would be a 'payment' within the meaning of this Article. In *Raja of Vizianagram v Raja Setru Cherla*,⁶ however, a different view was taken by the Madras High Court. Mr Justice Bhasbyam Ayyangar distinguished the Calcutta cases and the earlier Madras case, and observed as follows:

"In my opinion this makes no difference either in regard to the plaintiff's right to claim contribution or even as to the application of Article 99 or Article 61 of the Second Schedule to Act 15 of 1877, in both of which the person bringing the suit is referred to as having 'paid' the amount sought to be recovered.

I am unable to share in the doubt expressed in the above two cases as to the applicability of Article 99 or Article 61, as the case may be, to a case in which the amount was realised by sequestration or sale of the property of the person seeking contribution, and I cannot accede to the contention that, assuming that the plaintiff has no charge upon the defendant's share of the estate the Article applicable to the case is Article 120 and not Article 61 or Article 99."

Where *B*, while he was a trustee of a certain temple, took a certain sum for litigation expenses, and *A* on succeeding to *B* as trustee sued *B* to recover the said amount, it was held that this Article did not apply as it could not be said that *any money was paid* by the plaintiff for the defendant⁷. Similarly, this Article was held not to apply where

2 (1879) 5 Cal 321 (324). 5 Ind Jur 135, *Sunkar Pershad v Goury Pershad* (1927) 99 Ind Cas 271 (274) (Oudh), *Bhabhuti v Gur Das* (Mere execution of bond by plaintiff is not a payment)

3 (1914) A I R 1914 Cal 160 (162). 20 Ind Cas 24 (26), *Janaki Koer v Domi Lal*

4 (1899) 26 Cal 241 (245, 246), *Kumar Nath Bhattacharjee v Nobo Kumar Bhattacharjee*

(1878) 4 Cal 529 (530, 531), *Fuckrudddeen Mohamad Ahsan v Mohima Chunder*

(1921) A I R 1921 Cal 814 (815). 57 Ind Cas 851, *Gopendath Moonshi v Chandranath Moonshi*

(1914) A I R 1914 Cal 160 (162). 20 Ind Cas 24 (25, 26) *Janaki Koer v Domi Lal (Quare)*

5 (1896) 20 Mad 23 (24) *Pattabiramayya Naidu v Ramayya*

6 (1903) 26 Mad 686 (693, 696). 13 Mad L Jour 83 (F B)

7 (1934) A I R 1934 Mad 542 (543). 152 Ind Cas 345 *Krishna Kudra v Sri Venkataramana Temple*

Article 61
Notes
2—3

2 Scope of the Article — This Article is a *general* Article governing all suits for the recovery of money payable to the plaintiff for money paid for the defendant. Articles 79 81 82 83 99 100 and 107 *infra* may all be said to be *particular* Articles specifying various situations in which money is paid by the plaintiff for the defendant¹. On the principle of the maxim *generalia specialibus non derogant* applicable to the interpretation of statutes (see Preamble Note 24) where any of the said particular Articles apply, this general Article will not apply².

The question under what circumstances money paid by *A* can be recovered by him from *B* is a matter about which this Article or any other Article does not purport to lay down the law³ the question is one of substantive law.

3 Plaintiff should have paid money. — This Article applies only when the plaintiff has made a payment of money. A payment means a payment in money or transfer of property which is equivalent to a payment of money^{1a}. The mere incurring of a pecuniary obligation in the shape of a bond or promissory note is not a payment within the meaning of this Article¹. Thus the

(1876) " " " " " "

- (1872) 9 Bom H O R 280 (281) *Naro Ganesh v Muhammad Khan* (Defendant employed plaintiff to do repairs—This created an implied contract to pay their value—Suit by plaintiff would fall under cl 16)
 (1864) 2 M H O R 21 (22) *Penuballi Subbaranareddi v Bhimaraju Ramayya*
 (1865) 3 Sutb W R 134 (135) *Nabho Kristo Bhunj v Raj Bullubh Bhunj*

Note 2

- 1 (1903) 26 Mad 696 (719) 13 Mad L Jour 83 (F B) *Rajah of Visianagram v Rajah Setru Cherala*
 (1921) A I R 1921 Lah 935 (335) 67 Ind Cas 365 *Kunj Lal v Gulab Ram* (Between Arts 81 and 61 Art 81 applies)
 (1910) 5 Ind Cas 440 (442) 13 Oudh Cas 23 *Debi Sahas v Gauri Shankar*
 (1914) A I R 1914 Lah 407 (408) 1915 Pun Re No 23 26 Ind Cas 415 *Manghi Ram v Firm of Ram Saran Das* (Arts 83 & 61)
 (1921) A I R 1921 Lah 167 (167) 66 Ind Cas 900 *Kadaru Pershad Chhedi Lal v Har Bhogwan* (Of Arts 83 and 61 Art 83 was applied)
 (1927) A I R 1927 Lah 231 (232) 104 Ind Cas 419 *Abdul Qadir v Imam Din* (Do)

- 2 See cases cited in Foot Note (1)

See also (1923) A I R 1923 Mad 276 (279) 71 Ind Cas 466 *Kunhskuttiali v Kunhammad* (Art 61 and Art 85—Art 85 applies)

- 3 (1910) 5 Ind Cas 440 (442) 13 Oudh Cas 23 *Debi Sahas v Gauri Shankar*

Note 3

- 1a (1829) 10 B & O 329 (346) 34 R R 432 (439) 5 M & Ry 327 8 L J (O 6) 11 B 217 *Power v Butler* (The giving of a security to pay is not equivalent to actual payment)

(1904) 1901 Pun Re No 31 *Fitzgerald v Misa* (Execution of usufructuary mortgage is payment)

See Note 5 to Art 61 and Note 12 to Art 83 *infra*

- 1 See Note 5 to Art 61 and Note 12 to Art 83 *infra*

execution of a new bond to discharge a debt under an old bond will not amount to a payment ²

The money must have been paid by the *plaintiff* and not by a *third person* against the will of the plaintiff ³

There is a difference of opinion as to whether the word *payment* would include an *involuntary* payment as, for example, where money is recovered from a person under process of law. According to the High Court of Calcutta, where *A's* property is sold for a debt due by *A* and *B* *A* no doubt, has a claim against *B* for the amount paid in excess of his half share, but he cannot be said to have *paid* any amount for *B* in such a case ⁴. In the undermentioned case ⁵ the High Court of Madras also doubted whether in such a case there would be a payment within the meaning of this Article. In *Raja of Vizianagram v Raja Setru Cherla* ⁶ however a different view was taken by the Madras High Court. Mr Justice Bhashyam Ayyangar distinguished the Calcutta cases and the earlier Madras case, and observed as follows

In my opinion this makes no difference either in regard to the plaintiff's right to claim contribution or even as to the application of Article 99 or Article 61 of the Second Schedule to Act 15 of 1877, in both of which the person bringing the suit is referred to as having 'paid the amount sought to be recovered

I am unable to share in the doubt expressed in the above two cases as to the applicability of Article 99 or Article 61, as the case may be, to a case in which the amount was realised by sequestration or sale of the property of the person seeking contribution, and I cannot accede to the contention that, assuming that the plaintiff has no charge upon the defendant's share of the estate, the Article applicable to the case is Article 120 and not Article 61 or Article 99'

Where *B*, while he was a trustee of a certain temple, took a certain sum for litigation expenses, and *A* on succeeding to *B* as trustee sued *B* to recover the said amount, it was held that this Article did not apply as it could not be said that *any money was paid by the plaintiff* for the defendant ⁷. Similarly, this Article was held not to apply where

2 (1879) 5 Cal 321 (324) 5 Ind Jur 135, *Sunkar Pershad v Goury Pershad*
(1927) 99 Ind Cas 271 (274) (Oudh) *Bhabhuti v Gur Das* (Mere execution of bond by plaintiff is not a payment)

3 (1914) A I R 1914 Cal 160 (162) 20 Ind Cas 24 (26) *Janki Koer v Domai Lal*

4 (1899) 26 Cal 241 (245-246) *Kumar Nath Bhattacharjee v Noda Kumar Bhattacharjee*

(1878) 4 Cal 529 (530, 531), *Fuchruddeen Mohamad Ahsan v Molima Chunder*

(1921) A I R 1921 Cal 814 (815) 57 Ind Cas 88; *Gopernath Moonshi v Chandranath Moonshi*

(1914) A I R 1914 Cal 160 (162) 20 Ind Cas 24 (25-26) *Janki Koer v Domai Lal (Quare)*

5 (1896) 20 Mad 23 (24) *Pattabiramayya Naidu v Ramayya*

6 (1903) 26 Mad 686 (693-696) 13 Mad L Jour 83 (F B)

7 (1934) A I R 1934 Mad 542 (543) 152 Ind Cas 345, *Krisna Kudea v Sri Venkataramana Temple*

Article 61
Notes
2—3

2. **Scops of the Article.** — This Article is a *general* Article, governing all suits for the recovery of money payable to the plaintiff for money paid for the defendant. Articles 79, 81, 82, 83, 99, 100 and 107 *infra* may all be said to be *particular* Articles specifying various situations in which money is paid by the plaintiff for the defendant¹. On the principle of the maxim *generalia specialibus non derogant* applicable to the interpretation of statutes (see Preamble Note 24), where any of the said particular Articles apply, this general Article will not apply².

The question under what circumstances money paid by A can be recovered by him from B is a matter about which this Article or any other Article does not purport to lay down the law,³ the question is one of substantive law.

3. **Plaintiff should have paid money.** — This Article applies only when the plaintiff has made a "payment" of money. A payment means a payment in money or transfer of property which is equivalent to a payment of money^{1a}. The mere incurring of a pecuniary obligation in the shape of a bond or promissory note is not a "payment" within the meaning of this Article¹. Thus, the

- (1876) 1 Bom 305n (307) 1876 Bom P J 148 1 Ind Jur 188n, *Ramachandra v Soma* (Suits on implied contracts not otherwise specifically provided for by Act 14 of 1859 were held to fall within the general provision in cl 16 of S 1 of that Act, which prescribed the six years' limit)
(1872) 9 Bom H C R 280 (281), *Naro Ganesh v Muhammad Khan* (Defendant employed plaintiff to do repairs—This created an implied contract to pay their value—Suit by plaintiff would fall under cl 18)
(1864) 2 M H C R 21 (22), *Penuballi Subbaramareddi v Bhimaraju Ramayya*
(1865) 3 Suth W R 134 (135), *Nabho Kristo Bhunj v Raj Bullubh Bhunj*

Note 2

- 1 (1903) 26 Mad 686 (718) 13 Mad L Jour 83 (F B), *Rajah of Vizianagram v Rajah Setru Cherla*
(1921) A I R 1921 Lah 335 (335) 67 Ind Cas 365, *Kunj Lal v Gulab Ram* (Between Arts 81 and 61, Art 81 applies)
(1910) 5 Ind Cas 440 (442) 13 Oudh Cas 23, *Debi Sahai v Gauri Shankar*
(1914) A I R 1914 Lah 407 (408) 1915 Pun Re No 23 26 Ind Cas 415, *Manghi Ram v Firm of Ram Saran Das* (Arts 83 & 61)
(1921) A I R 1921 Lah 157 (167) 66 Ind Cas 900, *Kadari Pershad Ohhedai Lal v Har Bhagwan* (Of Arts 83 and 61, Art 83 was applied)
(1927) A I R 1927 Lah 231 (232) 104 Ind Cas 418, *Abdul Qadir v Imam Din* (Do)
2 See cases cited in Foot Note (1)
See also (1923) A I R 1923 Mad 278 (279) 71 Ind Cas 466, *Kunhikuttilali v Kunhammad* (Art 61 and Art 85—Art 85 applies)
3 (1910) 5 Ind Cas 440 (442) 13 Oudh Cas 23, *Debi Sahai v Gauri Shankar*

Note 3

- 1a (1829) 10 B & C 329 (346) 34 R R 432 (439) 5 M & Ry 327 8 L J (OS) K B 217, *Power v Butcher* (The giving of a security to pay is not equivalent to actual payment)
(1904) 1904 Pun Re No 31, *Fitzgerald v Musa* (Execution of usufructuary mortgage is "payment")
See Note 5 to Art 81 and Note 12 to Art 83, *infra*
1 See Note 5 to Art 81 and Note 12 to Art 83 *infra*.

Article 61
Note 3

execution of a new bond to discharge a debt under an old bond will not amount to a payment²

The money must have been paid by the *plaintiff* and not by a third person against the will of the plaintiff³

There is a difference of opinion as to whether the word "payment" would include an *involuntary* payment as, for example, where money is recovered from a person under process of law. According to the High Court of Calcutta, where *A's* property is sold for a debt due by *A* and *B*, *A*, no doubt, has a claim against *B* for the amount paid in excess of his half share, but he cannot be said to have paid any amount for *B* in such a case⁴. In the undermentioned case⁵ the High Court of Madras also doubted whether in such a case there would be a "payment" within the meaning of this Article. In *Raja of Vizianagram v Raja Setru Cherla*,⁶ however, a different view was taken by the Madras High Court. Mr Justice Bhasbyam Ayyangar distinguished the Calcutta cases and the earlier Madras case, and observed as follows

"In my opinion this makes no difference either in regard to the plaintiff's right to claim contribution or even as to the application of Article 99 or Article 61 of the Second Schedule to Act 15 of 1877, in both of which the person bringing the suit is referred to as having 'paid' the amount sought to be recovered . . . I am unable to share in the doubt expressed in the above two cases as to the applicability of Article 99 or Article 61, as the case may be, to a case in which the amount was realised by sequestration or sale of the property of the person seeking contribution, and I cannot accede to the contention that, assuming that the plaintiff has no charge upon the defendant's share of the estate, the Article applicable to the case is Article 120 and not Article 61 or Article 99"

Where *B*, while he was a trustee of a certain temple, took a certain sum for litigation expenses, and *A* on succeeding to *B* as trustee sued *B* to recover the said amount, it was held that this Article did not apply as it could not be said that any money was paid by the plaintiff for the defendant⁷. Similarly, this Article was held not to apply where

2 (1879) 5 Cal 321 (324) 5 Ind Jur 185, *Sunkar Pershad v Goury Pershad*
(1927) 99 Ind Cas 271 (274) (Oudh) *Bhabhuti v Gur Das* (Mere execution of bond by plaintiff is not a payment)

3 (1914) A I R 1914 Cal 160 (162) 20 Ind Cas 24 (26) *Janki Koer v Domi Lal*

4 (1899) 26 Cal 241 (245, 246), *Kumar Nath Bhattacharjee v Nobo Kumar Bhattacharjee*

(1878) 4 Cal 529 (530, 531), *Fuckruddeen Mohamad Ahsan v Mohima Chunder*

(1921) A I R 1921 Cal 814 (815) 57 Ind Cas 884, *Gopenath Moonshi v Chandranath Moonshi*

(1914) A I R 1914 Cal 160 (162) 20 Ind Cas 24 (25, 26), *Janki Koer v Domi Lal (Quare)*

5 (1896) 20 Mad 23 (24), *Pattabiramayya Naidu v Ramayya*

6 (1903) 26 Mad 656 (693, 694) 13 Mad L Jour 83 (F D)

7 (1934) A I R 1934 Mad 542 (543) 152 Ind Cas 345, *Krishna Kudra v Sri Venkataramana Temple*

Article 61
Notes
2—3

2. Scope of the Article. — This Article is a *general* Article, governing all suits for the recovery of money payable to the plaintiff for money paid for the defendant. Articles 79, 81, 82, 83, 99, 100 and 107 *infra* may all be said to be *particular* Articles specifying various situations in which money is paid by the plaintiff for the defendant¹. On the principle of the maxim *generalia specialibus non derogant* applicable to the interpretation of statutes (see Preamble Note 24), where any of the said particular Articles apply, this general Article will not apply².

The question under what circumstances money paid by *A* can be recovered by him from *B* is a matter about which this Article or any other Article does not purport to lay down the law,³ the question is one of substantive law.

3. Plaintiff should have paid money. — This Article applies only when the plaintiff has made a "payment" of money. A payment means a payment in money or transfer of property which is equivalent to a payment of money^{1a}. The mere incurring of a pecuniary obligation in the shape of a bond or promissory note is not a 'payment' within the meaning of this Article¹. Thus, the

(1876) " " " " " " " " " " " " " " " "

- (1872) 9 Bom H C R 280 (281) *Naro Ganesh v Muhammad Ahan* (Defendant employed plaintiff to do repairs—This created an implied contract to pay their value—Suit by plaintiff would fall under cl 16)
(1864) 2 M H C R 21 (22) *Penuballi Subbaramareddi v Bhimaraju Pamayya*
(1865) 8 Suth W R 134 (135), *Nabho Kristo Bhunj v Raj Bullubh Bhunj*

Note 2

- 1 (1903) 26 Mad 696 (718) 13 Mad L Jour 83 (F B) *Rajah of Visanagram v Rajah Setru Cherla*
(1921) A I R 1921 Lah 335 (335) 67 Ind Cas 365, *Kunj Lal v Gulab Ram* (Between Arts 81 and 61, Art 81 applies)
(1910) 5 Ind Cas 440 (442) 13 Oudh Cas 23, *Debi Sahai v Gauri Shankar*
(1914) A I R 1914 Lah 407 (408) 1915 Pun Re No 23 26 Ind Cas 415, *Manghi Ram v Firm of Ram Saran Das* (Arts 83 & 61)
(1921) A I R 1921 Lah 167 (167) 66 Ind Cas 900 *Kadara Pershad Chheda Lal v Har Bhagwan* (Of Arts 83 and 61 Art 83 was applied)
(1927) A I R 1927 Lah 231 (232) 104 Ind Cas 418, *Abdul Qadir v Imam Din* (Do)

2 See cases cited in Foot Note (1)

See also (1923) A I R 1923 Mad 278 (279) 71 Ind Cas 466, *Kunhikuttilal v Kunhammad* (Art 61 and Art 83—Art 83 applies)

3 (1910) 5 Ind Cas 440 (442) 13 Oudh Cas 23 *Debi Sahai v Gauri Shankar*

Note 3

- 1a (1829) 10 B & C 329 (346) 34 R R 432 (439) 5 M & Ry 327 8 L J (O S) K B 217, *Pouer v Butcher* (The giving of a security to pay is not equivalent to actual payment)

(1904) 1904 Pun Re No 31, *Pitgerald v Musa* (Execution of usufructuary mortgage is 'payment')

See Note 5 to Art 81 and Note 12 to Art 83 *infra*

1 See Note 5 to Art 81 and Note 12 to Art 83, *infra*

execution of a new bond to discharge a debt under an old bond will not amount to a payment.²

The money must have been paid by the *plaintiff* and not by a *third person* against the will of the plaintiff.³

There is a difference of opinion as to whether the word *payment* would include an *involuntary* payment as, for example, where money is recovered from a person under process of law. According to the High Court of Calcutta, where *A's* property is sold for a debt due by *A* and *B*, *A*, no doubt, has a claim against *B* for the amount paid in excess of his half share, but he cannot be said to have *paid* any amount for *B* in such a case.⁴ In the undermentioned case⁵ the High Court of Madras also doubted whether in such a case there would be a "payment" within the meaning of this Article. In *Raja of Vizianagram v Raja Setru Cherla*,⁶ however a different view was taken by the Madras High Court. Mr Justice Bhasbham Ayyangar distinguished the Calcutta cases and the earlier Madras case, and observed as follows

"In my opinion this makes no difference either in regard to the plaintiff's right to claim contribution or even as to the application of Article 99 or Article 61 of the Second Schedule to Act 15 of 1877, in both of which the person bringing the suit is referred to as having 'paid the amount sought to be recovered

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Where *B*, while he was a trustee of a certain temple, took a certain sum for litigation expenses, and *A* on succeeding to *B* as trustee sued *B* to recover the said amount, it was held that this Article did not apply as it could not be said that *any money was paid* by the plaintiff for the defendant.⁷ Similarly, this Article was held not to apply where

2 (1879) 5 Cal 321 (324) 5 Ind Jur 135, *Sunkar Pershad v Goury Pershad*
(1927) 99 Ind Cas 271 (274) (Oudh), *Bhabhuti v Gur Das* (Mere execution of bond by plaintiff is not a payment)

3 (1914) A I R 1914 Cal 160 (162) 20 Ind Cas 24 (26) *Janaki Koer v Doms Lal*

4 (1899) 26 Cal 241 (245, 246) *Kumar Nath Bhattacharjee v Nabo Kumar Bhattacharjee*

(1878) 4 Cal 529 (530, 531), *Fuckruddern Mohamad Ahsan v Mohima Chunder*

(1921) A I R 1921 Cal 814 (815) 57 Ind Cas 684, *Gopenath Moonshi v Chandranath Moonshi*

(1914) A I R 1914 Cal 160 (162) 20 Ind Cas 24 (25, 26) *Janaki Koer v Doms Lal (Quare)*

5 (1896) 20 Mad 23 (24) *Pattabiramayya Naidu v Ramayya*

6 (1903) 26 Mad 656 (693, 696) 13 Mad L Jour 83 (F B)

7 (1934) A I R 1934 Mad 542 (543) 152 Ind Cas 343, *Krishna Kudra v Sri Venkataramana Temple*

Article 61
Notes
2—3

2. Scope of the Article. — This Article is a *general* Article, governing all suits for the recovery of money payable to the plaintiff for money paid for the defendant. Articles 79, 81, 82, 83, 99, 100 and 107 *infra* may all be said to be *particular* Articles specifying various situations in which money is paid by the plaintiff for the defendant¹. On the principle of the maxim *generalia specialibus non derogant* applicable to the interpretation of statutes (see Preamble Note 24), where any of the said particular Articles apply, this general Article will not apply².

The question under what circumstances money paid by A can be recovered by him from B is a matter about which this Article or any other Article does not purport to lay down the law,³ the question is one of substantive law.

3. Plaintiff should have paid money. — This Article applies only when the plaintiff has made a "payment" of money. A payment means a payment in money or transfer of property which is equivalent to a payment of money^{1a}. The mere incurring of a pecuniary obligation in the shape of a bond or promissory note is not a "payment" within the meaning of this Article¹. Thus, the

- (1876) 1 Bom 305n (307) 1876 Bom P J 148 1 Ind Jur 183n, *Ramachandra v Soma* (Suits on implied contracts not otherwise specifically provided for by Act 14 of 1859, were held to fall within the general provision in cl 16 of S 1 of that Act, which prescribed the six years' limit)
(1872) 9 Bom H O R 260 (291), *Naro Ganesh v Muhammad Khan* (Defendant employed plaintiff to do repairs—This created an implied contract to pay their value—Suit by plaintiff would fall under cl 16)
(1864) 2 M H O R 21 (22), *Penuballi Subbaramareddi v Bhimaraju Ramayya*
(1865) 3 Suth W R 134 (185), *Nabho Kristo Bhunj v Raj Bullubh Bhunj*

Notes 2

- 1 (1903) 26 Mad 686 (718) 13 Mad L Jour 83 (F B), *Rajah of Visianagram v Rajah Setru Cherla*
(1921) A I R 1921 Lah 835 (835) 67 Ind Cas 365, *Kunj Lal v Gulab Ram* (Between Arts 81 and 61, Art 81 applies)
(1910) 5 Ind Cas 440 (442) 13 Oudh Cas 23, *Debi Sahai v Gauri Shankar*
(1914) A I R 1914 Lah 407 (409) 1915 Pun Re No 23 26 Ind Cas 415, *Manghi Ram v Firm of Ram Saran Das* (Arts 83 & 61)
(1921) A I R 1921 Lah 167 (167) 66 Ind Cas 900, *Kadari Pershad Chhedi Lal v Har Bhagwan* (Of Arts 83 and 61, Art 83 was applied)
(1927) A I R 1927 Lah 231 (232) 104 Ind Cas 418, *Abdul Qadir v Imam Din* (Do)

- 2 See cases cited in Foot Note (1)

See also (1923) A I R 1923 Mad 278 (279) 71 Ind Cas 466, *Kunhikuttiali v Kunhammad* (Art 61 and Art 85—Art 85 applies)

- 3 (1910) 5 Ind Cas 440 (442) 13 Oudh Cas 23, *Debi Sahai v Gauri Shankar*

Note 3

- 1a (1929) 10 B & O 329 (346) 34 R R 432 (439) 5 M & Ry 327 8 L J (O 8) K B 217, *Power v Butcher* (The giving of a security to pay is not equivalent to actual payment)

(1904) 1904 Pun Re No 31, *Fitzgerald v Mura* (Execution of usufructuary mortgage is "payment")

See Note 5 to Art 81 and Note 12 to Art 83, *infra*

- 1 See Note 5 to Art 81 and Note 12 to Art 83, *infra*.

execution of a new bond to discharge a debt under an old bond will not amount to a payment ²

The money must have been paid by the *plaintiff* and not by a *third person* against the will of the *plaintiff* ³

There is a difference of opinion as to whether the word 'payment' would include an *involuntary* payment as, for example, where money is recovered from a person under process of law. According to the High Court of Calcutta, where *A's* property is sold for a debt due by *A* and *B*, *A*, no doubt, has a claim against *B* for the amount paid in excess of his half share, but he cannot be said to have *paid* any amount for *B* in such a case ⁴. In the undermentioned case ⁵ the High Court of Madras also doubted whether in such a case there would be a 'payment' within the meaning of this Article. In *Raja of Vizianagram v Raja Setru Cherla*, ⁶ however, a different view was taken by the Madras High Court. Mr Justice Bhashyam Ayyangar distinguished the Calcutta cases and the earlier Madras case, and observed as follows

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² (1879) 5 Cal 321 (324) 5 Ind Jur 135, *Sunkar Pershad v Goury Pershad*
(1927) 99 Ind Cas 271 (274) (Oudh) *Bhabhuts v Gur Das* (Mere execution of bond by plaintiff is not a payment)

³ (1914) A I R 1914 Cal 160 (162) 20 Ind Cas 24 (26) *Janaki Koer v Domi Lal*

⁴ (1899) 26 Cal 241 (245, 246), *Kumar Nath Bhattacharjee v Nobi Kumar Bhattacharjee*

(1878) 4 Cal 509 (530, 531), *Fuchrudddeen Mohamad Ahsan v Mohima Chunder*

(1921) A I R 1921 Cal 814 (815) 57 Ind Cas 884, *Gopendath Moonshi v Chandranath Moonshi*

(1914) A I R 1914 Cal 160 (162) 20 Ind Cas 24 (25, 26) *Janaki Koer v Domi Lal (Quare)*

⁵ (1896) 20 Mad 23 (24) *Pattabiramayya Naidu v Ramayya*

⁶ (1903) 26 Mad 686 (693, 696) 13 Mad L Jour 83 (F B)

⁷ (1934) A I R 1934 Mad 542 (548) 152 Ind Cas 345, *Krishna Kudra v Sri Venkataramana Temple*

Article 61
Notes
2—3

2. Scope of the Article. — This Article is a *general* Article, governing all suits for the recovery of money payable to the plaintiff for money paid for the defendant. Articles 79, 81, 82, 83, 99, 100 and 107 *infra* may all be said to be *particular* Articles specifying various situations in which money is paid by the plaintiff for the defendant¹. On the principle of the maxim *generalia specialibus non derogant* applicable to the interpretation of statutes (see Preamble Note 24), where any of the said particular Articles apply, this general Article will not apply².

The question under what circumstances money paid by A can be recovered by him from B is a matter about which this Article or any other Article does not purport to lay down the law,³ the question is one of substantive law.

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- (1876) 1 Bom 305n (307) 1876 Bom P J 148 1 Ind Jur 183n *Ramachandra v Soma* (Suits on implied contracts not otherwise specifically provided for by Act 14 of 1859 were held to fall within the general provision in cl 16 of S 1 of that Act, which prescribed the six years limit)
(1872) 9 Bom H O R 280 (281) *Naro Ganesh v Muhammad Khan* (Defendant employed plaintiff to do repairs—This created an implied contract to pay their value—Suit by plaintiff would fall under cl 16)
(1864) 2 M H O R 21 (22), *Penuballi Subbaramareddi v Bhimaraju Ramayya*
(1865) 8 Suth W R 134 (185), *Nabho Kristo Bhunj v Raj Bullubh Bhunj*

Note 2

- 1 (1903) 26 Mad 686 (718) 13 Mad L Jour 83 (F B) *Rajah of Vizianagram v Rajah Setru Cheria*
(1921) A I R 1921 Lah 835 (335) 67 Ind Cas 365 *Kunj Lal v Gulab Ram* (Between Arts 81 and 61, Art 81 applies)
(1910) 5 Ind Cas 440 (442) 13 Oudh Cas 23, *Debi Sahai v Gauri Shankar*
(1914) A I R 1914 Lah 407 (409) 1915 Pun Re No 23 26 Ind Cas 415, *Manghi Ram v Firm of Ram Saran Das* (Arts 83 & 61)
(1921) A I R 1921 Lah 167 (167) 66 Ind Cas 900 *Kadari Pershad Chhedi Lal v Har Bhagwan* (Of Arts 83 and 61 Art 83 was applied)
(1927) A I R 1927 Lah 231 (232) 104 Ind Cas 418 *Abdul Qadir v Imam Din* (Do)

- 2 See cases cited in Foot Note (1)

See also (1923) A I R 1923 Mad 278 (279) 71 Ind Cas 466 *Kunhikuttilal v Aunhammad* (Art 61 and Art 85—Art 85 applies)

- 3 (1910) 5 Ind Cas 440 (442) 13 Oudh Cas 23 *Debi Sahai v Gauri Shankar*

Note 3

- 1a (1829) 10 B & C 329 (346) 34 R R 432 (439) 5 M & Ry 327 8 L J (O S) K B 217, *Pouet v Butler* (The giving of a security to pay is not equivalent to actual payment)

(1904) 1904 Pun Re No 31 *Fitzgerald v Musa* (Execution of usufructuary mortgage is 'payment')

See Note 5 to Art 81 and Note 12 to Art 83 *infra*

- 1 See Note 5 to Art 81 and Note 12 to Art 83 *infra*

execution of a new bond to discharge a debt under an old bond will not amount to a payment.²

The money must have been paid by the *plaintiff* and not by a *third person* against the will of the plaintiff.³

There is a difference of opinion as to whether the word *payment* would include an *involuntary* payment as, for example, where money is recovered from a person under process of law. According to the High Court of Calcutta, where *A*'s property is sold for a debt due by *A* and *B*, *A*, no doubt, has a claim against *B* for the amount paid in excess of his half share, but he cannot be said to have *paid* any amount for *B* in such a case.⁴ In the undermentioned case⁵ the High Court of Madras also doubted whether in such a case there would be a 'payment' within the meaning of this Article. In *Raja of Vizianagram v Raja Setru Cherla*,⁶ however, a different view was taken by the Madras High Court. Mr Justice Bhashyam Ayyangar distinguished the Calcutta cases and the earlier Madras case, and observed as follows

"In my opinion this makes no difference either in regard to the plaintiff's right to claim contribution or even as to the application of Article 99 or Article 61 of the Second Schedule to Act 15 of 1877, in both of which the person bringing the suit is referred to as having 'paid' the amount sought to be recovered

I am unable to share in the doubt expressed in the above two cases as to the applicability of Article 99 or Article 61, as the case may be, to a case in which the amount was realised by sequestration or sale of the property of the person seeking contribution, and I cannot accede to the contention that, assuming that the plaintiff has no charge upon the defendant's share of the estate, the Article applicable to the case is Article 120 and not Article 61 or Article 99."

Where *B*, while he was a trustee of a certain temple, took a certain sum for litigation expenses, and *A* on succeeding to *B* as trustee sued *B* to recover the said amount, it was held that this Article did not apply as it could not be said that *any money was paid* by the plaintiff for the defendant.⁷ Similarly, this Article was held not to apply where

² (1879) 5 Cal 321 (324) 5 Ind Jur 135, *Sunfar Pershad v Goury Pershad*
(1927) 99 Ind Cas 271 (274) (Oudh) *Bhabhuti v Gur Das* (Mere execution of bond by plaintiff is not a payment)

³ (1914) A I R 1914 Cal 100 (102) 20 Ind Cas 24 (26) *Janaki Koer v Domai Lal*

⁴ (1899) 26 Cal 241 (245, 246) *Kumar Nath Bhattacharjee v Nobi Kumar Bhattacharjee*

(1878) 4 Cal 529 (530, 531), *Fuckruddeen Mohamad Ahsan v Mohima Chunder*

(1921) A I R 1921 Cal 614 (615) 57 Ind Cas 884, *Gopenath Moonshi v Chandranath Moonshi*

(1914) A I R 1914 Cal 100 (102) 20 Ind Cas 24 (25, 26), *Janaki Koer v Domai Lal (Quare)*

⁵ (1896) 26 Mad 23 (24) *Pattabiramayya Naidu v Ramayya*

⁶ (1903) 26 Mad 686 (693, 696) 13 Mad L Jour 63 (F B)

⁷ (1934) A I R 1934 Mad 542 (543) 152 Ind Cas 745, *Krushna Kudra v Sri Venkataramana Temple*

Article 61
Notes
2—3

2. Scope of the Article. — This Article is a *general* Article, governing all suits for the recovery of money payable to the plaintiff for money paid for the defendant. Articles 79, 81, 82, 83, 99, 100 and 107 *infra* may all be said to be *particular* Articles specifying various situations in which money is paid by the plaintiff for the defendant¹. On the principle of the maxim *generalia specialibus non derogant* applicable to the interpretation of statutes (see Preamble Note 24), where any of the said particular Articles apply, this general Article will not apply².

The question under what circumstances money paid by *A* can be recovered by him from *B* is a matter about which this Article or any other Article does not purport to lay down the law,³ the question is one of substantive law.

3. Plaintiff should have paid money. — This Article applies only when the plaintiff has made a "payment" of money. A payment means a payment in money or transfer of property which is equivalent to a payment of money^{1a}. The mere incurring of a pecuniary obligation in the shape of a bond or promissory note is not a 'payment' within the meaning of this Article¹. Thus, the

(1876) 12 M H C R 207 (208) 13 M H C R 207 (208) 14 M H C R 207 (208)

(1872) 9 Bom H C R 260 (281) *Naro Ganesh v Muhammad Khan* (Defendant employed plaintiff to do repairs—This created an implied contract to pay their value—Suit by plaintiff would fall under cl 18)

(1864) 2 M H C R 21 (22), *Penuballi Subbaramareddi v Bhimaraju Ramayya*

(1865) 3 Suth W R 134 (135) *Nabho Kristo Bhunj v Raj Bullubh Bhunj*

Note 2

1 (1903) 26 Mad 686 (718) 13 Mad L Jour 83 (F B) *Rajah of Vizianagram v Rajah Setru Chelia*

(1921) A I R 1921 Lah 335 (335) 67 Ind Cas 365, *Kunj Lal v Gulab Ram* (Between Arts 81 and 61, Art 81 applies)

(1910) 5 Ind Cas 440 (442) 13 Oudh Cas 23 *Debi Sahai v Gauri Shankar*

(1914) A I R 1914 Lah 407 (403) 1915 Pun Re No 23 26 Ind Cas 415, *Manghi Ram v Firm of Ram Saran Das* (Arts 83 & 61)

(1921) A I R 1921 Lah 167 (167) 66 Ind Cas 900 *Kadari Pershad Chhedai Lal v Har Bhagwan* (Of Arts 83 and 61 Art 83 was applied)

(1927) A I R 1927 Lah 231 (232) 104 Ind Cas 418 *Abdul Qadir v Imam Din* (Do)

2 See cases cited in Foot Note (1)

See also (1923) A I R 1923 Mad 278 (379) 71 Ind Cas 466, *Kunhikuthali v Kunhammad* (Art 61 and Art 85—Art 85 applies)

3 (1910) 5 Ind Cas 440 (442) 13 Oudh Cas 23 *Debi Sahai v Gauri Shankar*

Note 3

1a (1820) 10 B & O 329 (346) 34 R R 432 (439) 5 M & Ry 327 8 L J (OS) B 217, *Powce v Dutcher* (The giving of a security to pay is not equivalent to actual payment)

(1904) 1904 Pun Re No 31, *Fitzgerald v Musa* (Execution of usufructuary mortgage is 'payment')

See Note 5 to Art 61 and Note 12 to Art 83 *infra*

1 See Note 5 to Art 81 and Note 12 to Art 83, *infra*

execution of a new bond to discharge a debt under an old bond will not amount to a payment²

The money must have been paid by the *plaintiff* and not by a *third person* against the will of the *plaintiff*³

There is a difference of opinion as to whether the word 'payment' would include an *involuntary* payment as, for example, where money is recovered from a person under process of law. According to the High Court of Calcutta, where *A's* property is sold for a debt due by *A* and *B*, *A*, no doubt, has a claim against *B* for the amount paid in excess of his half share, but he cannot be said to have *paid* any amount for *B* in such a case⁴. In the undermentioned case⁵ the High Court of Madras also doubted whether in such a case there would be a "payment" within the meaning of this Article. In *Raja of Vizianagram v Raja Setru Cherla*,⁶ however, a different view was taken by the Madras High Court. Mr Justice Bhashyam Ayyangar distinguished the Calcutta cases and the earlier Madras case, and observed as follows

"In my opinion this makes no difference either in regard to the plaintiff's right to claim contribution or even as to the application of Article 99 or Article 61 of the Second Schedule to Act 15 of 1877, in both of which the person bringing the suit is referred to as having 'paid' the amount sought to be recovered

I am unable to share in the doubt expressed in the above two cases as to the applicability of Article 99 or Article 61, as the case may be, to a case in which the amount was realised by sequestration or sale of the property of the person seeking contribution, and I cannot accede to the contention that, assuming that the plaintiff has no charge upon the defendant's share of the estate, the Article applicable to the case is Article 120 and not Article 61 or Article 99"

Where *B*, while he was a trustee of a certain temple, took a certain sum for litigation expenses, and *A* on succeeding to *B* as trustee sued *B* to recover the said amount, it was held that this Article did not apply as it could not be said that *any money was paid* by the plaintiff for the defendant⁷. Similarly, this Article was held not to apply where

2 (1879) 5 Cal 321 (324) 5 Ind Jur 135, *Sunkar Pershad v Goury Pershad*
(1927) 99 Ind Cas 271 (274) (Oudh) *Bhabhuti v Gur Das* (Mere execution of bond by plaintiff is not a payment)

3 (1914) A I R 1914 Cal 160 (162) 20 Ind Cas 24 (26) *Janki Koer v Domi Lal*

4 (1899) 26 Cal 241 (245, 246) *Kumar Nath Bhattacharjee v Nobo Kumar Bhattacharjee*

(1878) 4 Cal 529 (530, 531), *Fuckruddien Mohamad Ahsan v Mohima Chunder*

(1921) A I R 1921 Cal 814 (815) 57 Ind Cas 684, *Gopnath Moonshee v Chandranath Moonshee*

(1914) A I R 1914 Cal 160 (162) 20 Ind Cas 24 (25, 26) *Janki Koer v Domi Lal (Quare)*

5 (1896) 20 Mad 23 (24) *Pattabiramayya Naidu v Ramayya*

6 (1903) 26 Mad 686 (693, 696) 13 Mad L Jour 83 (F B)

7 (1934) A I R 1934 Mad 542 (543) 152 Ind Cas 345, *Krishna Kudra v Sri Venkataramana Temple*

Article 61
Notes
2—3

2. Scope of the Article. — This Article is a *general* Article, governing all suits for the recovery of money payable to the plaintiff for money paid for the defendant. Articles 79, 81, 82, 83, 99, 100 and 107 *infra* may all be said to be *particular* Articles specifying various situations in which money is paid by the plaintiff for the defendant¹. On the principle of the maxim *generalia specialibus non derogant* applicable to the interpretation of statutes (see Preamble Note 24), where any of the said particular Articles apply, this general Article will not apply².

The question under what circumstances money paid by *A* can be recovered by him from *B* is a matter about which this Article or any other Article does not purport to lay down the law,³ the question is one of substantive law.

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(1904) 1 D. — 208. (1904) 2 D. — 208. (1904) 3 D. — 208.

(1872) 9 Bom H O R 280 (281), *Naro Ganesh v Muhammad Khan* (Defendant employed plaintiff to do repairs—This created an implied contract to pay their value—Suit by plaintiff would fall under cl 15.)

(1864) 2 M H O R 21 (22), *Penuballi Subbaramareddi v Bhimaraju Ramayya*

(1865) 3 Suth W R 134 (135), *Nabho Kristo Bhunj v Raj Bullubh Bhunj*

Note 2

1 (1903) 26 Mad 686 (718) 13 Mad L Jour 83 (F B) *Rajah of Vizianagram v Rajah Setru Cherla*

(1921) A I R 1921 Lah 335 (335) 67 Ind Cas 365, *Kunj Lal v Gulab Ram* (Between Arts 81 and 61, Art 81 applies)

(1910) 5 Ind Cas 440 (442) 13 Oudh Cas 23, *Debi Sahas v Gauri Shankar*

(1914) A I R 1914 Lah 407 (403) 1915 Pun Re No 23 25 Ind Cas 415, *Manghi Ram v Firm of Ram Saran Das* (Arts 83 & 61)

(1921) A I R 1921 Lah 167 (167) 66 Ind Cas 900, *Kadari Pershad Chhedi Lal v Har Bhagwan* (Of Arts 83 and 61, Art 83 was applied)

(1927) A I R 1927 Lah 231 (232) 104 Ind Cas 418 *Abdul Qadir v Imam Din* (Do)

2 See cases cited in Foot Note (1)

See also (1923) A I R 1923 Mad 278 (279) 71 Ind Cas 466, *Kunkukuttal v Kunhammad* (Art 61 and Art 65—Art 85 applies)

3 (1910) 5 Ind Cas 440 (442) 13 Oudh Cas 23, *Debi Sahas v Gauri Shankar*

Note 3

1a (1829) 10 B & O 329 (346) 34 R R 433 (439) 5 M & Ry 327 8 L J (O S) 11 B 217, *Power v Bulcher* (The giving of a security to pay is not equivalent to actual payment)

(1904) 1904 Pun Re No 31, *Fitzgerald v Musa* (Execution of usufructuary mortgage is "payment")

See Note 5 to Art 81 and Note 12 to Art 83 *infra*

1 See Note 5 to Art 81 and Note 12 to Art 83, *infra*.

execution of a new bond to discharge a debt under an old bond will not amount to a payment²

The money must have been paid by the *plaintiff* and not by a *third person* against the will of the plaintiff³

There is a difference of opinion as to whether the word 'payment' would include an *involuntary* payment as, for example, where money is recovered from a person under process of law. According to the High Court of Calcutta, where *A's* property is sold for a debt due by *A* and *B*, *A*, no doubt, has a claim against *B* for the amount paid in excess of his half share, but he cannot be said to have *paid* any amount for *B* in such a case⁴. In the undermentioned case⁵ the High Court of Madras also doubted whether in such a case there would be a 'payment' within the meaning of this Article. In *Raja of Vizianagram v Raja Setru Cherla*⁶ however, a different view was taken by the Madras High Court. Mr Justice Bhashyam Ayyangar distinguished the Calcutta cases and the earlier Madras case and observed as follows

'In my opinion this makes no difference either in regard to the plaintiff's right to claim contribution or even as to the application of Article 99 or Article 61 of the Second Schedule to Act 15 of 1877, in both of which the person bringing the suit is referred to as having 'paid' the amount sought to be recovered

I am unable to share in the doubt expressed in the above two cases as to the applicability of Article 99 or Article 61, as the case may be, to a case in which the amount was realised by sequestration or sale of the property of the person seeking contribution, and I cannot accede to the contention that, assuming that the plaintiff has no charge upon the defendant's share of the estate, the Article applicable to the case is Article 120 and not Article 61 or Article 99'

Where *B*, while he was a trustee of a certain temple took a certain sum for litigation expenses, and *A* on succeeding to *B* as trustee sued *B* to recover the said amount, it was held that this Article did not apply as it could not be said that *any money was paid* by the plaintiff for the defendant⁷. Similarly, this Article was held not to apply where

2 (1879) 5 Cal 321 (324) 5 Ind Jur 135, *Sunkar Pershad v Goury Pershad*
(1927) 99 Ind Cas 271 (274) (Oudh) *Bhabhuti v Gur Das* (Where execution of bond by plaintiff is not a payment)

3 (1914) A I R 1914 Cal 160 (162) 20 Ind Cas 24 (26), *Janaki Koer v Domai Lal*

4 (1899) 26 Cal 241 (245, 246), *Kumar Nath Bhattacharyya v Nobi Kumar Bhattacharyya*

(1876) 4 Cal 529 (530, 531), *Fuckruddeen Mohamad Ahsan v Mohiama Chunder*

(1921) A I R 1921 Cal 614 (615) 57 Ind Cas 684, *Gopenath Moonshi v Chandranath Moonshi*

(1914) A I R 1914 Cal 160 (162) 20 Ind Cas 24 (25, 26), *Janaki Koer v Domai Lal (Quare)*

5 (1896) 20 Mad 23 (24), *Pattabiramayya Naidu v Ramayya*

6 (1903) 26 Mad 686 (693, 695) 13 Mad L Jour 63 (F B)

7 (1934) A I R 1934 Mad 542 (543) 152 Ind Cas 345 *Krishna Kudra v Sri Venkataramana Temple*

Article 61
Notes
3-5

A obtained a decree for contribution against B and C, and on failing to recover from C his share of the amount, sued B under the third paragraph of Section 43 of the Contract Act to recover the same.⁸

4. **Deposit into Court, when amounts to a payment.**—According to the High Court of Calcutta and the Chief Court of Oudh, a deposit of money into Court for the purpose of being paid to a particular person will amount to a payment within the meaning of this Article, only when such deposit is accepted by the Court,¹ the reason given being that so long as it is not accepted by the Court, it is open to the plaintiff to withdraw the deposit.² The High Court of Madras has dissented from this view and has held that the Court gets dominion over the money as soon as the deposit is made, and that therefore the deposit itself is a payment.³

5. The payment must have been made for the defendant. — Under the substantive law, where *A* makes a payment to *X*, he can seek to recover the same from *B* if

- 1 *B* has contracted to pay it to *A*, or
- 2 *B* is bound by law to make the payment to *X*, and *A* being interested in such payment, has paid it (see Section 69 of the Contract Act), or
- 3 *A* has made the payment for *B* not intending to do so gratuitously, and *B* has enjoyed the benefit thereof (see Section 70 of the Contract Act), or
- 4 *A* has made the payment under any other circumstances which would entitle him in justice and equity to recover the amount ¹

In the *first* case, a suit by *A* against *B* for the recovery of the amount so paid would be governed by the specific Articles which deal

8 (1900) 1900 Pun L R 149 (151-152) *Mul Chand v Narayan Das*

Note 4

- 1 (1917) A I R 1917 Cal 203 (204) 36 Ind Cas 392, *Ananda Mohan Roy v Maniruddin Muhammad*
 (1932) A I R 1932 Oudh 222 (223, 224) 139 Ind Cas 137 8 Luck 79 *Murli dhar v Naurihal Singh*
 (1918) A I R 1918 Oudh 303 (303) 48 Ind Cas 836 *Iqbal Narain v Suraj Narain*
 [See (1928) A I R 1928 Cal 861 (363), *Gahar ill Houladar v Abdul Onahab Sikdar*]
 2 (1917) A I R 1917 Cal 203 (204) 36 Ind Cas 392, *Ananda Mohan Roy v Maniruddin Muhammad*
 3 (1936) A I R 1936 Mad 782 (783 784) *Meghajarnam Naidu v Muhammad Mudeen Sahib*

Note 5

- 1 (1893) 21 Cal 142 (148, 149) 20 Ind App 160 6 Sar 366 17 Ind Jur 576
(P C), *Dakhina Mohun Fey v Saroda Mohun Fey*
(1926) ...

[See also (1931) A I R 1931 Pat 391 (398) 10 Pat 528 131 Ind Cas 193, *Dhagwati Saran Singh v Maipyan Murat Mati Kuer*]

with the recovery of money under contracts, e.g. Articles 57, 59, 65, 115 and 116. In the second and fourth cases such a suit may or may not fall within this Article. It would fall within this Article if the payment has been made by *A* for *B* and not otherwise. In the third case such a suit will fall within this Article, as under Section 70 of the Contract Act itself, *I* can recover only if he has paid the money for *B*.

The question whether a payment by *A* to *X* was made for *B* is one of fact which will depend upon the circumstances of each case.² It is, however, essential that *B* should himself have been liable to make the payment to *X*. Where therefore *B* is not liable to pay any amount to *X*, a payment by *I* to *X* cannot be considered to be one made for *B* even though, as between *A* and *B*, *B* may be liable to reimburse *A* in respect of such payment. (See Notes 6 to 13 *infra*.) A contrary view, namely that for the applicability of the Article it is not necessary that the defendant should be under a legal liability to pay the amount to the person to whom the plaintiff paid the money, was held in the undermentioned case.^{3a} This view has however not been followed in the generality of cases—see Notes 6 to 13 *infra*.

But the mere fact that *B* or his property may have been liable to pay *X* on the date on which *A* paid the amount to *X* will not necessarily show that the payment was made for *B*. Thus where *A*, being in possession of certain property adjudged to him by a competent Court, pays off a charge on the property, but it is subsequently decided on appeal that *B* is the owner of the property and not *A*, it cannot be said that, when *A* made the payment, he made it for *B*, though the property of *B* may be liable to meet the charge.³ Similarly, where *A* alleging himself to be the lawful heir of a deceased person paid off the debts due by the latter, but it was subsequently found that *B* and not *A* was the true heir, it was held that the payment of the debts by *A* could not be said to be for *B* and that therefore this Article did not apply.⁴ A contrary view has however, been taken in the undermentioned cases.⁵ In the first

2 (1894) 18 Mad 88 (92) 4 Mad L Jour 205, *Damodara Mudaliar v Secretary of State*

(1886) 14 Cal 256 (275), *Doya Narain Tewary v Secretary of State* (*A* purchasing stores for Government and paying for the same must be taken to have paid for the Government.)

2a (1910) 34 Mad 167 (172-178) 7 Ind Cas 399 *Kandasamy Pillai v Arayambal*

3 (1903) 6 Oudh Cis 212 (214) *Ganga Singh v Sangram Lal* (It was observed in this case that S. 70 did not apply because the payment was for himself and not for defendant. It was also observed that if S. 69 applied Art. 61 would apply—It is submitted that even if S. 69 applied, the payment not being for the defendant Art. 61 would not apply. This aspect was not considered.)

(1905) 3 Cal L Jour 93 (94) *Matangini Debby v Prasannamoyee Debby*

4 (1931) A I R 1931 Mad 207 (211-219) 53 Mad 92 129 Ind Cas 463 *Sardaribai v Pattabhiramavva*

5 (1931) A I R 1931 Bom 39 (40) 125 Ind Cas 90, *Lakshminath Bhatia v Lakshmi Sasthi* (Cf. 11 All 47 (P.C.) 24 All 45 at 123 All (Cis).)

Article 61
Notes
5—6

of these cases, *B* passed a sale deed in favour of *A* in respect of a certain house on which there was a mortgage in favour of *X*. *X* sued both *A* and *B* on his mortgage and obtained a decree. *A* paid the amounts. It was subsequently held in a suit by *B* against *A* that the sale in favour of *A* was a sham one. *A* thereupon sued *B* for the recovery of amount paid by him to *X*, and it was held that Article 61 applied to the case. The question whether the payment by *A* to *X* was for *B* or not was not adverted to. It is submitted that the decision is not correct. As between *A* and *B*, *A* himself had to meet the mortgage liability as the purchaser of the property, and his payment, when made, could only have been for himself and not for *B* within the meaning of this Article. In the second case, *X* died leaving his widow and a son by another wife. The son subsequently died and thereupon the widow, though not his heir, took possession of the property and denied the right of *C* who claimed the property as the heir. *C*'s claim was ultimately decreed, but in the meanwhile the widow paid off certain debts due by her husband. After *C*'s claim was allowed she sued *C* for reimbursement. It was held that Article 61 applied. It seems to have been assumed that the payment by the widow was for *C*. It is submitted that the decision is not correct. When she paid the debts, the widow was paying for herself and not for *C* whose title she was denying.

6. A and B both liable to X—A paying off whole liability.—

Where *A* and *B* are both liable, whether personally or in respect of their property,¹ to meet a particular liability to make a payment to *X* and *A* pays off the whole amount, it has been held that *A*'s payment, so far as it is in excess of his share of the liability, must be considered to have been made for *B*. Thus, where *A* drew a hundi for Rs. 5000 and *B* endorsed it to *X* who paid the amount, *A* and *B* each taking half thereof, and *A* subsequently was compelled to pay the whole to *X*, it was held that *A*'s payment, in respect of the Rs. 2500 taken by *B*, was for *B*.² Similarly, where one of several partners pays off a common liability, his payment must, in so far as it is in excess of his share, be held to be for other partners.³ So also where money is paid by one of two joint owners of a tenure to save an estate from sale for arrears of revenue and rent, the payment in excess of his share will be considered to be for the other.⁴ See also

(1928) A I R 1928 Mad 820 (823) 51 Mad 815 110 Ind Cas 613, *Muthusami Karundan v Ponnai Kaundan*

Note 6

1 (1878) 4 Cal 369 (373) *Yethooranath Chattopadhyay v Aristo Kumar Ghose*
 See also the Illustration to S. 69 of the Contract Act

2 (1903) 5 Bom L R 725 (727) *Hajee Hasan v Noor Mahomed*

3 (1924) A I R 1924 Lah 112 (114) 72 Ind Cas 385 *Walait Ram v Ilam Kushen* (One of several partners paying off common liability)

4 (1893) 25 Cal 844 (851) 25 Ind App 95 2 Cal W N 402 7 Btr 291 (P C), *Sukhamoni Choudharani v Ishan Chunder Roy*

(1926) A I R 1926 Cal 577 (578) 91 Ind Cas 159, *Registered Jessore Loan Co v Gopal Hari Ghose*

the undermentioned cases⁵

Article 61
Notes
6-7

7. A, interested in property, paying off charge liable to be paid by B. — A, a puisne mortgagee, pays off a prior mortgagee X and claims to recover the amounts so paid *personally* from the mortgagor B. The suit will be governed by this Article. B was bound to pay the prior mortgage and A's payment must be considered to have been made on behalf of B.¹ Under the terms of a compromise decree, the defendants had to pay off the incumbrances on certain properties which fell to the lot of the plaintiffs. The defendants failed to pay them and the plaintiffs paid them and sued the defendants for the recovery of the amount so paid. It was held that this Article would apply.² Where a vendor paid off certain charge on the property sold to the vendee which the vendee was bound to pay and then sued the vendee for reimbursement, it was held that the suit was governed by this Article.³ See also the undermentioned case⁴

(1936) A I R 1936 Mad 782 (783), *Ughatarnam Naidu v Muhammad Mohideen Sahib*

5 (1910) 5 Ind Cas 440 (442) 13 Oudh Cas 23, *Debi Sahai v Goura Shankar*, (1878) 4 Cal 369 (373) *Mothooranath Chattopadhyaya v Kristokumar Ghose*

(1919) A I R 1919 Mad 832 (833) 52 Ind Cas 243, *Marudai Muthuriyan v Chinnakannu Muthuriyan*

(1879) 5 Cal 321 (324) 5 Ind Jur 135, *Sunkur Pershad v Goury Pershad* (Where a Hindu, to avoid execution of a decree upon a bond executed by himself prior to his separation from his brother, for whose joint benefit the money had become expended executed a fresh bond in favour of the decree holder, the period of limitation for a suit for the recovery of a moiety of the amount from the brother must be counted from the date when the money was so expended.)

(1898) 8 Mad L Jour 271 (272), *Tirupatiraju v Rajagopala Kristnama*. (Do.)

(1869) 12 Suth W R 194 (195) 6 Beng L R App 103, *Ram Kristo v Muddun Gopal*. (Do.)

(1897) 19 All 244 (247) 1897 All W N 43, *Sri Raman Lalji Maharaj v Gopal Lalji Maharaj* (Suit to recover money paid for defendant's share of expenses.)

[See also (1900) 6 Cal W N 903 (904), *Suarnamoyee Debi v Hari Das Ray*]

[But see (1923) A I R 1923 All 309 (310-311) 51 All 606 116 Ind Cas 297, *Nandbat Lal v Mahadeo Prashad Singh* (Subsequent purchaser of portion of equity of redemption paying off prior mortgage decree and suing to recover from mortgagor — Suit not governed by Art 61 — The suit seems to have been treated as one to enforce a charge on the property of the defendants.)]

Note 7

1 (1922) A I R 1922 All 153 (154) 41 All 67 63 Ind Cas 604, *Dora Shib Lal v Munni Lal*

2 (1910) 6 Ind Cas 878 (879) (All) *Girraj Singh v Lakshubans Awar*

(1933) A I R 1933 Lah 307 (311) 156 Ind Cas 60, *Ajay Hussain v Maqbul Hussain*

3 (1927) A I R 1927 Mad 1060 (1063) 107 Ind Cas 412 *Sinthammas Chetti v Arunachallam Chettiar*

(1919) A I R 1919 All 18 (19) 42 All 61 52 Ind Cas 632, *Alayur Khan v Ali Bibi Kunwar*

4 (1925) A I R 1925 Oudh 132 (135) 75 Ind Cas 79, *Collector Singh v Malars*

Article 61
Notes
8—9

8. A depositing money with B to be paid to C — A paying it on failure of B to pay. — Where A deposits money with B to be paid to A's creditor C, B is not liable to C. Therefore if B fails to make the payment and A is compelled to pay himself, it cannot be said, on the principles mentioned in Note 5 *ante*, that A's payment was for B within the meaning of this Article. Thus where the mortgagee of certain property, with whom a certain amount was left by the mortgagor to be paid to the latter's creditors, did not make the payment with the result that the mortgagor himself had to pay the amount, it was held that though the mortgagor might be entitled to recover the amount so paid from the mortgagee, a suit for such recovery would not be governed by this Article inasmuch as the mortgagee was not directly liable to the creditors and the payment by A was consequently not one for the mortgagee¹. Similarly, where a vendee required to pay off the vendor's incumbrances, fails to pay and the vendor is compelled to pay the same, it cannot be said that the payment is for the vendee within the meaning of this Article². A contrary view was however held in the undermentioned case³. It is submitted that it is not correct.

9. A taking over liability of B and subsequently paying it. — B owes money to X and A takes over the liability by executing a promissory note to X who thereupon releases B from liability. A subsequently pays X and sues B for reimbursement. The suit is not governed by this Article. On the date of payment by A, B had been released from liability to X and was not liable to pay the amount to him. A's payment, therefore, was not for B¹. Where the plaintiff executed a bond whereby he agreed to pay a decree holder the amount due by his judgment debtor under a decree and the decree was certified as satisfied and the amount was subsequently paid off by him, it was held that the plaintiff's suit against the judgment debtor for reimbursement was not governed by this Article². See also the undermentioned cases³.

Note 8

- 1 (1931) A I R 1931 All 549 (550) 133 Ind Cas 615 53 All 702 *Zastun Aheer v Sat Ram Singh* (Held Article 120 applied 6 Ind Cas 878, Disturbed)
- (1921) 63 Ind Cas 87 (89) (All) *Sarju Mera v Gulam Hussain*
- 2 (1926) A I R 1926 All 605 (608) 95 Ind Cas 913 *Kedar Nath v Har Govind*
(See also (1933) A I R 1933 Lah 109 (111) 14 Lah 380 141 Ind Cas 435 *Gulzare Mal v Maghi Mal* (Point raised but not decided))
- 3 (1922) A I R 1922 All 409 (409) 70 Ind Cas 592, *Bhikant Prinde v Pandit Jamna Dhar Dubey*

Note 9

- 1 (1936) A I R 1936 Mad 334 (335) 163 Ind Cas 177, *Pangappa v Venkata Ramayya*
- 2 (1909) 4 Ind Cas 1041 (1012) (Lah) *Mansur Khan v Garian Khan*
- 3 (1927) A I R 1927 Lah 231 (232) 101 Ind Cas 418, *Abdul Qadir v Isam Din*
(1911) 11 Ind Cas 60 (61) (Lah) *Jalu v Samand* (Quare)

10. A liable to C — B not liable to C but to A — A paying off C. — Where, under the provisions of the Madras Local Boards Act, 5 of 1884, Government cess has to be paid by the landlord to the Government and the tenant is liable to the landlord for the sums so paid by the landlord, a payment of cess by the latter to the Government cannot be said to be for the tenant. A suit by the landlord against the tenant for the recovery of money so paid by him is therefore not governed by this Article.¹ A, B and C were partners, and the firm having suffered loss, A had to pay his share of the loss. D was a sub partner with A and was liable only to A to contribute towards losses sustained by A. A filed a suit against D for contribution in respect of the amount paid by him towards the loss sustained in the main partnership. It was held that A's payment was not on behalf of D as D was not liable to any other person except A.² See also the case cited below.³

A contrary view has however been taken in some cases. A, an occupancy tenant, sub let the land to B. One of the terms of the lease was that B should pay to the landlord the occupancy rent payable by A. B failed to pay the same and A was compelled to pay it. In a suit by A against B for reimbursement it was held that Article 61 applied to the case.⁴ It is clear in this case that B was not liable to the landlord in any way and A's payment could not be considered to be for B within the meaning of this Article. Where A executed a promissory note to K for moneys advanced to B and subsequently A paid off the promissory note and sued B for reimbursement, it was held in the undermentioned case⁵ that Article 61 applied. In the decision cited below,⁶ which was a similar case, it was observed that Article 61 or Article 83 might apply to the case. In neither of them was B liable to the person to whom A made the payment. Consequently A's payment could not be considered to have been for B. In the undermentioned case, a divorced Muhammadan wife incurred expenses for the maintenance of her daughter and then sued the husband for reimbursement. It was held that Article 61 applied.⁶ In

NOTE 10

- 1 (1919) A I R 1919 Mad 81 (32) 52 Ind Cas 468 *Muthuramalinga Sethupathi v Mahalinga Raju* (Landlord and tenant — Payment by

Article 61
Notes
10—12

this case unless it could be said that the persons who lent the money to the widow for the expenses were entitled to proceed against the husband for its recovery, the widow's payment could not be said to have been *for B*. It is submitted that the decisions expressing the contrary view referred to above are not correct.

11. Suit for contribution by a co-owner in respect of repairs or improvement to common property.—*A* and *B* were co-owners of certain property. They agreed that *A* should build a house on the property and that *B* should contribute his share of the expenses. *A* built a house and incurred expenses therefor and then sued *B* for contribution. It was held that the suit was not governed by this Article. As it was *A* who constructed the building, he and nobody else was primarily liable to pay for the labour and materials used. The persons who supplied the materials and masons could only hold *A* responsible for payment. *B* incurred no liability to them. *A*'s payment therefore was not *for B* within the meaning of this Article.¹ Similarly, where *A* and *B* are co-owners of certain property and are bound to carry out certain necessary repairs and *A* effects the repairs and sues *B* for contribution, the suit would not be governed by this Article.² A contrary view has however been expressed in the under-mentioned cases.³ It is submitted that it is not correct.

12. Co-sharer incurring expenses for common benefit.—*A* and *B* were both co-sharers in a mortgage right. *A* filed a suit on the mortgage and had to incur costs therefor. A decree was passed in favour of all the co-sharers. *A* then sued *B* for contribution in respect of the costs incurred. It was held that this Article did not apply as no money was paid by *A* for *B*.¹ See also the undermentioned case.²

Note 11

Lachman

Shyam v

Dangaroo
cause of

v Naba
not arise
contractor
1 up and

Note 12

13. Fine paid by A for misuse of land by B.—B used A's land for non agricultural purposes without his permission with the result that A had to pay a fine to the Government. A paid the fine and sued B for reimbursement. It was held that he did not pay the money for B and that this Article did not therefore apply.¹

14. Suit by receiver to recover money spent for estate. — When a receiver or manager is appointed by the Court, he is appointed on behalf of all persons interested in the property. If he incurs liabilities in the course of the management, the creditors can proceed against the estate for the recovery of the amount.¹ Hence the expenses incurred by the receiver of an estate in instituting a suit to recover money due to the estate are incurred by him on behalf of and for the benefit of the person who owns the estate and they are money payable to the plaintiff for money paid for the defendant (who is liable in respect of the property) within the meaning of this Article. Therefore a suit by the receiver to recover the amount so spent by him from the owner is governed by this Article and not by Article 83 or by Article 120. The circumstance that in any particular suit the receiver was also benefited by the suit does not make the suit any the less a suit on behalf of the owner of the estate and take it out of the purview of this Article.²

15. Suit by an agent against his principal.—Under Section 226 of the Contract Act, contracts entered into through an agent and obligations arising from the acts done by an agent may be enforced in the same manner as if the contracts had been entered into and the acts done by the principal. Where, therefore, an agent acting within his authority has borrowed money, the principal is also liable to the creditor to pay the amount. Where in such a case the agent pays off the creditor, the payment must be regarded as a payment for the principal, in view of the principles stated in Note 5 ante. A suit by the agent against the principal for the recovery of the money so paid would be governed by this Article, if no other specific Article applied to the case. There is, however, a conflict of opinion as to whether Article 83 *infra* will not apply to such cases. According to the High Court of Madras,¹ this Article and not Article 83 will apply to such cases, as the liability under S. 222 of the Contract Act is not a liability under any contract of indemnity. According to

Note 13

1 (1922) A I R 1922 Bom 257 (257) *Parnamacl and Chandiram v Kashinath*

Note 14

Note 15

Arayambal

Varadaraja

Article 61
Notes
15—18

the High Courts of Bombay² and Lahore^{2a} the liability under Section 222 of the Contract Act is under a *contract of indemnity* within Article 83 *infra* and consequently that Article will apply and not this Article. See for fuller discussion Note 4 to Article 83 *infra*.

16. 'Defendant' — See Note 1 to Section 2, sub section 4 *ante*.

It was doubted in the undermentioned case¹ whether the word 'defendant' would include the Secretary of State for India in Council. It was observed that a suit against the latter is not *really* against any person or a body corporate at all though it is allowed to be brought as one against a body corporate.

17. Claim for money charged on property.—Where A making payment on behalf of another acquires a charge on certain properties in respect of such payments a suit to recover such amount by enforcement of the charge will be governed by Article 132 and not by this Article¹.

18 Starting point — Time runs under this Article from the date when the money is *paid* by the plaintiff¹ and not from the date

2 (1932) A I R 1932 Bom 25 (90) 196 I C 481 *Harakchand v Sumatilal*

(1932) A I R 1932 Bom 593 (594) 140 Ind Cas 624 *Babasa v Hombanna*

2a (1914) A I R 1914 Lah 407 (408) 1915 Pun Re No 23 26 Ind Cas 415

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Art 83 applies and not Art 61)

(1926) A I R 1926 Lah 152 (153) 92 I C 595 *Munshi Ram v Bhagwan Das*

(1927) A I R 1927 Lah 826 (827) 106 I C 40 *Kirpa Ram v Sauran Mal*

(1928) A I R 1928 Lah 421 (425) 112 I C 719 *Bhagat Ram v Harjas Mal*

(1931) A I R 1931 Lah 392 (392) 128 I C 816 12 Lah 190 *Bhagwan Das v Mutsaddi Lal*

Note 16

1 (1886) 14 Cal 256 (271) *Doya Narain Tewary v Secretary of State*

Note 17

1 (1922) A I R 1922 Pat 499 (502) 1 Pat 780 68 Ind Cas 707 *Sibanand Masra v Jagmohan Lal*

(1931) A I R 1931 Cal 493 (495) 134 Ind Cas 75 *Rajeswar Prasad v Rajani Nath* (Suit to enforce statutory charge created on property—Art 132 and not Art 61 applies)

Note 18

1 (1922) A I R 1922 Cal 79 (80) 70 Ind Cas 289, *Sheikh Jamal v Sheikh Chand* (Where in a redemption suit by two plaintiffs one has paid

when such payment is accepted or adopted by the defendant ^{1a} In fact, the plaintiff's cause of action itself, in cases where he seeks to recover the money paid by him for the defendant, arises only when he has made the payment ² The starting point of limitation has thus been made to synchronize with the plaintiff's cause of action. As to the meaning of the word "paid," see Note 3 *ante*.

The expression "when the money is paid" does not mean "when the whole debt has been discharged" ³ Where several payments have been made by the plaintiff to meet a particular liability of the defendant, time will run, in respect of each item of payment, from the date of such payment ⁴ Thus, where A and B executed a joint promissory note in favour of C, but A paid the whole amount in

(1913) 19 Ind Cas 676 (677) (All), *Hakim Ali v. Dahir Singh* (Money lent by A with B to be paid to C—B failing to pay and A paying it and

when the money is actually repaid by him)

(1937) A I R 1937 Nag 402 (406), *Totaram Jawaharlal v. Haris Chandra*

matter of fact, Art 61 will not apply to the case as the payment could not be considered to be for defendant)]

1a (1931) AIR 1931 Lah 344 (347) 135 I. C. 177, *Shahbaz Khan v. Bhangs Khan*,

2 (1933) A I R 1933 Lah 404 (406) 147 I. C. 57, *Des Raj v. Lachhi Ram*.

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Notes
18—19

several instalments, it was held that *A* could recover from *B* only such sums as he had paid in excess of his share within three years of the suit ⁵

19. Onus of proof.—Where the defendant pleads limitation for the plaintiff's suit, the onus is on the plaintiff to establish the date when he made the payment and to satisfy the Court that his claim is within limitation ¹

Article 62

62. For money payable by the defendant to the plaintiff for money received by the defendant for the plaintiff's use.	Three years.	When the money is received.
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Synopsis

1. Legislative changes.
2. Scope of the Article.
3. Suit must be for money.
4. Article not applicable to suit for accounts.
5. Article not applicable to suit for damages.
6. "Money received by the defendant."
7. Money must have been received for the plaintiff's use at the time of the receipt.
8. Money received for use of plaintiff's predecessor-in-interest — Applicability of the Article.
9. Co-sharers — Suit by one against another who has received the former's share of money due.
10. Suit against agent for money had and received.
11. Suit against legal representative of deceased agent.
12. Money paid under void agreement.
13. Suit for money paid on an existing consideration which afterwards fails.

* Act of 1877, Art 62 and Act of 1871, Art. 60 — Same as above
Act of 1859 — No corresponding provision

5 (1891) 1891 All W N 102 (103), *Syed Hasan v Mir Khan* (Suit within

was negatived — Suit for contribution — Held governed by Art 61, payment by *A* being held to be payment for the real owner.—Submitted not correct))

Notes 19

- 1 (1927) 99 Ind Cas 271 (273) (Oudh) *Dhabhuts v Gur Dass*
(1879) 5 Cal 321 (324) 5 Ind Jur 135, *Sunhur Pershad v Goury Pershad*

- 14 Suit for money paid under mistake.
- 15 Suit for money obtained by fraud.
16. Suit for legacy
17. Suit for money deposited
- 16 Suit for recovery of money paid under judgment.
- 19 Suit by auction-purchaser for refund of purchase money on its being found that the judgment-debtor had no saleable interest in the property.
- 20 Sale of patni taluk for arrears of rent set aside — Suit by auction-purchaser for refund of purchase money.
21. Suit for surplus sale proceeds on revenue sale
- 22 Suit for compensation money paid in land acquisition proceedings.
- 23 Suit to recover tax etc , illegally collected.
- 24 Suit against benamidar receiving money belonging to real owner.
- 25 Suit by ward against guardian.
- 26 Suit for refund of assets wrongly paid to defendant under Section 73 of the Civil Procedure Code.
27. Suit for money wrongly attached
- 28 Suit to recover over-payment.
- 29 Suit against person receiving offerings for shrine
- 30 Suit for haqq-i-chaharam
- 31 Other illustrative cases
- 32 Starting point of limitation

Other Topics

Article 95 and this Article	See Note 15
Article 96 and this Article	See Note 14
Assignment of debt	See Note 6 Pt 2
Cohe rs	See Note 9 FNs (5) (6)
Conditions for applicability of Article	See Note 2
English law	See Note 2

Privity of contract—Necessity of	See Note 2 Pts 8b 9
Rent received in kind by defendant—Article not applicable	See Note 6, Pt 1 FN (1a) See Note 30 See Note 7 Pt 3 See Note 7 Pt 4

1 **Legislative changes** — There was no specific provision corresponding to this Article in the Act of 1859 and hence claims for money had and received for the use of the plaintiff were held to fall within clause 16 of Section 1 of the Act which corresponded to

Article 62
Notes
1—2

Article 120 in the Act of 1908¹ The Article in the present form was first enacted in the Act of 1871 as Article 60 and it has continued in the same form in the Acts of 1877 and 1908, with only its number changed from 60 to 62

2. Scope of the Article. — There are various circumstances under which money received by the defendant is deemed, under the law, to be received by him for the use of the plaintiff In such cases, a suit will lie for the recovery of the money from the defendant This Article applies to such suits They are analogous to the action under the English law for money had and received by the defendant for the plaintiff's use¹

In *Mahomed Wakib v Mahomed Ameer*,² Mookerjee, J, observed as follows

" the Article, when it speaks of a suit for money received by the defendant for the plaintiff's use, points to the well-known English action in that form, consequently, the Article ought to apply wherever the defendant has received money which in justice and equity belongs to the plaintiff under circumstances which in law render the receipt of it a receipt by the defendant to the use of the plaintiff '³

Hence, the conditions necessary for the applicability of this Article are as follows —

- 1 The suit must be for money received by the defendant
- 2 The money must, in justice and equity, belong to the plaintiff at the time of such receipt
- 3 The circumstances under which the money is received by the defendant must be such that in the eye of the law the receipt is by the defendant for the use of the plaintiff

Thus, where money is paid by the plaintiff to the defendant under an agreement which is void, the money would be money received by the defendant for the use of the plaintiff within the

Article 62 — Note 1

Note 2

- 1 (1932) A I R 1932 Bom 86 (89 90) 135 I C 601, *Abashba v Dhimji*
(1934) A I R 1934 Bom 491 (493) 154 Ind Cas 680, *Kasturchand v Harji*
(1921) A I R 1921 Cal 596 (596) 61 I C 315 *Janaki Nath v Bejoy Chand*
(1936) A I R 1936 Pat 370 (371) 15 Pat 433 161 Ind Cas 171, *Bhagwati Saran Singh v Rai Ashunji*
- 2 (1905) 32 Cal 527 (533) 1 Cal L Jour 167.

Chellis v Raviath Ammal

(1932) A I R 1932 Bom 86 (89 90) 135 I C 601, *Abdul v Dhimji*
See also Chitty on Contracts, 16th Edition, page 55

meaning of this Article. Similarly, where the defendant compels, by coercion, the plaintiff to pay him money to which he is not entitled, he will be deemed to have received the money for the use of the plaintiff and a suit for the recovery of such money will be governed by this Article.

The test to determine whether money is received by the defendant for the use of the plaintiff is to see whether, under the law, the money is to be treated as so received. The intention of the person receiving the money⁴ or of the person paying the money⁵ that it should be used for the benefit of the plaintiff, is not a material factor in determining the question.

Under the English law, an action for money had and received is one of assumption based on an implied or imputed contract. It is in the nature of an action for damages for breach of a promise, although the promise is not a real promise but one imported by fiction of law. In other words the action is based, under the English law, on contract imputed by law. Hence unless the circumstances are consistent with the existence of a contract between the parties, an action for money had and received would not lie under the English law⁶. Thus it was held in *Sinclair v Brougham*⁷ that an action for money had and received would not lie because, under the circumstances of the case, even if really there had been a contract between the parties such contract would have been *ultra vires* and consequently the law could not import a contract by fiction under such circumstances. But under the Indian law the above restrictions laid down by the English law with reference to an action for money had and received do not apply.^{7a}

4 (1905) 32 Cal 527 (533) 1 Cal L Jour 167 *Mahomed Wahib v Mahomed*

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(1919) A I R 1919 Lah 47 (49) 52 Ind Cas 580 1919 Pun Re No 85 *Mt Durga Devi v Ramanath*

(1918) A I R 1918 Cal 813 (814) 40 Ind Cas 173 *Binode Lal v Prem Nath*

(1916) A I R 1916 Pat 54 (55) 37 Ind Cas 30 *Harishar Misser v Syed Md*
[But see (1923) A I R 1923 Cal 379 (381) 50 Cal 475 72 Ind Cas 1011 *Anantram Bhattacharyee v Hem Chandra Kar*]

5 (1936) A I R 1936 Pat 370 (371) 161 Ind Cas 171 15 Pat 433 *Bhagwati Saran Singh v Ras Kishunji*

[But see (1928) A I R 1928 Cal 296 (297) 110 Ind Cas 49 *Shiba Kumar, Debi v Daksha Bala Dass* (Submitted not correct)]

(1916) A I R 1916 Pat 54 (56) 37 Ind Cas 30 *Harishar Misser v*

Article 62
Note 2

In *John v Dodwell & Co*^a (a case from Ceylon), their Lordships of the Privy Council observed as follows

"... under principles which have always obtained in Ceylon, law and equity have been administered by the same Courts as aspects of a single system, and it could never have been difficult to treat an action analogous to that for money had and received as maintainable in all cases 'where the defendant has received money which *ex aequo & bono* (in equity and good conscience) he ought to refund.' If, as in Ceylon, there is no necessity to find an actual contract or to impute the fiction of a contract, inasmuch as every Court can treat the question as one not merely of contract, but of trust fund where necessary, there is no difficulty in extending the remedy to all the cases covered by the words just quoted."

The above observations, though made with reference to Ceylon, would apply equally well to India^{8a}

Although, thus, under the Indian law, privity of contract is not necessary to constitute a receipt of money by the defendant a receipt for the use of the plaintiff,^{8b} there must be some privity of a legally recognizable nature between the parties. It was observed by Sadasiva Iyer, J., in *Ramasamy v Muthusamia*,⁹ as follows:

"While privity of contract between the parties is, of course, not necessary to sustain such an action, I think there must be what might be called some privity of a legally recognizable nature, such as some knowledge of particular facts in the man who received the money, and some mistake or ignorance of fact on the part of the man who paid the money, or some relation of trust and confidence between the person who received the money and the person claiming the money or portion thereof, on which the Court would fasten as creating the relation of principal and agent (though by fiction) between the plaintiff and the defendant."¹⁰

Full Bench) "Nothing was more likely to mislead or to confuse

Illustrations

Article 62
Note 2

- 1 *B* owes money to *A*. *A* dies. There is a dispute between *C* and *D*, each claiming to be the sole heir of *A*. *B* pays the money to *C*. *D* cannot maintain an action for money had and received against *C* even if he establishes against *C* that he is the rightful heir and not *C*, and *D*'s only remedy is against *B*. The reason is that there is no privity of a legally recognizable nature between *C* and *D*.¹¹
- 2 *A* and *B* are joint creditors of *C* who owes them Rs 100. *D*, a stranger, purchases the whole debt from *A* believing that *A* was entitled to transfer the whole debt of Rs 100 to *D*. *D* is then paid by *C* the debtor, the whole of the Rs 100. Held that *B*, the co-creditor, cannot treat Rs 50 of the Rs 100 as having been received by *D* for *B*'s use and sue to recover it from *D*, the reason being that there is no privity between the parties.^{11a} But, if *A* himself received the whole of the Rs 100 from the debtor *C*, it has been held that *B*, his co-creditor, could treat Rs 50 as money had and received by *A* for *B* and sue *A* for it.¹²
- 3 *A* was a *benamidar* for *B*. *A* realised the money due on a bond which stood in his name and paid over the money so obtained to a third party *C* in the course of a transaction into which *C* entered *bona fide* and without collusion or knowledge that *B* was beneficially interested in the money. Held that in these circumstances the money was not received by *C* for the use of *B* as there was no privity between the parties.^{12a}
- 4 *A* wrongfully converts certain timber belonging to *B*. *A* then dies leaving *C*, his widow as his legal representative. *D* acting as the agent of *C* sells the timber and is holding the sale proceeds on *C*'s behalf. *B* sues *D* for the money. The suit does not fall within this Article. The reason is that *D* receives the money as the agent of *C* and not for the use of the plaintiff. The suit is only for the enforcement of an equitable claim on the part of the plaintiff to follow the proceeds of his timber and finding them in the hands of the defendant to make him responsible for the amount.¹³

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Article 62
Notes
2—4

This Article applies whether the liability of the defendant arises under a statute¹⁴ or under general principles of law¹⁵

Where a sum of money is due from *A* to *B* and *C* receives the money from *A* under circumstances which would otherwise render such receipt one for the use of *B*, the fact that at the date of such receipt a suit by *B* against *A* would have been barred by law, does not affect the maintainability of a suit by *B* against *C* for money received by the latter for the former's use¹⁶

Where the plaintiff is entitled to sue either for money received by the defendant for the plaintiff's use or for some other relief to which a shorter period of limitation is applicable, he cannot be compelled to sue for the latter relief so as to make the shorter period applicable to the suit¹⁷

As, under the Indian law, a suit for money received by the defendant for the use of the plaintiff is not one based on contract, such a suit is not in the nature of a suit for damages or compensation¹⁸

3. Suit must be for money.—The Article only applies to a suit for money. Hence, where the suit is for a share of immovable property acquired by the defendant, the Article does not apply¹

4. Article not applicable to suit for accounts.—The Article only applies where a definite sum of money is claimed against the defendant and does not apply to a suit for accounts¹

14 (1932) A I R 1932 Bom 86 (89, 90) 185 Ind Cas 801, *Abasbhai v Bhimsji*.

Note 3

- 1 (1934) A I R 1934 Bom 491 (493) 154 Ind Cas 650, *Kasturchand v Hari*
 (See also (1924) A I R 1921 Oudh 218 (221) 78 Ind Cas 393, *Jai Indar Bahadur Singh v Sheo Indar Bahadur Singh*]

Note 4

- 1 (1933) A I R 1933 All 612 (617) 147 Ind Cas 529 55 All 814, *Mohlal v*

5. Article not applicable to suit for damages. — The Article only applies to a suit where a definite sum of money is claimed, and does not apply to a suit for *damages*. Thus where a transfer of property is void, the money paid as consideration is recoverable as money received by the defendant for the use of the plaintiff and this Article will apply to a suit for such recovery. But where the suit is for the recovery of compensation for breach of the covenant for title or for quiet enjoyment expressly or impliedly contained in the deed of transfer, this Article will not apply to the suit¹. Similarly, it has been held that a suit to recover the difference between the sum advanced on a written contract for supply of goods and the value of the goods delivered is one for compensation for a breach of contract and is governed by Article 115 and not this Article².

Article 62
Note 5

and the balance is shifted from one side to the other the account is a mutual open and current account. The proper Article to apply to such a case is Article 85 and not Article 62.

- (1885) 7 All 25 (23) 1884 All W N 219 *Mad Habbullah Khan v Safdar Hussain Khan* (Article not applicable to equitable claim against a trustee liable to account in which the relief sought is to have an account of the trust property and to recover what may be due.)

- (1935) A I R 1935 Cal 511 (518) 62 Cal 120 157 I C 936 *Eliza Martin In re*
(1938) A I R 1938 All 642 (647) 147 Ind Cas 529 55 All 614 *Moti Lal v Radhey Lal*
[But see (1924) A I R 1924 Cal 142 (143) 50 Cal 610 74 Ind Cas 1010 *Abedunnissa v Isuf Ali* (Submitted that view is wrong)]
(1928) A I R 1928 All 689 (695 696) 114 Ind Cas 734 *Rangacharya v Retti Raman Acharya* (Do.)

Note 5

- 1 (1932) A I R 1932 All 358 (359) 136 Ind Cas 829 *Zia Uddin v Akbar Ali*
(1915) A I R 1915 Mad 742 (742 743) 38 Mad 1171 25 Ind Cas 618 *Aruna challa Iyer v Ramaswami Iyer*
(1929) A I R 1929 All 293 (295) 51 All 651 119 Ind Cas 243 *Hanmant Ras v Glands Prasad*
(1904) 2 Nag L R 174 (177) *Bahadur Lal v Jadhao*
(1932) A I R 1932 Bom 36 (38 39) 55 Bom 565 134 Ind Cas 1157 *Ratan bai v Ghashiram*
(1930) A I R 1930 All 771 (774) 52 All 601 124 I C 185 *Mad Syddiq v Mad Nuh*
(1933) A I R 1933 Mad 126 (127, 128) 140 I C 805 *Thillakannu v Abdul*
(1931) A I R 1931 Sind 141 (142) 25 Sind L R 173 133 Ind Cas 76, *Chandrawati bai v Valabdas*
(1924) A I R 1924 Cal 148 (149 150) 80 Ind Cas 623 *Injad Ali v Mohini*
(1930) A I R 1930 Sind 12 (14) 118 Ind Cas 203 24 Sind L R 172 *Abdul Rahim Fateh Mohammed v Kadu*

- (1924) A I R 1924 Pat 321 (322) 72 Ind Cas 653 (655) *Jilingu Ojha v*

Article 62
Note 6

6. "Money received by the defendant."—This Article applies only where *money* has been received by the defendant ^{1a} Hence, the Article does not apply where the suit is based on the allegation that the defendant has received certain rent in *kind* and that such rent belongs to the plaintiff.¹

In the undermentioned case,² *A* owed a sum of money to *B*. *B* entered into a contract with *C*, one of the conditions of which was that *C* was to recover from *A* the above sum and pay it over to *B*. *C* subsequently assigned to *A* himself the above contract. It was held that on such assignment the money in *A*'s hands became money received by him for the use of *B*.

The Article applies only where the defendant is alleged to have *actually* received the money. Where the suit is based on the allegation that the defendant *ought* to have received a certain sum of money on plaintiff's behalf, this Article will not apply.³

As the expression "defendant" includes a person through whom a defendant derives his liability to be sued (see Section 2 clause 4 *ante*), a receipt of money by the defendant's predecessor-in-interest is equivalent to a receipt of the money by the defendant himself for the purposes of this Article.⁴ Similarly, a receipt by the defendant's agent is equivalent to a receipt by the defendant.⁵

A purchased certain property from *B*. Relying on the purchase, *A* paid off certain encumbrances on the property. Subsequently it was held that *B* had no title to transfer to *A*. *A* then sued *B* for the recovery of the money paid by him to discharge the encumbrances. It was held by Devadoss, J., that the suit was not one within this Article inasmuch as the *defendant* had not received any money.⁶ But, in the undermentioned case,^{6a} where a mortgagee had under-

Note 6

1a (1917) A I R 1917 Mad 354 (355) 33 Ind Cas 661, *Chami v Ana Pattar*

Bhattacharjee

as 625, *Man*

3 (1937) A I R 1937 Bom 217 (222) 169 Ind Cas 232 *Jaffar v Mahomed*

(1922) A I R 1922 Cal 499 (499, 500) 67 Ind Cas 943, *Ram Hari Kapals v Rohini Kanta Chakravarty* (Suit to recover from defendant as son

from the representative of the pleader after his death is not Article 62 because the *defendant* was not the person who

taken to pay off prior encumbrances and failed to do so and the mortgagor was compelled to discharge such encumbrances himself, it was held that a suit by the latter for recoupment against the mortgagee was governed by this Article. It is submitted that the decision is not correct.

The term "receipt" necessarily implies that the money has been obtained (or received) from some one other than the person himself who withholds payment. Hence, where there is no "receipt" in this sense of the term, it cannot be said that a person who wrongfully omits to pay money due from him to another "receives" such money for such other's use.⁷

A obtained a lease of certain premises from the Collector of his District for the purpose of carrying on a grog shop, and by way of security for the rent, he deposited in the Collectorate a sum of Rs. 250. A then died. A dispute then arose between B and C, each claiming to be exclusively entitled to the property of A. It was finally settled that C was the rightful heir of the deceased. But, in the meanwhile, by an arrangement between the Collector and B, the lease in favour of A, the deceased, was transferred to B and the amount of Rs. 250 deposited as security by A was adjusted towards arrears of rent due by B. After it was settled that C was the rightful heir to A, C sued B for the recovery of the said sum. It was held that the suit was not one within this Article on the ground that no money was *received* by the defendant. There was only an *application* of money in the hands of a third party and belonging to the plaintiff for the benefit of the defendant.⁸

7. Money must have been received for the plaintiff's use at the time of the receipt. — This Article will apply only where *at the time of the receipt of the money* by the defendant it is received for the use of the plaintiff.¹

Article 62
Note 7*Illustrations*

- 1 A suit for dividend by a share-holder in a company is not a suit for money had and received, because the money out of which the dividend is to be paid is, at the time of its original receipt by the company, only received for its own use and the declaration of the dividend is only a later affair.²
- 2 A suit for the refund of money legally collected by a Municipality but wrongfully refused to be refunded is not governed by this Article where the duty to refund arises only after the receipt of the money.³
- 3 Money was paid to the promoter of a company by intending share holders in the company. The company, contrary to law, was not registered and therefore became an illegal body. A suit for converting the assets of the company into cash and for return of subscriptions was held not governed by this Article. The reason is that it cannot be said that at the time of the receipt of the money by the defendant it was received for the use of the plaintiffs. It was received for other specific purposes, viz. the purchasing of materials for starting the business and it became payable to the plaintiffs only by reason of the failure to register the company as required by law.⁴

115001 00 C 1 53 157 157 D) Summary of State v C = Page 2 P = 10 =

- (1920) A I R 1920 Nag 94 (95) 55 Ind Cas 93, *Premulhadas v Namdeo*
 (1936) A I R 1936 Rang 80 (81) 161 Ind Cas 461, *Ma Pira Thien v Ma Me Tha* (In a suit for recovery of money under S 63, T P Act, limitation is governed by Article 116 or Article 120 and not by Article 62.)
 (1912) 15 Ind Cas 707 (708) 40 Cal 187, *Amrita Lal v Jogendra Lal* (Execution sale set aside by judgment-debtor — Suit by auction purchaser for refund of purchase money is not within this Article.)
 [But see (1880) 5 Cal 830 (832) 6 Cal L R 355, *Johari Mathen v Thakoor Nath Lukee* (Where money was deposited pending

received by the defendant for the plaintiff's use, from the time that the negotiations fell through and that not Article

- (1914) A I R 1914 All 511 (516) 37 All 40 27 Ind Cas 533, *Mansud-din v Imtiaz Un Nisa Bibi* }
 2. (1925) A I R 1926 Mad 615 (619) 47 Mad 468 94 Ind Cas 515 (F B) *Venka's Gururatha Paria Sathayya v Tripurasundari Cotton Press*
 3 (1914) A I R 1914 All 335 (339) 26 All 545 25 Ind Cas 943 *Municipal Board of Ghazipur v Deedarwan Prasad*
 4 (1920) A I R 1920 Rang 21 (25) 7 Rang 540 120 I C 502 *U Sein v U Phyu*
 [But see (1921) A I R 1921 All 73 (74) 64 Ind Cas 417 *Ram Kumar v Devi Chaud*]

8. Money received for use of plaintiff's predecessor-in-interest — Applicability of the Article. — *A* received certain money for the use of *B C*, a judgment creditor of *B*, attached the money in the hands of *A* and then sold his rights under the decree to *D*. *D* sued *A* for the money. It was held that the suit did not come within this Article as the money was not received for the use of *D*, the plaintiff, but for the use of *B*.¹ It is submitted that this decision is not correct, inasmuch as the definition of "plaintiff" in Section 2 *ante* includes a person through whom the plaintiff derives his right to sue, and in this case *D* clearly derived his right to sue from *B*.

9. Co-sharers — Suit by one against another who has received the former's share of money due. — Where the plaintiff and the defendant are entitled to share in a certain sum of money and the money is received by the defendant alone, the question whether this Article applies to the plaintiff's suit for the recovery of his share of the money depends on the circumstances of each case. If, under the circumstances of the case the taking of accounts is necessary in order to determine the amount payable to the plaintiff, the suit will not come within this Article. The reason is that in such a case the money cannot be said to be received for the use of the plaintiff at the time of the receipt and the defendant's duty of paying over the money to the plaintiff only arises subsequently, on taking accounts.¹

Notes 8

- 1 (1891) 18 All 368 (371) 1891 All W N 130 *Chand Mal v Angan Lal*

Note 9

- 1 (1922) A I R 1922 Mad 150 (156 159) 45 Mad 648 71 Ind Cas 177 (F B) *Jogulu v Talayya*
(1917) A I R 1917 v *Rama R*
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collections and disbursements is governed by Article 120 and not by Article 62)
(1935) A I R 1935 Nag 187 (189) 31 Nag L R 304 156 Ind Cas 672 *Mansaram v Champalal*
(1915) A I R 1915 All 148 (149) 37 All 318 28 Ind Cas 953 *Parsotam Rao Tantia v Radha Bai*
(1917) A I R 1917 Mad 214 (247) 32 Ind Cas 83 *Abdul Rahman v Pathummal Bai*
(1931) A I R 1931 Rang 150 (152) 131 I C 511 *Pa Nyun v Ma Saw Tin*

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Note 9

For instance, where the plaintiff and the defendant are co-sharers in a village, but the defendant is entrusted with the general management of the village and he has to spend as well as receive money, it cannot be said that immediately each tenant pays his rent, the plaintiff can claim his share of the rent² In such cases, the amount payable to the plaintiff cannot be determined without taking accounts³ Similarly, where the defendant is in possession of the money on behalf of the plaintiff as the latter's agent with the express or implied authority of the latter, this Article cannot apply to a suit to recover the money⁴ The reason is that the Article only applies where the defendant is bound to pay over the money to the plaintiff as soon as it is received by him and not to cases where the defendant's duty of paying over the money to the plaintiff does not arise till a later date But where immediately on receipt of money the defendant is bound to pay over to the plaintiff a definite share of the money, this Article will apply to a suit to recover such share⁵

(1928) A I R 1928 Lah 688 (689) 111 Ind Cas 635, *Mt Kishen Devi v Danwar Lal* (Where by virtue of an arrangement some of the co sharers have been realizing rent of joint immovable property for division among other co sharers, the relationship between the latter and the former is that of an agent and principal)

(1929) A I R 1929 F 107 (108, 109) 116 Ind Cas 997, *D. Ch. D. Cas*

(1884)

2 (1913) A I R 1916 Nag 40 (41) 13 Nag L R 127 41 Ind Cas 848, *Balwant v Deorao* (Following 10 C P L R 93)

3 (1911) 12 Ind Cas 588 (587) (Bom), *Mahomed Bhai v Ismailji Haji*
[See also (1916) 32 Ind Cas 102 (104) 1915 Pun Re No 5 (Rev),
Kahdim Hussain Khan v Mt Murad Bibi]

4 (1928) A I R 1928 Bom 365 (367) 113 Ind Cas 178, *Govindas v Ganpatidas*
(1921) A I R 1921 Bom 884 (385) 45 Bom 813 59 I O 857 *Gabu v Zipru*
(1916) A I R 1916 Mad 1207 (1210) 29 Ind Cas 275, *Beevammal v Kadir*

Taidyanatha Aiyar v Aiyasamy.
anchand

Tulsi Ram

2 All L Jour 107, *Mehin Lal v*

held that a co sharer's suit for

is governed by the three years' period of

In some decisions,⁶ however, the above principles have not been adverted to and it has been held without any qualification that this Article does not apply to a suit by one co sharer against another for recovery of his share of the money received by him. It is submitted that such an *unqualified* proposition is not correct.

Where one member of a *joint Hindu family* governed by the Mitakshara law realizes a debt due to the family, the other members of the family cannot sue the former for money received by him for their use. The reason is that so long as the family remains joint, it cannot be said that any part of its property belonged to one member more than to another while the essence of a cause of action for a suit for money received by the defendant for the use of the plaintiff is that money which in justice and equity belongs to the plaintiff, is received by the defendant under circumstances which render the receipt of it by the defendant a receipt for the use of the plaintiff.⁷

10. Suit against agent for money had and received.—Where an agent receives money belonging to his principal under circumstances which make it the agent's duty to pay over to the principal

the plaintiff's share of the *hak* is a suit for money received by the

is only recovered by the other on one of such bonds was governed not by Article 127 but by Article 62.)

(1881) 9 All 170 (172) *Kundan Lal v Bansu Dhar* (Suit by one heir of a deceased person against another for the recovery of his share of the money belonging to the deceased, received by the latter from a banker with whom it was deposited is a suit for money received by the defendant for the plaintiff's use.)

⁷ (1908) 4 Nag L R 64 (85) *Tarachand v Pranchand*

[See also (1909) 9 Ind Cas 9 (11) (Cal) *Ajodhya Pershad v Mahadeo Pershad* (Even after partition of some of the properties Art 127 may apply to a suit for partition of the other properties)]

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Notes
10—11

immediately the money is received, a suit for the money will be one for money received by the defendant for the use of the plaintiff¹ This Article will apply to such a suit²

But a suit by a principal against an agent for the balance due out of moneys received by him *after* deducting all legitimate expenses and allowances is not a suit for money received by the defendant for the plaintiff's use within the meaning of this Article. The reason is that it cannot be said that the balance claimed, as claimed, was money received by the agent for the use of the principal³

Money belonging to the principal and received by the agent after the termination of the agency will be money received by the agent for the principal's use and a suit for the money will be governed by this Article³

11. Suit against legal representative of deceased agent. — Where money is received by an agent for the use of the principal and the agent has died without paying over the money to the principal a suit for the recovery of the money against the legal representative of the agent will also be a suit for money received by the "defendant" for the use of the plaintiff. The reason is that the expression "defendant" in this Article includes persons through whom he derives his liability to be sued. Hence, this Article will apply to such a suit¹

In the undermentioned case² it was held that although a suit "for money received by the defendant for the use of the plaintiff" would not have lain against the deceased agent, the suit against the legal representative of the agent for the recovery of the money received by the agent would come within this Article and that the legal representative must be treated as 'receiving' the money claimed on the death of the agent. It is submitted that this view is

Note 10

- 21 (1886) 1886 Pun Re No 96 page 239 *Seth Chand Mal v Kahan Mal*
3 (1915) A I R 1915 All 259 (260) 29 Ind Cas 898 *Hansraj v Ratan*
(1915) A I R 1915 Mad 596 (597) 27 Ind Cas 807 *Arunachellam v Raman*
(1922) A I R 1922 Mad 55 (55) 71 Ind Cas 257, *Arunachalam v Rajeswara*

Note 11

- 1 (1922) A I R 1922 Cal 499 (499) 500) 67 Ind Cas 913 *Ramhari Kapali v*

2 (1886) 1886 Pun Re No 96 page 239 *Seth Chand Mal v Kahan Mal*

not correct as the cause of action against the agent and that against his legal representative cannot be different.

A suit for accounts against the legal representative of a deceased agent is not governed by this Article¹

12. Money paid under void agreement.—Where money is paid under a void agreement, the person paying the money is entitled to recover such money under Section 65 of the Contract Act on discovering that the agreement is void. Ordinarily, the date of the agreement will be presumed to be the date of the discovery, so that in such cases the right to recover the money will accrue under Section 65 as soon as the money is paid. Hence, ordinarily, such cases may be treated as cases of receipt of money by the defendant for the use of the plaintiff and will come within this Article under which time will begin to run from the date of the receipt of the money by the defendant¹. Thus, where a transfer of property is

- 3 (1912) 13 Ind Cas 930 (935) 1912 Pun Re No 1, *Fatma v Mt Imtarijan*
(1909) 2 Ind Cas 118 (121) 31 All 429, *Gurraj Singh v Raghubir Kunwar*

Note 12

are void as forbidden by law, time would begin to run from the date of the payment itself as everybody must be deemed to know the law.)

- (1915) A I R 1915 Bom 102 (104) 89 Bom 358 23 Ind Cas 442 *Jaterbhas v Gordhan* (Mortgage void under Bombay Bhagdari Act of 1862)
(1915) A I R 1915 Cal 579 (583) 29 Ind Cas 429 *Jagannath v Giridhari*
(1930) A I R 1930 All 771 (775) 124 I C 185 52 All 604, *Ud Siddiq v Md Nuh*
(1932) A I R 1932 Bom 36 (38) 55 Bom 565 134 Ind Cas 1157, *Ratanbai v Ghashiram*

- (1918) A I R 1918 Lah 249 (249) 46 Ind Cas 26 1918 Pun Re No 44 *Datta Ram v Gurdas* (Vendor having no title to land sold—Sale void ab initio—Suit for refund of purchase money is under this Article)

- (1882) 1882 Pun Re No 194 p 563 *Ganga Ram v Baldewa* (Suit for

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wholly void *ab initio*, a suit by the purchaser for the return of the purchase money will fall within this Article^{1a}. But in exceptional circumstances the date of the discovery of the agreement being void may be later than the agreement itself and in such cases, therefore, as the cause of action for the recovery of the money will accrue under Section 65 of the Contract Act *after* the agreement and the payment of the money under it, this Article will not apply on the principles discussed in Section 9 Note 8, *ante*².

13. Suit for money paid on an existing consideration which afterwards fails.—Where a suit is brought for money paid on an existing consideration which afterwards fails, the money cannot be said to have been received by the defendant for the use of the plaintiff *at the time of the receipt of the money*. Hence, this Article cannot apply to such a suit. Article 97 is applicable to such suits¹. Thus, where, under a contract to sell property, a sum of money is paid by the intending transferee as earnest money but the vendor refuses or fails to perform the contract and a suit for specific performance is also dismissed, a suit for the refund of the earnest money will not be

(1918) A I R 1918 Oudh 348 (355) 47 Ind Cas 214 *Har Nath Kuar v Indra Bahadur Singh*

1a (1802) 19 Cal 123 (126) 18 Ind App 158 68ar 91 (P C) *Hanuman Kamal v Hanuman Mandur* (On appeal from 15 Cal 51 (58)) But in this case the Privy Council held that the transfer was not void but only voidable by the transferor's coparceners and hence there was no failure of consideration until the plaintiff tried and failed to obtain possession and that Article 97 applied.)

2 (1922) A I R 1922 P C 403 (405) 71 Ind Cas 629 50 Ind App 69 45 All 179 26 Oudh Cas 223 (P C) *Harnath Kuar v Indar Bahadur Singh* (Money paid under a transfer of a *spes successionis* by Hindu reversioner — Transfer held void — Suit by purchaser for refund of purchase money — Held that such suit lay under Section 65 of the Contract Act and the limitation ran from the date when the transfer was discovered to be void.)

(1925) A I R 1925 Oudh 212 (214 215) 80 I C 855 *Ram Nath v Damodar*

Note 13

1 (1932) A I R 1932 Lah 382 (383) 13 Lah 188 137 Ind Cas 828 *Lal Ditta v Dast Mohamad*

(1925) A I R 1925 Mad 749 (750) 86 I C 755 *Venkatanna v Appalaswami*

be void *ab initio*.)

(1893) 1833 Bom P J 56 *Tingapa Hegde v Vykhunth Nask*

(1895) 18 Mad 173 (174) 5 Ind L Jour 52, *Venkatanarasimhulu v Perama*

(1913) 21 Ind Cas 591 (592) (Oudh) *Debi Prasad v Sheo Narain*

(1913) 20 I C 251 (255) 37 Bom 533, *Narsing Shitbaks v Pachu Rautbaks*

governed by this Article but will come under Article 97²

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14. Suit for money paid under mistake. — A suit for money paid under a mistake is a suit for money received by the defendant for the use of the plaintiff¹ But such a suit will be governed by Article 96 and not this Article² The reason is that Article 96 will keep alive the cause of action for a longer time than Article 62³ and it is a general principle that where a suit can come within two or more provisions of the law of limitation, and neither of them can be said to be more specific than the other, that which keeps alive rather than that which bars the right to sue should, as a general rule, be applied (See Preamble Nata 24, *ante*) The Madras High Court, however, has taken the view that Article 96 is more *specific* than Article 62 and as such is to be preferred to Article 62⁴

15. Suit for money obtained by fraud. — Article 95 only applies to cases where the fraud has been practised on the plaintiff himself and will not apply where the fraud has been practised on a third party (see Notes to Article 95, *infra*) Hence, where the defendant, by means of fraud practised on a *third* party having plaintiff's money in his possession, obtains from such third party such money, a suit by the plaintiff against the defendant for the recovery of the money will not be governed by Article 95 Such a suit will come under this Article¹

16. Suit for legacy. — Where the plaintiff was entitled under the terms of a will to receive a certain amount as maintenance from the income of certain properties in the hands of the defendant, it was held in the undermentioned case² that a suit for such amount was one for a legacy within Article 123 and was not governed by this Article

17. Suit for money deposited. — Where A deposits money with B on terms that the latter should return to A an equivalent

(1923) A I R 1923 All 321 (321) 72 Ind Cas 86 45 All 378 *Munni Babu v Koer Kamta Singh*

2 (1918) A I R 1918 Mad 645 (645) 40 Ind Cas 893, *Kotinagulu v Anahayya*

Nata 14

1 (1925) A I R 1925 Mad 1255 (1256 1257) 48 Mad 925 91 Ind Cas 151, *P Ramiah & Co v T R Sadania Mudaliar*

2 (1925) A I R 1925 Pat 765 (76" 768) 4 Pat 443 93 Ind Cas 129 *Tofa Lal*

5 91 Ind Cas 151,

3 (1925) A I R 1925 Pat 765 (76" 768) 4 Pat 443 93 Ind Cas 129 *Tofa Lal Das v Syed Moinuddin Mirza*

4 (1925) A I R 1925 Mad 1255 (1256 1257) 48 Mad 925 91 Ind Cas 151, *P Ramiah & Co v T R Sadania Mudaliar*

Note 15

1 (1877) 2 Cal 393 (395) *Paghmoni Audhicary v Nilmoni Singh Deo*

(1902) 25 Mad 396 (393) *Sriramulu v Chinna Venkatasami*

Note 16

1 (1931) A I R 1931 Cal 670 (671) 1321 C 684 *Haricharan v Kamal Kumari*.

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sum of money, *B* does not receive the money for *A*'s use. The reason is that in such cases, *B* becomes the *owner* of the money as soon as it is received and is only subject to the liability of returning an equivalent sum of money to *A*. Hence, a suit for recovery of the deposit by *A* is not one for money received by the defendant for the use of the plaintiff.¹

18. Suit for recovery of money paid under judgment.—Where the suit is for money paid under a decree which is afterwards set aside (in cases where such suit is maintainable), there is a conflict of decisions as to the applicability of this Article to the suit. According to one view, this Article does not apply to such suits the reason being that in such cases the money is not payable to the plaintiff immediately on its receipt by the defendant but it becomes payable only on the reversal of the judgment.¹ Some decisions, however, hold that this Article applies to such suits as being suits for money received by the defendant for the use of the plaintiff.²

Unless a decree under which the money is paid is reversed or superseded no suit will lie for the recovery of such money on the ground that the person to whom it was paid was not entitled to it.³ But where the decree has been passed *without jurisdiction*, a suit will lie for the recovery of the money paid under such decree and such suit will be governed by this Article.⁴

Note 17

- 1 (1919) A I R 1919 All 351 (353) 52 Ind Cas 25 *Lakshmi Ram v Hari Ram*
(1913) 19 Ind Cas 8 (5) (Mad) *Thangaswami Thiraiyan v Rajaram Aaidu*

Note 18

[See also (1892) 15 Mad 882 (883) *Krishnan v Perachan* (Attachment of land in execution of decree removed at instance of
1

by this Article)]

- 2 (1917) A I R 1917 All 276 (278 279 280) 39 All 922 39 Ind Cas 532 *Ram Narain v Brij Banker Lal*
(1912) 17 Ind Cas 311 (315) 1913 Fuz Ro No 36 *Chand Mal v Sansar Chand* (Certain Government Promissory Notes were attached in execution of a decree against *A*—*B* objected on the ground that the

ground of lessor having no title to lease and lessee not getting any title under lease—Suit not maintainable the moneys being moneys paid by compulsion of legal proceedings)

- 4 (1876) 1 All 333 (335) (F B) *Pam Ashan v Dhawan Das*

A obtained a decree against B for rent at an enhanced rate and the decree was subsequently reversed on appeal. But, in the meanwhile, A obtained other decrees against B for rent at the enhanced rate on the basis of the original decree above-mentioned, and rent under such decrees was received by A. On the reversal of the basic decree, a suit was filed for the recovery of the excess rent paid by B. It was held that the suit was governed by Article 120 and not this Article.⁵

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Notes
18—20

19. Suit by auction purchaser for refund of purchase money on its being found that the judgment-debtor had no saleable interest in the property.—A suit by an auction purchaser for refund of purchase money on its being found that the judgment debtor had no saleable interest in the property sold, is governed (assuming that such a suit lies) by this Article as being a suit for money received by the defendant for the use of the plaintiff.¹ (As to the maintainability of such a suit, see Authors' Civil Procedure Code, Second Edition, Order 21 Rules 91 and 93 and the Notes thereunder.) The undermentioned cases² decided under the Code of 1882 held that the suit was not governed by this Article under which time begins to run from the date when the defendant receives the money but that limitation ran from the time when it was found that the judgment debtor had no saleable interest in the property. But these decisions are distinguishable on the ground that under Section 315 of the Code of 1882 the right to claim refund of purchase money accrued to the auction purchaser only on its being found that the judgment debtor had no saleable interest.

20. Sale of patni taluk for arrears of rent, set aside.—Suit by auction purchaser for refund of purchase money.—A patni taluk was sold for arrears of rent under the Bengal Regulation 8 of 1819. The sale was then reversed under Section 14 of the Regulation. The purchaser was a party to the proceedings in which the sale was reversed but was given no indemnity under Section 14. He then sued the zamindar for refund of the purchase money. It was held that having regard to the peculiar character of a sale

5 (1878) 2 Cal L R 354 (355) *Kali Churn Dutt v Jogesh Chunder Dutt*

Note 19

1 (1935) A I R 1935 Mad 354 (355) 159 I C 750 *Sitarama v Secy of State*
(1937) A I R 1937 Oudh 286 (287) 166 I C 705 *Gobind Prasad v Hasan Shah*
(1909) 2 Ind Cas 559 (561) 37 Cal 67, *Ram Kumar v Ram Gour Shaha*
(1881) 1881 All W N 125 (125), *Kishori Lal v Ghansham*
[See (1911) 10 Ind Cas 716 (717) 14 Oudh Crs 74, *Jot Singh v*

2 (1892) 16 Mad 361 (362) 3 Mad L Jour 134, *Nilakanta v Imam Sahib*
(1910) 6 Ind Cas 291 (291) (Mad) *Pichu Ayyar v Palaniappa Chettiar*
(1913) 19 I C 986 (988) 35 All 419, *Sidheswar Prasad v Mayanand Gir*
(1912) 17 Ind Cas 437 (441) (Mad), *Mohsdeen Ibrahim v Meera Leuva*

21. Suit for surplus sale proceeds on revenue sale.—*A* purchased certain land, and subsequently, it was sold for arrears of Government revenue. The surplus sale proceeds remaining after satisfaction of the arrears were paid to *B* who was the original owner of the land and who continued to be recorded in the Collector's registers as the proprietor. It was held that *B* received the money for the use of *A* and that a suit by *A* against *B* for the recovery of the money was governed by this Article.¹

A mortgaged property was sold for arrears of revenue and the surplus sale proceeds were withdrawn by the mortgagor. A suit by the mortgagee to recover the mortgage money out of the sale proceeds was held to be governed by Article 132 and not this Article. The reason given was that such a suit was one to enforce the *lien* which was transferred under Section 73 of the Transfer of Property Act (before the amendment of 1929) to the surplus sale proceeds.²

22. Suit for compensation money paid in land acquisition proceedings.—Where the plaintiff is entitled to receive the compensation money paid in land acquisition proceedings but the money is received by the defendant, a suit by the plaintiff for the recovery of the money from the defendant will be a suit for money received by the latter for the use of the plaintiff and will be governed by this Article¹ The contrary view taken in the undermentioned cases² is not correct.

1 (1918) A I R 1918 P C 151 (152) 46 Cal 670 46 Ind App 52 50 Ind Cas
* 444 (P O), *Juscurn Boid v Parthuchand Lal Chowdhury*

1 (1936) A I R 1936 Pat 370 (371) 15 Pat 433 161 Ind Cas 171, *Bhagwat Saran Singh v Ras Kishunji*
(1916) A I R 1916 Pat 54 (56) 37 Ind Cas 30, *Harishar Misser v Syed Md*
(1912) 17 Ind Cas 351 (352) (Cal), *Lachmi Narain v Dhanukdhar, Prosad*
2 (1900) 27 Cal 180 (184), *Kamala Kant Sen v Abul Barkat*

2 (1879) 5 Cal 537 (601) 5 Cal L R 45 *Nund Lal Bose v Meer Aboo Maho-*
 —Defendant taking
 ids — Plaintiff after
 improperly granted
 so received by the
 and not Article 62
 and (Land acquired
 arently entitled for

23. Suit to recover tax etc., illegally collected. — Where a tax or similar sum is illegally collected, a suit to recover the sum so paid would be a suit for money received by the defendant for the use of the plaintiff. To such a suit, ordinarily, this Article would apply.¹ But where the case comes within Article 16, the latter Article, being a special Article, would govern the case.²

A certain amount was fixed as a contribution to be made by the plaintiff to the defendant, the holder of a certain office, under a certain statute, and on his making default in the payment the amount was recovered from the plaintiff by the Collector by sale of the plaintiff's moveable property, and paid to the defendant. Subsequently, the amount payable by the plaintiff was reduced by the higher authorities to whom the plaintiff had appealed. The plaintiff thereupon sued the defendant for the recovery of the excess amount recovered from him. It was held that the suit was for money received by the defendant for the use of the plaintiff and was governed by this Article.³

24. Suit against benamidar receiving money belonging to real owner. — Where A is the benamidar of B and, as such, receives the money due to B, a suit by B against A for the recovery of the money will be a suit for the money received by the defendant

same — Suit by person having interest in land for money paid by Government is governed by Art. 120 and not by Art. 17 or Art. 62.)

(1919) A I R 1919 Oudh 26 (26) 22 Oudh Cas 342 54 Ind Cas 535 *Ladli Prasad v Nizam ud din Khan*

Note 23

- 1 (1932) 1932 Mad W N 1089 (1090) *Taluk Board Deacotta v Chokkalingam* (Suit for the refund of money illegally collected as profession tax.)
- (1896) 24 Cal 163 (165) *Dewan Roy v Sundar Tewary* (Suit for money paid to redeem a distress is on same footing as other suits where defendant has received money which in justice and equity belongs to plaintiff.)
- (1921) A I R 1921 Cal 596 (596) 64 Ind Cas 315, *Janaki Nath v Bejoy Chand* (Rent paid by purchaser of patni at sale for arrears—Suit for return of rent on sale being set aside is governed by this Article.)
- (1920) A I R 1920 Cal 466 (467) 58 Ind Cas 741 *Bejoy Chand Mahtab v Tinkari Banerjee* (Do.)
- (1934) A I R 1934 Oudh 158 (160) 9 Luck 577 148 Ind Cas 448 *Kathiawar & Ahmedabad Banking Corporation Ltd v Ram Charan* (Suit for recovery of money voluntarily paid to Official Liquidator to save property wrongly attached and for damages.)

(1901) 25 Mad 548 (552) *Narayanaswami Reddi v Osuru Reddi*

(1924) A I R 1924 Sind 87 (88) 17 Sind L R 82 80 Ind Cas 955 *Holkhan Sher Khan v Pahlumal Ukermal*

(1910) 6 Ind Cas 401 (403) 32 All 491 *Rajputana Malwa Railway Co operative Stores Ltd v Ajmere Municipal Board* (Such a suit is not one for damages.)

2 (1920) A I R 1920 Mad 948 (956) 59 Ind Cas 98 (S B) *Secretary of State v Zamindarans of Vegayammampeta Estate*

3 (1887) 10 Bom 665 (669) *Ladji Nask v Musabi*

Article 62
Notes
24—27

for the use of the plaintiff and will be governed by this Article¹ The above rule will also apply to cases where a mortgage bond stands in the name of a benamidar and the benamidar receives the money due on the bond² In the undermentioned case,³ however, it was held that a suit against a benamidar mortgagee for the recovery of the mortgage money which had been received by the benamidar was a suit to enforce the payment of money charged on immovable property and hence was governed by Article 132 and not this Article It is submitted that the decision is not correct

25. Suit by ward against guardian.—It has been held by the Chief Court of the Punjab that a suit by a ward against the guardian for specific sums received by the latter is governed by this Article¹ But in the undermentioned case² it has been held by the same Court that though in *form* the suit was one for specific sums alleged to be received by the defendant, yet, in *substance*, the suit was one for accounts and hence this Article was not applicable to the suit

26. Suit for refund of assets wrongly paid to defendant under Section 73 of the Civil Procedure Code.—A suit under sub section 2 of Section 73 of the Civil Procedure Code for refund of money wrongly paid to the defendant by an executing Court engaged in the rateable distribution of the assets of a judgment-debtor is one under this Article¹

27. Suit for money wrongly attached.—Where money is wrongly attached in execution of a decree and paid over to the decree holder, a suit by the owner of the money against the decree holder for the recovery of the money is one under this Article¹

Note 24

- 1 (1907) 30 Mad 293 (299) 17 Mad L Jour 221 2 Mad L Tim 332 *Subbanna Batta v Kunhyanna Batta* (Suit against benamidar for recovering rent received by him)

(1903) 25 All 62 (64) 1902 All W N 185 *Sundar Lal v Fakir Chand* (Suit by beneficiary against a benamidar in whose name a bond stood)

- 2 (1916) A I R 1916 Mad 521 (525) 28 I C 495, *Narayanan v Rangaswami*
3 (1909) 1 Ind Cas 732 (734) 1909 Pun Re No 37, *Sham Lal v Johrimal*

Note 25

- 1 (1883) 1883 Pun Re No 56 page 172 *Surjan Singh v Charan Das*
2 (1891) 1891 Pun Re No 84 page 416, *Sher Ali v Khwaja Muhammad*

Note 26

- 1 (1915) A I R 1915 Mad 405 (406 407) 39 Mad 62 26 Ind Cas 219, *Baisnath Lala v Ramadoss*
(1890) 15 Bom 438 (441) *Vishnu Dholaj v Achut Jagannath Ghate*
(But see (1935) A I R 1935 Lah 642 (643) 159 Ind Cas 603 *Ishar Das v Panna Lal* (In this case the suit was treated as one to set aside an order in claim proceedings under O 21 R 63 C P C))

Note 27

- 1 (1916) A I R 1916 All 335 (335) 38 All 676 35 Ind Cas 86, *Nadar Singh v Mt Ganda Dei*
(1914) A I R 1914 Mad 126 (128) 39 Mad 972 22 Ind Cas 870 (F B), *1 ellammal v Ayyappa Nall*

28. Suit to recover over-payment.—Where *A* owes a certain sum of money to *B* but overpays the amount a suit by him for recovery of the excess amount paid is a suit for money received by him for the use of the plaintiff and is governed by this Article¹

29. Suit against person receiving offerings for shrine.—A suit on behalf of a shrine for the recovery of money received by the defendant as offerings for the shrine is one under this Article¹

30. Suit for haqq-i-chaharam.—A suit for "haqq-i-chaharam" (one fourth of the purchase money due to the proprietor of a mohalla on the sale of a house situated in it) based on custom has been held not to be governed by this Article¹ The reason given is that the right claimed in such a suit is based on custom whereas the suit contemplated by this Article is based on implied contract. It has been seen in Note 2 ante that such a view as to the suits contemplated by this Article is not correct

(1922) A I R 1922 Mad 189 (191) 45 Mad 70 69 Ind Cas 326 *Official Receiver South Malabar v Veeraraghavan Pattar*

(1881) 4 All 6 (8) 1881 All W N 96 *Lachman Persad v Chammi Lal* (Money belonging to *A* was wrongly attached in execution of a decree obtained by *B* against *C* and it was thereafter withdrawn by the decree holder *B* Held that *A*'s suit against *B* to recover the money was one for money had and received for plaintiff's use)

Note 28

1 (1875) 25 Suth W R 415 (416) *Radha Nath Dose v Dama Charan Mookerjee* (Contract between plaintiff and defendant that defendant should

ment)

(1914) A I R 1914 Lah 29 (31) 22 Ind Cas 592 *Roman Catholic Mission Rawalpindi v Sundar Singh* (Suit for the recovery of over payments made to a building contractor)

[See (1928) A I R 1928 Nag 256 (256) 112 Ind Cas 126 *Lal Singh v Jivan Ram* (Fields given to defendant in order to satisfy a debt due to him—Implied promise to pay surplus profit to plaintiff—Suit for profit would be within Article 62)]

Note 29

1 (1925) A I R 1925 Mad 1188 (1190) 89 Ind Cas 933 *Sethu Rao v Seethalakshmi Ammal*

(1926) A I R 1926 Lah 228 (228) 92 Ind Cas 731 *Najal Singh v Secretary Gurudwara Guru Tegh Bahadur*

(1928) A I R 1928 All 134 (135 136) 50 All 265 103 Ind Cas 459 *Jaishth Madho v Galashram Narayaji*

Note 30

1 (1879) 2 All 358 (360) *Kiratla Chand v Ganesh Prasad*

(1896) 18 All 430 (432) 1896 All W N 140 *Sham Chand v Bahadur Upadhyay* (Following 1 All 444 (F B) and 2 All 358)

[But see (1893) 1893 All W N 65 (66) *Raghunath Prasad v Girdhari*]

Article 62
Note 3131. Other illustrative cases.—See the undermentioned cases¹

Note 31

- 1 (1884) 8 Bom 234 (238), *Morbhat Purohit v Gangadhar Karkare* (Sums due to plaintiff out of collections from the village should be regarded as money received to his use or else payable on a contract)
- (1921) A I R 1921 Mad 362 (363) 44 Mad 823 62 Ind Cas 742, *Tarabchand v M & S M Ry Co* (Where the Railway Company has sold the goods in exercise of the powers conferred by Section 56 of the Railways Act, a suit by the consignor to recover the surplus sale proceeds from the Railway Company is governed by Article 62)
- (1927) A I R 1927 All 710 (710, 711) 104 Ind Cas 419 50 All 111, *Mahbub Ali v Mohammad Husain* (A had a decree against B — B paid certain sums under decree and applied for certificate of satisfaction—A resisted and eventually the application was rejected—Then B sued for recovery of the money Held the suit lay The cause of action was one for money received by defendant for plaintiff's use)
- (1871) 8 Bom H C R A C 107 (110) *Rangoba Naik v Collector of Ratnagiri* (Where a Collector in the year 1854 employed certain karkuns to assist a deshmukh in the performance of his duty, deducting the amount of their pay from the deshmukh's watan, but failed to show that the employment of such karkuns was necessary, it was held that the deshmukh was entitled to recover the amount so deducted from his watan as money received by the defendant for the use of the plaintiffs)
- (1870) 13 Suth W R 150 (151) 4 Beng L R App 68, *Abhaya Churn Dutt v Haro Chandra Das Bank* (Defendant who was a batwara ameen employed by the Collector drew from the public treasury a sum of money to pay the establishment, but failed to pay the plaintiff who was a mohurrir under him Suit against the ameen for recovery of his salary is governed by this Article)
- (1907) 17 Mad L Jour 143 (144) *Nataraja Desikar v Veerabadran Chetty* (Suit lies to recover money paid to witness for hatta and travelling expenses if he does not attend in pursuance of a summons served on him as money had and received)
- (1923) A I R 1923 Bom 155 (160) 67 Ind Cas 761, *Bank of Bombay v Fazulbhai Ebrahim* (Bank holding Government paper held in trust for plaintiff of which trust it had constructive notice—Bank selling it and parting with sale proceeds—Suit against bank for recovery of the sale proceeds with interest—Suit is either one for conversion (Article 48) or for money had and received to the plaintiff's use)
- (1927) A I R 1927 All 161 (162) 49 All 520 101 Ind Cas 224 (F B), *Upper India Rice Mills, Ltd v Jaunpur Sugar Factory, Ltd* (Same agent for two principals—Money belonging to one lent by the agent to the other — Liability of the other to repay the loan is for money had and received)
- (1911) 10 Ind Cas 730 (731) 33 All 450, *Mahd, Hussain v Sukh Chand* (Money deposited in Court in *usum jus habentis* and withdrawn by a person not entitled to it may properly be held to be received for the use of the person entitled)
- (1907) 30 Mad 459 (460) 17 Mad L Jour 452, *Shanmuga Vela Pillai v Govinda Suamy* (Suit by an assignor for recovery of money received by assignee of mortgage bond from the mortgagor under an assignment ab initio valid is a suit for "money had and received" and is governed by Article 62)
- (1920) A I R 1920 Mad 742 (744) 43 Mad 803 60 Ind Cas 255, *Neelamani Patnaik v Sukadara Behara* (Where, after having assigned his mortgage by an unregistered document (which though it could not affect the mortgaged property—would pass the debt), the mortgagee

32. Starting point of limitation. — Limitation begins to run under this Article from the time when the money is received by the defendant¹ But where, by the fraud of the defendant the plaintiff has been kept from the knowledge of the fact that the defendant has received the money, time will begin to run, under Section 18 of the Act, from the date when the fraud first becomes known to the plaintiff²

received the mortgage money from the mortgagor in fraud of the rights of the assignee, the latter a suit against the assignor to recover the money would be governed by Article 62)

(1914) A I R 1914 Mad 572 (573) 37 Mad 331 14 Ind Cas 254, *Sanjunn Menon v Gorinda Menon* (Money belonging to Malabar tarwad received by junior member is money received by him for the use of the karuvanas representing the tarwad and suit by karuvan for recovery of such money falls under this Article)

(1904) 1 A L J 422 (423), *Mulhita Pd v Gajraj* (Suit for recovery of a sum of money kept in deposit with a particular person is governed by Art 62)

(1922) A I R 1922 Cal 157 (158) 49 Cal 836 68 Ind Cas 94 (F B), *Biman Chandra Datta v Promotho Nath Ghose* (Where the defendant had drawn out a sum of money which had been invested in a bank through him, and which belonged to a deceased lady whose heir at law was the plaintiff and defendant had appropriated it, a suit to recover the amount from the defendant is governed by Article 62)

(1879) 2 All 354 (355), *Bhawani Kuar v Rukhi Ram* (When the auction purchaser at an execution sale of a decree for money realizes the amount of such decree, and, on such sale being set aside, the holder of the decree sues the auction purchaser for the recovery of the money realized by him under the decree, the suit is not one for damages but is one for money payable by the defendant to the plaintiff for money received by the defendant for the plaintiff's use)

(1876) 1 Bom 295 (300), *Abdul Karim v Manji Hansraj* (Where defendant wrongfully obtains plaintiff's money from a third party, plaintiff a debtor, suit for recovery of money is governed by this Article)

(1914) A I R 1914 Lah 242 (245) 23 Ind Cas 445, *Kirpa Ram v Jaichand* (Where a certain jaghir was leased out and the lessee continued to collect the rents even after the lease was put an end to a suit by the lessor to recover from the lessee the amounts so recovered was governed by Article 62)

(1911) 11 Ind Cas 145 (151) 33 All 708, *Bhagwandas v Karam Husain* (Properties of A and B mortgaged to secure same debt — A's property sold and entire proceeds appropriated for debt — B's property sold and portion appropriated to make up the balance of the mortgage debt remaining — A's property having paid more than its proportional share of the debt, A suing B for a share in the surplus sale proceeds of latter's property—Suit is governed by this Article)

Note 32

- 1 (1922) A I R 1922 P C 403 (405) 71 Ind Cas 629 50 Ind App 69 45 All 179 26 Oudh Cas 223 (P C), *Harnath Kuar v Indar Bahadur Singh*
- (1925) A I R 1925 Cal 67 (72) 83 Ind Cas 110, *Niranka Chandra v Atul*
- (1920) A I R 1920 Cal 466 (467) 58 Ind Cas 741, *Bejoy Chand v Tinkari*
- (1923) A I R 1923 Mad 392 (395) 74 I C 416, *Gopala Iyengar v Mummachi*
[But see (1926) A I R 1926 Mad 615 (619) 94 Ind Cas 515 49 Mad 468 (F B), *Venkata Gurunadha Rama Seshayya v Treepoor-sundars Cotton Press, Berwada* (Observation in this case that where plaintiff is not aware of the receipt of money by the defendant, time will run from the date when he becomes so aware is, it is submitted, not correct)]

2. (1918) A I R 1918 Mad 288 (290) 43 I C 625 41 Mad 483, *Panku v. Dharman*.

Article 62
Note 32

Where the receipt of money by the defendant has been by means of a cheque, the date on which the cheque has been cashed and not the date on which the cheque is issued is the date when the money is received by the defendant for the purposes of this Article³

Where money awarded as compensation in land acquisition proceedings has been withdrawn by the defendant and the plaintiff claims such money as belonging to him, the money must be deemed as definitely received by the defendant on the date of the final award⁴

In the undermentioned case,⁵ A mortgaged certain property to B. A left a portion of the consideration money in the hands of B in order that certain prior mortgage debts might be paid off. B did not pay off such debts and A sued B for the recovery of the money which remained in the latter's hands. It was held that assuming that this Article applied to the case, the words "when the money is received" in the third column of the Article meant "when the money is received for the plaintiff's use," that is to say, the period would begin to run from the time when the mortgagees refused to pay to the prior mortgagees but held the money constructively for the use of the plaintiff. It is submitted that the above view is not correct, inasmuch as, if the Article applies at all to the case, that can be only on the footing that when the money is actually received by the defendant it is received for the use of the plaintiff. The Article does not apply to cases where after money is received by the defendant it becomes money held by him for the use of the plaintiff. The same criticism will also apply to the undermentioned decision,⁶ which also proceeds on the view that the date when the money is received for the plaintiff's use can be later than the date when the money is received by the defendant.

(1921) A I R 1921 All 155 (157) 43 All 410 60 IC 774 *Sahab Ram v Gerandi*
(1867) 8 Suth W R 23 (23) *Arrool Singh v Lalla Gopeenath* (Mere ignorance on plaintiff's part of receipt of money by defendant where such ignorance is not due to defendant's fraud will not save limitation)

(1938) A I R 1938 Cal 263 (270) 1 L R (1938) 1 Cal 512 *Chaitanya Das Banerjee v Ranjit Pal Chaudhury*

(1972) A I R 1972 Cal 157 (159) 69 Ind Cas 94 49 Cal 886 (F B) *Diman Chandra Dutta v Promotho Nath Ghose*

(1917) A I R 1917 All 8 (9) 40 IC 37, *Lakhpat Pandey v Jang Bahadur*

(1921) A I R 1921 Mad 283 (283) 69 Ind Cas 274 *Ramalinga Serrai v Solais Serrai* (Fraud subsequent to receipt of money by defendant cannot save time. See Section 18 Note 2 ante)

3 (1914) A I R 1914 Bom 33 (35) 33 Bom 293 23 IC 779 *Sec. of State v Hughes*

4 (1920) A I R 1920 Lah 491 (491) *Isdul Hamid v Mahomed Sharif*

5 (1919) A I R 1919 Pat 344 (345) 51 IC 320 *Mukhi Singh v Kistun Singh*

C (1887) 14 Cal 457 (460) *Atul Arista v Lyon & Co* (Goods paid for before delivery—Short delivery—Suit to recover sum overpaid—Date of delivery is date when money is received by defendant for plaintiff's use)

63.* For money payable for interest upon money due from the defendant to the plaintiff.	Three years.	When the interest becomes due.	Article 63
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Synopsis

1. Scope of the Article.
2. Suit for money payable for interest.
3. Interest recoverable under registered contracts.
4. Suit for interest charged on immovable property.
5. "When the interest becomes due."

Other Topics

Claim for interest to be based on independent contract	..	See Note 1
Interest claimed as accessory to principal—Article not applicable		See Note 1
Interest includes payment in kind	... ..	See Note 2, Pt. 2
Interest on mortgage	... ..	See Note 4 F-N (1)

1. **Scope of the Article.**—This Article applies to suits for the recovery of *interest* upon money due from the defendant to the plaintiff. The *right* to recover interest arises under the substantive law in the following ways

1. under an express or implied contract,¹
2. under mercantile usage,²
3. under statutory provisions,³ or
4. by way of equitable relief or damages in cases where justice, equity and good conscience require it.⁴

* Act of 1877, Article 63 and Act of 1871, Article 61.

Same as above

Act of 1859.

No corresponding provision.

Article 63 — Note 1

1. See the Authors' Commentaries on the Civil Procedure Code, Section 34, Note 7
2. See the Authors' Commentaries on the Civil Procedure Code, Section 34, Note 8
3. See the Authors' Commentaries on the Civil Procedure Code, Section 34, Note 9
4. (1922) A I R 1922 Mad 55 (56) 71 Ind Cas 257, *Arunachalam v Rajeswara Sethupathi* ("It is true that there is no contract to pay interest and that interest was not awardable under the Interest Act either as there was no demand made for payment. But it is now settled that, apart from contract and the Interest Act, it is open to the Court to decree interest by way of equitable relief in a proper case where justice, equity and good conscience require it.")

Article 63
Note 1

But the fact that there is a *right* to recover interest does not necessarily mean that the person having such right can sue for the recovery of interest *alone*. The general principle is that interest is *accessory* to the principal and cannot be recovered apart from the principal to which it is accessory.⁵ Thus, where *A* promises to repay a loan taken from *B* with interest at 12 per cent per annum after five years, *B* cannot sue *A* for the interest alone before or even after the period of five years. If a suit on the principal amount is barred by limitation, the right to recover interest will also fall with it. In *Valia Tamburati v Vira Rayan*⁶ Holloway, J. cited the following passage from Savigny

"When the principal demand is lost by prescription, actions for all sums of interest in arrears are barred with the principal, even when these would (primarily) arise at a very recent time. The ground of this apparent anomaly is to be found in the accessory nature of these liabilities, which would render the pursuit of them after the loss of the main action a contradiction in terms.

There is however an exception to the general principle stated above namely that where there is an *independent contract* to pay interest it may be recovered by suit even though the principal may be barred or may not have become due or may have been paid up.⁷ In

(1887) 10 All 85 (90) 1887 All W N 292 *Mansab Ali v Gulab Chand*
(Interest as interest cannot be allowed on money lent in India on a

(1924)
v *Sarju Prasad Messer* (Interest payable on ground of equity)
(1924) A I R 1924 Oudh 319 (819) 78 Ind Cas 85 *Aditya Prasad v*
Chhotelal (Do)
[See a]

deposit with interest—Interest on deposit from date of breach cannot be claimed in absence of provision in the contract to that effect.]

See also Note 10 to Section 34 and Note 2 to Order 34 Rule 11 (relating to *post diem* interest) of the Authors' Commentaries on the Code of Civil Procedure

5 (1902) 27 Bom 330 (333) 5 Bom L R 198 *Diondi Ram v Tiba Saradan*
(1934) A I R 1934 Nag 219 (222) 152 Ind Cas 319 *Indarsa v Narayansa*
(1880) 5 Cal 759 (765) 6 Cal L R 112 *Hajee Syed Muiammad v Mt Ashruf*
Connissa

6 (1877) 1 Mad 228 (231) 1 Ind Jur 231 1 Mad L R 351

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period for the recovery of the debt from the mortgaged property.)
(1917) A I R 1917 Low Bur 9 (10) 41 Ind Cas 72 *Thair Maistry v A N L-*
A Chetty Firm

Cheang Thye Phin v Lam Kin Sang,* which was a case which went up to the Privy Council from the Straits Settlements, the plaintiff claimed two sums of money with the interest, as regards one of which there was no independent contract to pay interest and as regards the other of which there was such a contract. As regards the first claim their Lordships observed as follows:

"It seems to their Lordships to follow that there being no independent contract to pay interest, the interest is a mere accessory of the principal and if the principal is irrecoverable, so is the interest on it. See *Hollis v Palmer*."

As regards the other claim their Lordships observed as follows:

It would appear from the evidence that there was a special contract to pay interest at a specified rate. This being the case, the principle that where interest is a mere accessory to the principal and a claim to the latter is barred by statute the interest thereon cannot be recovered does not apply.

It would follow from the above principles that this Article will apply only to suits for the recovery of interest based on an *independent contract* to pay it and not to cases where it is claimed as an accessory to the principal amount claimed. A takes a loan from B and agrees to repay the same after five years. He also agrees to pay the interest on the amount at a particular rate at the end of every year. B files a suit on the loan six years after the date of the loan. He can recover the interest that has fallen due only within three years of the date of the suit under this Article.¹⁰ The reason is that the claim for interest is based on an independent contract to pay it and would be governed by this Article.

2 Suit for money payable for interest. — The word interest in its ordinary sense means something paid for money overdue.¹ It may also include a payment made in kind such as paddy.² A suit by a depositor against a banker for the difference between the higher rate of interest claimed by him on his deposit

(1906) 30 Bom 452 (455) 8 Bom L R 82 1 Mad L Tim 49 *Nusserwanji v Lazman* (Even though principal money was paid up.)

(1911) 12 Ind Cas 42 (44) 35 Bom 327 (P C) *Madappa Hedge v Ramkrishna Narayan* - - - - -

ikar

Cas 403 *Swamy*

P 264
229 4mr

(The case
contract was
charged on property—so the 12 years rule of limitation was applied.)

Note 2

1 (1878) 4 Cal 293 (301) 3 Cal L R 336 2 Shome L R 2 *Ram Chunder*

Article 63
Notes
2—5

and the lower rate admitted and paid by the banker is not one for money lent under an agreement or for money deposited under an agreement but is one for money payable for interest upon money due³

3. Interest recoverable under registered contracts—A suit for interest on money payable under a registered contract would be governed by Article 116 of the Act. The reason is that that Article must be regarded as a special Article applicable to such suits where the contract in respect of which the amount is recoverable is a registered contract¹

4. Suit for interest charged on immovable property.—A suit for recovery of interest which is charged on immovable property, by enforcement of the charge, would be governed by the 12 years' rule of limitation under Article 132 *infra* and not by this Article¹

5. "When the interest becomes due."—The starting point under this Article is the date when the interest becomes due, that is, when the interest becomes *actually* payable. In cases of deposit on *thavanai*, where the agreement is that the interest is not to be paid until demanded but should be added to the principal as an increment, the whole amount being treated as a fresh deposit at the

3 (1880) 3 All 328 (332-333) *Makundi Kuar v Balkrishen Das*

Note 3

1 (1916) A I R 1916 P C 182 (184) 44 Cal 759 44 Ind App 65 39 Ind Cas 156 (P C) *Triconidas Cooverji Bhoja v Sri Gopinath Jiu Thakur*

Note 4

1 (1916) A I R 1916 Lah 451 (451) 29 Ind Cas 854 *Jahan Khan v Chandi Shah* (Where a mortgage bond provided that the interest on the mortgage money would be paid yearly and the mortgagee could recover arrears of interest by suit and after ten years if the land was

before the institution of the suit)

Atk 1007
(1919) A I R 1919 Cal 46 (47) 46 Cal 448 52 Ind Cas 433 *Sita Nath v Thakurdas*

(1909) 2 Ind Cas 111 (112) (Cal) *Ashmony Sinha v Hardhan Das* (Where interest under a mortgage bond is payable in kind (paddy) a suit for the interest falls within Art 132 as the interest which is the value of the paddy though variable from time to time is charged upon the mortgaged property)

(1882) 6 Mad 417 (417-418) *Dayans Ammal v Ratna Chetti*

(1916) A I R 1916 Mad 78 (79) 30 Ind Cas 818 *Vasudevan v Kotturuppel Tamanna*

(1880) 1880 Pun Re No 101 *Ram Nath v Mit Jio*

(1896) 19 All 39 (46-50) 23 Ind App 138 1 Cal W N 52 6 Mad L Jour 214 78 Ind 83 (P C) *Mathura Das v Raja Narindar*

end of each *thanasai*, the proper Article applicable to a suit for the recovery of the same is Article 60 and not this Article ¹

Article 63
Note 5

64.⁶ For money payable to the plaintiff for money found to be due from the defendant to the plaintiff on accounts stated between them.

Three years.

When the accounts are stated in writing signed by the defendant or his agent duly authorized in this behalf, unless where the debt is, by a simultaneous agreement in writing signed as aforesaid, made payable at a future time, and then when that time arrives.

Article 64

Synopsis

1. Legislative changes.
2. "Accounts stated."
3. Account stated, acknowledgment and Section 25 (3) of the Contract Act.
4. Distinction between Article 85 and this Article.
5. Accounts must be in terms of money.
6. Statement of account does not extinguish original rights.
7. Statement of account between principal and agent.
8. Adjustment of accounts not signed, if furnishes cause of action.
9. Starting point.
10. "Signed."

Other Topics

Account kept in terms of grain—Article does not apply
Accounts need not be mutual
Accounts not signed as required—Article not applicable
Simultaneous verbal agreement

See Note 5 F N (2)
See Notes 2, 8
See Note 10, Pt 2
See Note 9, Pt 4

* Act of 1877, Article 54.

Same as above.

Act of 1871, Article 62.

Columns one and two, same as above. The third column was —When the accounts are stated, unless where the debt is made payable at a future time and then when that time arrives.

Act of 1859.

No corresponding provision

Note 5

1. (1920) A I R 1920 Mad 983 (985) 43 Mad 629 53 Ind Cas 639, *Narayan Chetty v Subbiah Chetty*

Article 64
Notes
1—2

1. Legislative changes.

- 1 There was no provision corresponding to this in the Act of 1859. In some cases¹ the suit on an account stated was held governed by clause 16 of Section 1 of that Act and in other cases² by clause 9.
- 2 In the Act of 1871, the statement of account was not required to be signed by the defendant or by his agent³.

2. "Accounts stated." — The expression "accounts stated" has more than one meaning. It sometimes means a claim to payment made by one party and admitted by the other to be correct, in other words, an acknowledgment of liability. It is, in this sense, merely evidence of the debt and does not, by itself, constitute a cause of action,¹ though it may extend the period of limitation under Section 19 of the Act for a suit on the original cause of action.² Although such admission or acknowledgment implies a promise to pay, such promise is not supported by any consideration.³

There is a second kind of accounts stated where the account contains items both of credit and debit, and the figures on both sides are adjusted between the parties and a balance struck and acknowledged. Such a statement not only implies a promise to pay as in the case of an acknowledgment of liability, but such promise is supported by consideration and is therefore a contract giving rise to a fresh cause of action.⁴ It is the second kind of accounts stated that

Article 64 — Note 1

- 1 (1868) 5 Bom H C R O C 16 (23) *Umedchand Hukamchand v Sha Bulahidas Lalchand*
 - (1875) 1875 Bom P J 152 (153) *Kanaji v Sadashiva*
 - 2 (1866) 6 Suth W R 328 (328) *Nobin Chunder Sahoo v Suroop Chunder Doss*
 - (1875) 24 Suth W R 440 (440) *Bissessor Gyr v Sreo Kishen Shaha Choudhry*
- v Allum Biswas
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Note 2

- 1 (1921) 38 T L R 134 (143) *Cannullo Tank Steamship Co Ltd v Alexandria Engineering Works*
[See also (1931) 1 I R 1934 Cal 441 (441) 61 Cal 64 151 Ind
Cas 331 T A *Hurst v Shyamsundarlal Ahandelwal*]

v Alexandria
(1863) 129 R

R 827)

- (1868) 5 Bom H O R O O 16 (20), *Umedchand Hukamchand v Shah Bulah*

der

Skinner & Co Ltd

- (1929) 4 I R 1928 Rang 301 (305 306) 6 Rang 578 117 Ind Cas 572, *Maung Chit U v Maung Pya* (It is not necessary to go into the earlier transactions and show that the balance is correct)

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is referred to by this Article ⁴. In *Bishun Chand v. Girdhari Lal*,⁵ Lord Wright in delivering the judgment of the Judicial Committee of the Privy Council observed that the essence of an account stated within the meaning of this Article is

"the fact that there are cross items of account and that the parties mutually agree the several amounts of each and, by treating the items so agreed on the one side as discharging the items on the other side *pro tanto*, go on to agree that the balance only is payable. Such a transaction is in truth bilateral, and creates a new debt and a new cause of action. There are mutual promises, the one side agreeing to accept the amount of the balance of the debt as true (because there must in such cases be, at least in the end, a creditor to whom the balance is due) and to pay it, the other side agreeing the entire debt as at a certain figure and then agreeing that it has been discharged to such and such an extent, so that there will be complete satisfaction on payment of the agreed balance. Hence there is *mutual consideration to support the promises on either side and to constitute the new cause of action*. The account stated is accordingly binding, save that it may be reopened on any ground—for instance, fraud or mistake—which would justify setting aside any other agreement."

It would follow from what has been stated above that a mere balancing of an account is not necessarily an account stated within the meaning of this Article ⁶. It must be the result of *agreement* between the parties to set off the cross items of the account against one another ⁷. Whether in any particular case the striking of a balance falls under the first or the second kind of accounts stated referred to above depends, therefore, on the facts and circumstances of the particular case ⁸.

Before the decision of the Privy Council in *Bishun Chand's case*⁵ referred to above, there was a conflict of opinion in the various Courts in India as to whether an account which merely consisted of advances of amounts on the one side and repayments towards such advances on the other would constitute an account stated within the meaning of this Article. One view was that it would not constitute

(1909) 4 Ind Cas 38 (41) 92 Mad 284 *Seshan Pattar v. Vira Raghava Pattar*

1911 10 Cal 100 1911 10 Cal 100 1911 10 Cal 100

1911 10 Cal 100 1911 10 Cal 100 1911 10 Cal 100

1911 10 Cal 100 1911 10 Cal 100 1911 10 Cal 100

1911 10 Cal 100 1911 10 Cal 100 1911 10 Cal 100

1911 10 Cal 100 1911 10 Cal 100 1911 10 Cal 100

(1920) A I R 1920 Pat 161 (161) 5 Pat L Jour 371 56 Ind Cas 379 *Suray Prasad Pandey v. W. W. Boucke*

7 (1910) 7 Ind Cas 270 (275) (Cal) *Prasanna Kumar v. Burn & Co. Ltd.*

8 (1904) 1904 Pun Re No 63 1904 Pun L R No 123 *Ganpat v. Daulat Ram* (1878 Pun Re No 3 (F B) Followed)

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Note 2

an account stated but would be a mere acknowledgment of liability.⁹ This view was based on an interpretation of the leading case of *Laycock v. Pickles*^{2a} decided in England in the year 1863. In that case Blackburn, J., observed as follows —

"An account stated is commonly called an admission of a debt but it is merely evidence of it. There is a real account stated, called in old law an *insimul computassent*, that is to say, when several *items of claim* are brought into account on either side, and, being set against one another, a balance is struck, and the consideration for the payment of the balance is the discharge of the items on each side."

The words "*items of claim*" mentioned by Blackburn, J. were held to refer to accounts where there were reciprocal demands between the parties, i. e. to cases where the parties had *independent claims* against each other and not to cases of advances and repayments in discharge thereof.¹⁰

A contrary view, namely that Article 64 was not restricted to cases where there were mutual dealings between the parties but would include cases of advances and repayments also, was held in the undermentioned cases.¹¹

9 (1925) A I R 1925 Mad 1147 (1148) 86 Ind Cas 942, *Asriada Nadan v Vadamuthu Nadan*

- 9a (1863) 129 R R 827 (831) 4 B & S 497 33 L J Q B 43 (48) 10 Jur (NS) 336 9 L T (NS) 378 12 W R (Eng) 76
10 (1892) 15 All 1 (2) 1892 All W N 215, *Jamun v Nand Lal*
(1901) 23 All 502 (504) 1901 All W N 150 *Ganga Prasad v. Ram Dayal*
(1925) A I R 1925 Mad 1147 (1148) 86 Ind Cas 942, *Asriada Nadan v Vadamuthu Nadan*
(1872) 6 Mad H C R 197 (201, 202), *Hirada Karibasappa v Gadiga Muddappa*
(1929) A I R 1929 Pat 258 (260) 8 Pat 706 120 Ind Cas 470, *Deoraj Tewari*

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The conflict has now been set at rest by the decision of the Privy Council in *Bishun Chand v. Girdhari Lal*¹² Their Lordships observed in that case as follows:

"It is also clear that in that great class of cases, where the whole dealings between the parties are financial the items of account can only be in terms of money and can only consist of payments of one to the other and *vice versa*. It seems that the rule adopted by the Court in the decision appealed from would exclude from the category of legally valid accounts stated all such financial accounts. Nor can it be material as it seems in determining whether there can be an account stated whether the balance of indebtedness is throughout as it must be at the end, in favour of one side. Equally it seems irrelevant, whether the debt in favour of the final creditor was created at the outset by one large payment or consisted of several sums of principal and several sums of interest, nor can it matter in this connexion whether the only payments made on the other side were simply payments in reduction of such indebtedness or were payments made in respect of other dealings. In any event, items must in the same way be ascertained and agreed on each side before the balance can be struck and settled.

The result of the above discussion is that, in order to constitute a statement of accounts within the meaning of this Article two things are essential —

- 1 There must be *cross items* of account though they need not be in respect of mutual or independent dealings^{12a} Where

(1931) A I R 1931 Lah 233 (235) 131 Ind Cas 292 *Mulki Ram Hem Raj v. Rup Chand Lachman Das* (Account between two firms—Creditor m—Balance struck rest on the balance

Cas 84 1915 Pun
(Promise to pay

interest on balance)

(1917) A I R 1917 Lah 432 (434) 41 Ind Cas 915 1917 Pun Re No 66 *Bhagwan Singh v. Munshi Ram* (Do)

(1932) A I R 1932 Lah 273 (275) 138 Ind Cas 542 *Ganeshi Das Gobind Rai v. Har Bhagwan* (Balance struck after going into accounts implies a promise to pay and a suit brought to recover the amount secured by it is governed by Art 64)

(1929) A I R 1929 Lah 263 (264) 10 Lah 745 115 Ind Cas 764

entry—Art 64 is the proper Article applicable)

(1922) A I R 1922 Lah 425 (426) 3 Lah 326 69 Ind Cas 502 *Nand Lal v. Partab Singh*

12 (1934) A I R 1934 P C 147 (151) 150 Ind Cas 6 61 Ind App 273 56 All 376 (P C)

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y to

adjustments of mutual accounts]

(1904) 1904 Pun Re No 69 1904 Pun L R No 123, *Ganpat v. Daulat Ram*

there is only a *single* item of account between the parties which is acknowledged, this Article will not apply¹³

- 2 The striking of the balance must be result of an *agreement* between the parties. Where on a letter of demand by A on B, the latter endorsed "will pay next August," it was held that this was not an "account stated," but a mere proposal¹⁴. In a similar case¹⁵ it was held to be an acknowledgment.

It was held in the case cited below that an "account stated" must *on the face of it* purport to contain accounts and that a document containing an entry by the creditor "Rupees 375 due on making accounts after repayments deducted," and an entry by the debtor admitting such amount as due is not an account stated within the meaning of this Article¹⁶.

3. Account stated, acknowledgment and Section 25 (3) of the Contract Act. — An acknowledgment under Section 19 is a purely one sided and unilateral statement. It is merely evidence of the debt and does not, as has been seen in Note 2, *supra*, by itself constitute a cause of action. Being merely an admission of a debt, it may be shown to be erroneous. It will save time under Section 19 of the Act if it is made before the expiry of the period of limitation in respect of the right sought to be enforced¹.

A statement of account on the other hand is, as has also been seen in Note 2, *supra*, the result of a mutual agreement and is *bilateral* in character². It implies a promise to pay and this promise to pay, being one supported by *consideration*, gives rise to a new debt and a new cause of action. It is immaterial whether the items of

(1935) A I R 1935 Lah 877 (879) 159 Ind Cas 677, *Sohan Lal v Arya Megh Udhar Sabha*

(1937) A I R 1937 Pat 348 (348) 167 Ind Cas 652 *Ramlochan Pande v Ramnarain Singh*

(1936) A I R 1936 Cal 470 (472) 166 Ind Cas 548 *Prosonna Kumari Mozumdar v Tripura Charan Choudhury* (Where on settlement of an account in respect of a debt on a promissory note a certain amount is found due on a particular date on calculation of interest at a reduced rate, and an endorsement to that effect made on the back of the promissory note is signed by the debtor such an endorsement amounts to an account stated between the parties and a suit for recovery of the amount alleged to be due is governed by Art 64.)

13 (1938) A I R 1938 Nag 180 (181) 174 Ind Cas 374 *Ramprasad Jagbandhoo v Anandi Brindawan*

14 (1919) A I R 1919 Oudh 401 (402) 52 Ind Cas 262, *Fakir Khan v Anand Behari Lal*

14 (1916) A I R 1916 Mad 774 (775) 29 Ind Cas 36 *Ramasamy Pattar v Tirucha Mannadar*

15 (1935) A I R 1935 Nag 221 (222) 159 Ind Cas 447, *Shamlal v Gulabchand*

Note 3

1 (1930) A I R 1930 All 467 (470) 123 Ind Cas 820 52 All 480 *Paj Narain Lao v Lam Sarup*

(1929) A I R 1929 Pat 258 (260) 8 Pat 706 120 Ind Cas 470, *Deoraj Tewari v Indrasen Tewari*

2 (1931) A I R 1931 All 375 (376) 131 Ind Cas 867, *Ganesh v Mullu Mal Girdhar Das*

account balanced and stated are beyond the period of limitation³ The Court cannot go behind the statement of account, except on grounds on which any other contract could be attacked⁴ In *Laycock v Pickles*⁵ Blackburn J observed as follows:

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'It is then the same as if each item was paid and a discharge given for each and in consideration of that discharge the balance was agreed to be due. It is not necessary, in order to make out a real account stated that the debts should be debts *in presenti* or that they should be legal debts. I think equitable claims might be brought into account and I am not certain that a moral obligation is not sufficient.

This view has been affirmed by the Privy Council in the under mentioned cases⁶

Section 25 sub section 3 of the Contract Act provides that a promise in writing to pay a barred debt is a valid contract. But under that Section the promise must be an express one. A promise such as is implied in an acknowledgment or in a statement of account is not an express promise within the meaning of Section 25 sub section 3⁷

4 Distinction between Article 85 and this Article — Article 85 provides the limitation for a suit for the balance due on a mutual, open and current account. An open and current account means a running *unsettled or unclosed* account (see Note 14 to Article 85)¹ This Article deals with a case where the account has been stated and this involves that on that date the account was closed. Consequently Article 85 will not apply where the accounts have been stated.*

- 3 (1875) 1875 Pun Re No 14 *Sauai v Badan Singh*
(1877) 1877 Pun Re No 6 *Sauai v Dalmokund*
(1877) 1877 Pun Re No 41 *Atma Ram v Jumma Khan*
- 4 (1875) 1875 Pun Re No 14 *Sauai v Badan Singh*
(1934) A I R 1934 P C 147 (150 151) 150 Ind Cas 6 56 All 376 61 Ind App 273 (P C) *Bishun Chand v Chudhari Lal*
- 5 (1863) 129 R R 827 (831) 4 D & S 497 30 L J Q B 43 10 Jur (N S) 336 9 L T (N S) 378 12 W R (Eng) 76
- 6 (1934) A I R 1934 P C 144 (146) 151 Ind Cas 90 (P C) *Siqueira v Noronha*
(1934) A I R 1934 P C 147 (150 151) 150 Ind Cas 6 56 All 376 61 Ind App 273 (P C) *Bishun Chand v Girdhari Lal*
- 7 (1930) A I R 1930 All 467 (4 0) 123 Ind Cas 820 52 All 480 *Raj Narain Rao v Ram Sarup*
(1915) A I R 1915 Cal 186 (187) 25 Ind Cas 89 *Debi Prosad v Ram Ghulam Sahu*
(1910) 7 Ind Cas 901 (901) (Mad) *Ramasamy Pillai v Kuppusamy Pillai*
(1929) A I R 1929 Pat 258 (260 261) 8 Pat 06 120 Ind Cas 470 *Deoraj Tewari v Indrasan Tewari*

Note 4

- 1 (1922) A I R 1922 Lah 316 (317) 66 Ind Cas 337 *Jwala Das v Hukam Chand* (An account does not become closed whenever a balance is struck)
- 2 (1931) 130 Ind Cas 570 (570) (Lah) *Jesa Ram Diwan Chand v Lachman Das*
(1922) A I R 1922 Lah 189 (183) 68 Ind Cas 815 *Firm Gurudas Ramkotu-ram v Bhagwan Das*

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5—8

5 Accounts must be in terms of money.—In *Bishun Chand v Girdhari Lal*,¹ the Privy Council observed as follows

"Indeed it follows from the idea of an account stated that whatever the consideration for each item, every item must appear *in terms of money*, since what is being agreed is matter of accounts."

There must be a *definite sum of money* entered in the account as due.²

6. Statement of account does not extinguish original rights.—The statement of an account does not extinguish the original debt on which the account is based. It is therefore open to the creditor to base his suit for the recovery of the debt, either on the accounts stated or on the original contract. Where, therefore, in respect of money due on a registered contract there was an account stated and a suit was filed on the original contract within six years thereof but beyond three years of the statement of accounts, it was held that the suit was not barred¹ but was governed by Article 116.²

7. Statement of account between principal and agent.—In *Bishun Chand v Girdhari Lal*,¹ their Lordships of the Privy Council pointed out as an illustrative case governed by this Article, the statement of accounts between principal and agent. See also the undermentioned cases.²

8. Adjustment of accounts not signed, if furnishes cause of action.—There has been a conflict of opinion as to whether an adjustment of accounts which has not been signed by the defendant would furnish a substantive cause of action for a suit for recovery of the amount due on such adjustment. The Act of 1871 assumed that such an adjustment would furnish a cause of action for, Article 62

(1922) A I R 1922 Lah 204 (204) *Nanak Singh v Mithan Singh*. (It was held that there was no mutual open and current account—But it is not decided which of the Art 64 or Art 85 applied to the case.)

Notes 5

- 1 (1934) A I R 1934 P C 147 (151) 150 Ind Cas 6 56 All 376 61 Ind App 273 (P C)
- 2 (1923) A I R 1923 Lah 645 (615) 62 Ind Cas 91 *Ram v Gaman Ram* (Account kept throughout in terms of grain—Art 64 does not apply.)

Note 6

- 1 (1921) 63 Ind Cas 280 (231) (Pat) *Bhatu Das v Bibi Iffatun Nisha*
- 2 (1901) 14 Mad 465 (466) 1 Mad L Jour 492, *Renga Reddi v Chinna Reddi*

Notes 7

- 1 (1931) A I R 1931 P C 147 (151) 150 Ind Cas 6 56 All 376 61 Ind App 273 (P C)
- 2 (1937) A I R 1937 Cal 535 (536) *Lachmi Narayan v Muralidhar Agarwalla* (1975) 24 Suth W R 218 (219), *Baboo Dabee Chand v Goor Dyal Singh* (1917) A I R 1917 Cal 156 (158) 40 Ind Cr 359 *Aksho Prasad Singh v Sarwan Lal* (Court was inclined to this view.)
- (1925) A I R 1925 Lah 51 (52) 100 Ind Cas 874, *Karam Chand Sant Ram v Dayanand Damodar Das*
- (1933) A I R 1933 Lah 12 (13) 110 Ind Cas 187 11 Lah 14 *Dasaundhi Ram v Mulchand*

Article 64
Notes
8—9

came to the conclusion that Article 64 must be reasonably considered and so considered will govern cases *both of oral as well as of written statement of accounts*. It is submitted that the view of Jenkins, C J in *Jalim's case*¹ must be preferred on principle.

In the cases cited below⁶ it was held that if the dealings were *mutual* between the parties an oral statement of accounts will give rise to a cause of action. In view of the decision of the Privy Council in *Bishun Chand v Girdhari Lal*,⁷ the mutuality of accounts is not a necessary factor in a statement of account giving rise to a cause of action.

9. Starting point.—Time under this Article runs from the date when the accounts are stated in writing signed by the defendant or his agent duly authorised in that behalf. Where however, the debt is by a *simultaneous agreement* in writing signed as aforesaid made payable at a future time, time will run from that date¹.

When there is no evidence as to when the accounts were stated, a finding that a suit is not barred by the three years' rule under this Article cannot be supported.²

Where *A*, the creditor, demanded money of *B*, the debtor, and *B* endorsed on the letter of demand will pay next August it was held that it was a mere proposal and not an *agreement* to pay next August and therefore not a simultaneous agreement such as is referred to in the Article, and would not postpone the starting point to that date.³

A simultaneous *verbal* agreement cannot have the effect of extending the three years' period of limitation.⁴

Where a surety undertook to hold himself liable for the dues of *A* to *B* on any account whatever⁵ and interest to the extent of Rs. 1000 and there was a statement of account between *A* and *B* subsequently and *B* sued *A* and the surety for the amount due on the stated account it was held that limitation began to run against both *A* and the surety from the date of the statement of account.⁶

6 (1917) A I R 1917 Mad 622 (622) 34 Ind Cas 431 *Ajasaari v Chamma* (1897) 21 Mad 366 (367) *Marimuthu v Srinantha Pillai* (16 Mad 339 Distt quished.)

7 (1934) A I R 1934 P C 147 (151) 150 I C 6 56 All 376 61 I A 273 (P C)

Note 9

1 (1917) A I R 1917 Cal 156 (159) 40 Ind Cas 359 *Kesho Prasad Singh v Sarwan Lal*

(1907) 25 All 67 (69 70) 1902 All W N 199 *Falarchand v Daya Ram*

2 (1933) A I R 1933 All 101 (106) 143 Ind Cas 400 *Raza Husain v District Board Banda*

3 (1919) A I R 1919 Oudh 401 (402) 52 Ind Cas 262 *Vakil Khan v Anand Behari Lal*

[See also (1937) A I R 1937 Cal 535 (537) 174 Ind Cas 154 *Lachmi Narayan v Hurlidhar* (Mere statement by defendant that money was owing from him and held in deposit payable on demand is not agreement making the amount payable in future)]

4 (1894) 8 Bom 512 (513) *Daglus Tadakchand v Shama I*

5 (1936) A I R 1936 Pat 444 (445) 162 Ind Cas 178 *Denares Bank Ltd v Manudan Lal*

10. "Signed." — It has been held that what is good and valid signature for Section 19 *ante* is also good and valid signature for this Article. In this respect there is no distinction¹ See Note 31 under Section 19

Article 64
Note 10

Where an account stated is not signed as required by this Article by the defendant or his agent, this Article will not apply²

65. For compensation for breach of a promise to do anything at a specified time, or upon the happening of a specified contingency.

Three years.

When the time specified arrives or the contingency happens.

Article 65

Synopsis

1. Applicability of the Article.
2. Contracts performable 'on demand.'
3. Registered contracts.
4. Contracts of indemnity and guarantee.

1. Applicability of the Article. — This Article applies in general to all contracts which are to be performed at a *specified future date*, or on the happening of a *specified contingency*. The word 'specified' implies that there should be some particularity in the contract itself as to the time when the contract is to be performed or as to the contingency which is to happen¹. The use of the word 'contingency' shows that the Article refers to "contingent contracts" as defined in Section 31 of the Indian Contract Act, viz "a contract to do or not to do something if some event collateral to such contract does or does not happen"². Such a contract not being enforceable unless the contingency happens (Section 32 of the Indian Contract Act), limitation for a suit for damages for non-performance thereof commences from the time the contingency happens

* Act of 1877, Article 65

Same as above

Act of 1871, Article 63.

63.—Upon a promise to do anything at a specified time, or upon the happening of a specified contingency

Three years

At the time specified or upon the contingency happening

Act of 1859.

No corresponding provision

Note 10

1 (1933) A I R 1933 Lah 12 (13) 140 Ind Cas 187 14 Lah 14, *Dasaundhi Ram v Moolchand*

2 (1907) 1907 Pun Re No 132 1907 Pun W R No 173, *Gulzari Mal v Kishan*

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1 (1932) A I R 1932 Bom 25 (27, 28) 136 Ind Cas 481, *Haralchand Tara-chand v Sumatilal Chunilal*

2 (1932) A I R 1932 Bom 25 (27, 28) 136 Ind Cas 481, *Haralchand Tara-chand v Sumatilal Chunilal*

Article 65
Note 1

Illustrations

- (a) Where the plaintiff in enforcement of the conditions of sale to him claims refund of purchase money in respect of the deficiency in the extent of the land sold to him, the suit being in effect one claiming compensation for breach of contract on the happening of a specified contingency, viz the discovery of the deficiency, is governed by this Article and time will run from the date when the deficiency is discovered ³
- (b) Where the defendant promises to pay the plaintiff at the time of the mutation of names under a mortgage in favour of the defendant, limitation for a suit to enforce the payment runs from the date on which the mutation of names takes place ⁴
- (c) A suit on a promise "to make arrangements for payment of the debt the moment my circumstances permit" is governed by this Article and the period begins to run from the time the circumstances of the defendant permit his making arrangements for the liquidation of the debt. The words such as 'when I am able' should not be treated as surplusage without any meaning but as forming part of a binding contract pointing to a specified contingency ⁵
- (d) Where the plaintiff advanced money under a deed on a promise that the money would be repaid at the time of redemption of the prior mortgage on the property, the period begins to run from the date of redemption of the earlier mortgage ⁶
- (e) Where the defendant undertakes to pay the costs of the plaintiff in a litigation the period of limitation for a suit for such costs commences to run from the date of the termination of the litigation ⁷
- (f) Where the defendant purchased from plaintiff a quantity of cotton seeds undertaking to take delivery on a specified date and to pay a certain amount as compensation for default, the period of limitation for a suit claiming compensation commences to run from the date of delivery of the goods ⁸

See also the undermentioned cases ⁹

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- 3 (1881) 3 All 712 (715-716) 1881 All W N 67 6 Ind Jur 106 *Kishen Lal v Kinlock*
 - 4 (1883) 1883 All W N 129 (129) *Dammar Singh v Lalak Singh*
 - 5 (1864) 1 Suth W R 368 (368-369) *Watson & Co v Bleckenden*
 - 6 (1917) A I R 1917 Oudh 176 (171) 38 I C 480 *Lal Belari v Satgur Prasad*
 - 7 (1927) A I R 1927 Oudh 53 (54) 99 Ind Cas 460 *Brahmajit Singh v Dwarka Singh*
 - 8 (1913) 21 Inl Cas 442 (443) (Mad) *Sivarambramaniam Mudaliar v Somasundaram Chettiar*
 - 9 (1927) A I R 1927 Lah 122 (123) 99 Ind Cas 591 *Nand Lal Jaypat Rai v Ramji Das Dwarka Das*
 - 9 (1923) A I R 1923 Lah 23 (24) "2 Inl Cas 897 *Rukan Din v Hassan Din* (Where defendant in a sale deed bound himself to pay compensation in case the land sold did not fall to his share in partition limitation for a suit for compensation commences from date of final order in partition proceedings and the period is six years under Art 116 read with this Article)

The Article applies to *suits* and not to execution applications. An execution application to enforce a surety bond given under Order 21 Rule 43 of the Civil Procedure Code is not governed by this Article but is governed by Article 182 of the Act.¹⁰

Article 115 *infra* applies to all suits for compensation for breach of any contract not in writing registered and not specially provided for in the Act. In a case falling under both this Article and Article 115, this Article will prevail over Article 115. In the undermentioned cases¹¹ it was held that the suits were governed either by Article 65 or by Article 115, but it was not decided which of them applied.

2. Contracts performable 'on demand.'—It has been seen in Note 6 to Article 59 *ante*, that in certain cases arising out of contract, the words 'on demand' do not, by themselves, make a demand a term of the contract, but that in all other cases the question will be whether in the particular case the parties *intended to make the demand a term of the contract*. In cases where the parties must be taken to have so intended, the making of the demand would be a contingency which should be proved to have happened before it is sought to fix the defendant with liability. Time would, in such cases, run under this Article from the date of demand.¹ For instances where this meaning has not been adopted, see the undermentioned cases.²

(1910) 7 Ind Cas 917 (919) (Cal) *Mir Musar Ali v Guru Charan Sen* (A undertook to produce judgment debtor—Liability on failure—Governed by this Article.)

(1923) A I R 1923 Nag 47 (48) 71 Ind Cas 40 *Shriram v Badaji* (Where defendant agreed to give plaintiff a half share in the land for helping him in recovering it. Limitation runs from the refusal of the defendant after recovery.)

plated by bond and Article 65 or Article 86 applies—Debtor has no right to compel creditor to stick to the shorter term.)

10 (1933) A I R 1933 Mad 219 (220) 142 Ind Cas 368 *Ram Reddi v Gurumurthy*

11 (1910) 8 Ind Cas 788 (789) (Cal) *Nistrani Debi v Chandi Das Debi* (Money payable on a specified date.)

(1922) A I R 1922 Lah 122 (123) *Labu Singh v Firm Rurchand Tuls Ram* (Contract to deliver grain on a specified date.)

(1919) A I R 1919 Lah 108 (108) 1918 Pun Re No 41 49 Ind Cas 231, *Mengha Ram v Hassu* (Do.)

(1922) A I R 1922 Lah 271 (271) 65 Ind Cas 691 *Muhammad Din v Sohan Singh* (Do.)

Note 2

1 (1919) A I R 1919 Mad 462 (463 464) 50 Ind Cas 87, *Seetaramayyar v Muniswami*

(1919) A I R 1919 Mad 562 (564) 51 Ind Cas 724 *Ramadh Dibi v Kandasamy Pillai*

2 (1911) 12 Ind Cas 57 (58) 36 Mad 66 *Karunakaran Nair v Krishna Menon*

(1916) A I R 1916 Mad 486 (487) 31 Ind Cas 335 *Surayya v Bapirazu*

(1893) 3 Mad L Jour 199 (200) *Karindan Kuttassan v Karindan Suppi*

Article 63
Notes
3-4

3. **Registered contracts.**—Where the contract such as the one referred to in this Article has been *registered*, a suit for compensation in respect thereof would be governed by Article 116 *infra* as being a special Article applicable to suits on registered contracts.¹ See Notes to Article 116 *infra*

4. **Contracts of indemnity and guarantee.**—A contract of indemnity is a contingent contract.¹ This Article will not, however, apply to suits on such contracts inasmuch as suits on contracts of indemnity are specifically provided for by Article 83 *infra*.²

A contract of guarantee is also a contingent contract but has not been provided for in any specific Article. Consequently, this Article will apply to suits against the surety on such contracts.³ Where a loan given to A is made repayable 'on demand' in the technical sense (i.e. where the obligation to pay arises immediately on the loan) and X guarantees the loan, the contingency contemplated by the contract of guarantee namely the default of the debtor, must be taken to have been committed on the date of the loan itself and time for a suit against the surety will run under this Article from the date of the loan itself.⁴ It has however been held in the undermentioned cases⁵ that there is no contingency in such cases inasmuch as the obligation of the guarantor arises *uno flatu* (at the same moment) with the execution of the contract of guarantee, and that consequently the suit is governed by Article 115 and not by this Article. It is submitted that this view is not correct. As has been seen already, the contingency is the *default* of the debtor. Therefore that such default occurs *eo instanti* with the loan will not take away such contracts from the class of contingent contracts.

Note 3

- 1 (1911) 9 Ind Cas 492 (493) (All), *Makabir Prasad v. Durbhaji Ras*
(1890) 13 All 200 (204) 1891 All W N 5 *Naubat Singh v. Indar Singh*

Note 4

- 1 See Pollock and Mulla's Contract Act 4th Edition Page 251
2 See (1875) 12 Bom H C R 239 (240) *Shapurji Jahangirji v. Superintendent of Poona City Jail* (Suit was held barred both under Article 63 and Art 84 of the Act of 1871 corresponding to Arts 65 and 83 of the present Act. Their Lordships seem however to think that Art 83 rather than Art 65 would apply to the case.)

- 3 (1879)

Judge to determine upon the evidence when the demand was made on the surety and then to apply Art 65.)

- 4 See (1911) 9 Ind Cas 204 (205) (Mad) *Dharkados v. Arisnaya*
(See also (1918) A I R 1918 Cal 707 (709) 39 Ind Cas 705 44 Cal 978, *Brojendra Kishore v. Hindustan Co-operative Insurance Society Ltd* (Either Art 65 or Art 115 applies. It was not decided which of the two will apply.))
5 (1917) A I R 1917 Cal 151 (155, 156) 39 Ind Cas 205 *Shree Nath Roy v. Pearu Mohan*
(1919) A I R 1919 Cal 736 (737) 53 Ind Cas 999 *Charu Chandra v. L. Faithful* (A I R 1917 Cal 154, Followed.)

66.* On a single bond, where a day is specified for payment.	Three years.	The day so specified.
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Article 66

Synopsis

1. Legislative changes.
2. Single bond.
3. "Where a day is specified for payment."
4. Registered bonds.
5. Suit against legal representatives of executant.

1. Legislative changes. — By Section 2 and Schedule 1 of the Repealing and Amending Act, 2 of 1923, the words "three years" have been substituted in column 2 for the word "Ditto" which occurred in the corresponding Article of the Acts of 1871 and 1877.

2. Single bond. — There is a difference of opinion as to the meaning of the expression "single bond".

According to one view a single bond means simply a bond without any penalty¹. Thus, according to this view a bond providing for the payment of the principal and interest, and providing that in default of regular payment of interest at the stipulated periods the whole amount should become due, is only a single bond². The stipulation for the payment of the whole amount is not a penalty in the sense that a larger amount is payable in default of payment of a smaller amount. Similarly, a bond providing that the amount should

* Act of 1877, Article 66 and Act of 1871, Article 65

Same as above

Act of 1859

No corresponding provision

Article 66 — Note 2

1 Wharton's Law Lexicon

(1914) A I R (1914) Mad 4 (6) 22 Ind Cas 60, *Balakrishnaudu v Narayana swamy Chetty*

(1879) 2 All 322 (331) 4 Ind Jur 461 *Ball v Stouell*

(1882) 4 All 3 (6) 1881 All W N 93, *Lachman Singh v Kesri*

2 (1917) A I R 1917 All 403 (409) 39 Ind Cas 574 *Gaja Prasad v Sher Ali*

(1919) A I R 1919 All 226 (227) 41 All 581 50 Ind Cas 640 *Makrand Singh v Kallu Singh* (Mortgage bond)

(1920) A I R 1920 All 124 (124) 58 Ind Cas 278 *Sham Lal v Teharsya Lakshmi Chaud* (Mortgage bond—Money repayable within fixed period—Payment of interest in instalments—Whole amount realisable on default)

(1893) 14 All 162 (164) 1892 All W N 27 *The Collector of Etawah v Bets Maharani* (Where under a debt bond executed by him the obligor agreed that if the principal and interest be not paid up at the

Article 66
Note 2

be paid before the payment of another debt of the obligor, is only a single bond³ Where a bond provided that on default of payment of the amount mentioned in the bond on the date fixed the obligee might take possession of the property of the mortgagor, it was held in the undermentioned cases that it was only a single bond⁴ A contrary view was however taken in the case noted below,⁵ namely that the stipulation for taking possession amounted to a penalty and that therefore the bond was not a single one

The second view is that a single bond means merely a bond for the payment of a certain sum of money without *any condition* in or any penalty annexed to it⁶ According to this view, a stipulation for the payment of the whole amount on default of payment of interest on the due dates is a condition and consequently the bond is not a single one⁷ In fact any condition attached to the payment of the amount of the bond is, according to this view, sufficient to take it out of the category of single bonds⁸

A third view is that even where the bond is a single one and a day is specified for payment, Article 66 is not applicable if the document contains a provision for immediate payment of the whole amount on default of payment of interest regularly^{9a}

3 (1888) 1888 All W N 234 (234) *Fad Ali v Asiba Bibi*: (Art 68 was held not to apply—Art 67 appears to have been applied though not specifically referred to)

[But see (1916) A I R 1916 Lah 251 (251) 32 Ind Cas 575, *Kirpa Ram v Churu*]

4 was not expressly referred to but a three years' rule of limitation was applied)

[See also (1892 1896) 2 Upp Bur Rul 473 (473) *Yaung Aung Ze v Yaung Yan Aung*]

5 (1892) 4 All 8 (6) 1891 All W N 93 *Lachman Singh v Kesri*

6 See the cases cited in Foot Note 7 *infra*

7 (1923) A I R 1923 All I (7) 69 Ind Cas 981 45 All 27 (FB) *Shib Dayal v Maherbani* (Mortgage — Provision for payment of interest annually — Default — Option to claim whole amount)

(1923) A I R 1923 Oudh 19 (20) 70 Ind Cas 85 26 Oudh Cas 121, *Hari Lal v Thamsman Lal*

8 (1892) 1892 Pnn Re No 26, *Gurdatta Mal v Pal Singh* (A "single" bond means a simple bond without alternative conditions or penalty attached an absolute engagement in writing for the payment of money)

(1890) 1890 Pnn Re No 138 *Sunder Singh v Bur Singh* (Debtor under taking to pay amount with interest at a particular harvest on default to pay such interest up to date of payment)

(1916) A I R 1916 Lah 251 (251) 32 Ind Cas 575, *Kirpa Ram v Churu*

in two years and on default whole sum payable at once—It is not a single bond or a bond subject to a condition Where a condition is appended to an obligation to pay, then Art 80 applies)

According to yet another view, a bond providing for the payment at once of the whole of the principal and interest on default of the regular payment of interest, is a single bond if there is no default committed but is a bond subject to a condition if there is a default.⁹

It is submitted that the second and third views are not correct. The second view purports to follow the view stated in Halsbury's Laws of England which refers to single bonds as being bonds without any condition or penalty attached to them. An examination of the passage referred to and of the cases on which the passage is based shows, however, that the word "condition" is used in its technical sense as meaning a condition of *defeasance* and not other conditions. The third view also is not correct. Where the bond is a single one and a day is specified for payment, it is difficult to see how the Article cannot apply. As regards the correctness of the last view, see Notes to Article 68, *infra*.

The following have been held to be single bonds governed by this Article

- 1 A bond by two persons, one as the principal debtor and the other as his surety.¹⁰
- 2 Book entries of the balances struck in the plaintiff's account books by the defendant attested by witnesses.¹¹
- 3 Bond stipulating that the money deposited with the executant is repayable by him at the end of a fixed period.¹²

3 "Where a day is specified for payment" — There is a difference of opinion as to whether, when a debt is payable within a particular period, it can be said that a day is specified for payment within the meaning of this Article.¹ There is also a difference of opinion as to whether, when on default of regular payment of

9 (1935) A I R 1935 All 405 (406) 157 Ind Cas 409 *Narain Das v Mannoolal*
10 (1924) A I R 1924 Lah 534 (536) 76 Ind Cas 150 *Nihal Chand v Khuda Bakhsh*

11 (1925) A I R 1925 Lah 75 (75) 5 Lah 406 84 Ind Cas 524 *Narain Das v Miran Bakhsh* (As no date was specified for payment Art 67 was applied)

(1920) A I R 1920 Lah 175 (175) 56 Ind Cas 117 *Hari Singh v Fazal*
[See also (1910) 8 Ind Cas 575 (575) (Lah) *Bhola Ram v Nanak Chand* (Balance struck by debtor in creditor's books containing a distinct promise to pay interest thereon amounts to a bond)]

(1903) 1903 Pun Re No 35 (page 113) 1903 Pun L R No 101 *Daula v Ganda*

(1879) 1879 Pun Re No 72 *Ladhu Shah v Fazl Dad*]

12 (1936) A I R 1936 Rang 338 (340) 164 Ind Cas 412 *I S Seema v R K Banerjee*

Note 3

(Yes)
Srsad Bias

(1935) A I R 1935 All 413 (413) 154 Ind Cas 531 *Umrao Singh v Mangla*
(Yes—Money payable on demand and further that the whole sum with interest should be paid within one year)

Article 66 Note 3

interest on the amount of the bond the amount becomes immediately payable though a period has been fixed for such payment, it can be said that "a day is specified for payment"² Where a bond provided that the amount due would be paid at the time of payment of two other debts, it was held that it cannot be said that any day was specified for payment³ Similarly, where a bond provided that the amount due thereunder would be paid *before* the payment of another debt, it was held that no day was specified for payment^{3a} But, where a bond provided that the obligor would pay the amount *after the disposal of certain suits then pending*, White, C J., observed "I feel no difficulty in holding that this is a single bond. As to the question 'where a day is specified for payment,' I should be prepared to hold that here there is a day specified for payment. The day or the time specified for the payment is the happening of an event which was in the contemplation of both the parties when the undertaking was given"⁴ His Lordship however thought that Article 115 applied to the case and consequently Article 66 was not applicable, a line of reasoning which does not seem to be acceptable, inasmuch as Article 115 is a general Article and cannot prevail over a special one

In the undermentioned case⁵ it was held that where the whole amount of the bond was to become due on default of the regular payment of interest, time ran from the date of default. It was apparently assumed that Art. 66 would apply and that the date of the default was the "day specified for payment." In the light of the Privy Council decision in *Lasa Din v. Mt. Gulab Kunwar*,⁶ the

-
- (1875) 1875 Pun Re No. 79, *Sher Jang v. Parlab Singh* (Yes)
 (1917) A I R 1917 All 402 (402) 39 Ind Cas 574, *Gaya Prasad v. Sher Ali* (Yes)
 (1891) 3 All 276 (279) *Gours Shankar v. Surju* (No)
(See also (1900) 23 Mad 33 (34), Rose Ammal v. Rajarathnam Ammal (Mortgage—Mortgagor's right to redeem before end of period specified)
 (1912) 15 Ind Cas 287 (288) 39 Cal 828, *Purna Chandra Sarma v. Peary Mohan Pal*
 (1906) 16 Mad L J 146 (147), *Chinnasamy Reddiar v. Krishna Reddy*
 2 (1923) A I R 1923 Oudh 19 (20) 26 Oudh Cas 121 70 Ind Cas 65, *Hari Lal v. Thamman Lal* (No)
 (1936) A I R 1936 Oudh 279 (280) 162 Ind Cas 459 *Shita Narain v. Badal* (No)
 (1890) 5 Cal 21 (23) 4 Ind Jur 407, *Narain Dabu v. Gours Pershad* (Yes)
 (1917) A I R 1917 All 402 (402) 39 Ind Cas 574, *Gaya Prasad v. Sher Ali* (Yes)
 3 (1916) A I R 1916 Lah 251 (251) 32 Ind Cas 575, *Kirpa Ram v. Churu*
 (1889) 1889 Pun Re No. 139 *Bahadur Lal v. Gaman* (Art. 67 applies to the case)
 (1933) A I R 1933 Lah 81 (85) 140 Ind Cas 855, *Dhaguan Sahai v. Bhusri*
 3a (1858) 1888 All W N 234 (234) *Fad Ali v. Aniba Bibi*
 4 (1914) A I R 1914 Mad 4 (6) 22 Ind Cas 60, *Balakrishnaulu v. Narayana swamy Chetty*
 5 (1929) A I R 1929 Siml 140 (141) 116 Ind Cas 591, *Nenomal Jamal v. Chandmal Asanmal*
 6. (1932) A I R 1932 P O 207 (211) 194 Ind Cas 779 7 Luck 412 59 Ind App 716 (1 C)

view that time runs from the date of default is open to question. Nor does it seem correct to state that the date of the default can be said to be the date specified in the bond.

See also the undermentioned case.⁷

4. Registered bonds.—Before the decision of the Privy Council in *Ganesh Lal v. Khetra Mohan*,¹ it had been generally held that where a bond was registered, the Article applicable was Article 116 and not this Article or Article 67,² the reason apparently being that Article 116 is a special Article and this Article and the next, general Articles, and that the special Article must prevail over the general Article in accordance with general principles of interpretation of statutes. In *Ganesh Lal's case*,¹ where a mortgagee sued more than six years but within 12 years of the cause of action on the personal covenant in the bond, their Lordships of the Privy Council observed that the claim was barred under Article 66 of the Act. This case was held in the undermentioned cases,³ to be authority for the proposition that even a claim on a registered bond was governed by Article 66 and not by Article 116. The facts in *Ganesh Lal's case*¹ however show that the mortgage document in that case was not validly registered. In this view it has now been generally held that

7 (1874) 1874 Pun Re No 58 *Dhas Sawaya Singh v. Hira Nand* (Bond was payable six months after date—Day is specified.)

Note 4

1 (1926) A I R 1926 P C 56 (59) 53 Ind App 134 95 Ind Cas 839 5 Pat 585 (P C)

2 (1920) A I R 1920 All 124 (121) 58 Ind Cas 278 *Sham Lal v. Tehariya Lakhmi Chand*

(1919) A I R 1919 All 226 (227) 41 All 581 50 Ind Cas 640, *Mahrand Singh v. Kallu Singh*

(1914) A I R 1914 Bom 141 (141 142) 38 Bom 177 23 Ind Cas 353 *Dinkar Hars v. Chhaganlal Narasidas*

(1881) 8 All 276 (279) *Gours Shankar v. Surju*

(1916) A I R 1916 All 137 (138) 83 Ind Cas 111 (112) *Mohan Lal v. Lekhray Singh*

(1917) A I R 1917 Oudh 252 (253) 41 Ind Cas 423 *Bahuram v. Abdhoot Singh*

(1903) 30 All 388 (390) 1903 All W N 161 5 All L Jour 6 O *Jangal Singh v. Chander Mal*

(1891) 13 All 200 (205) 1891 All W N 5 *Naubat Singh v. Indar Singh*

(1881) 6 Bom 75 (76) *Ganesh Krishn v. Madhatarao Raju*

(1907) 34 Cal 672 (675) 6 Cal L Jour 119 11 Cal W N 674 *Rahmat Karim v. Abdul Karim*

[See (1885) 7 All 502 (505) 12 Ind App 12 9 Ind Jur 160 4 Sar 619 (P C) *Ram Din v. Kalka Prasad* (The words three or six years as the case may be in the case obviously refer to unregistered and registered mortgages.)]

[See also (1916) A I R 1916 Lah 251 (251) 32 Ind Cas 575 *Kirpa Ram v. Churu* (Art 67 has to be read with Art 66 and both these Articles apply to unregistered bonds.)]

3 (1927) A I R 1927 Oudh 567 (568) 107 Ind Cas 559 *Ram Prasad v. Gurpatra* (Art 66 applies A I R 1926 P C 56 Followed.)

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Notes
4-5

the case cannot be taken to have overruled the series of cases in which Article 116 was applied in suits to enforce personal covenants in registered bonds⁴. When a bond is not validly registered, it must be treated as an unregistered bond. Article 66 and not Article 116 will apply in such cases⁵.

5. Suit against legal representatives of executant.—The Article makes no reference to the person against whom the suit is brought. But there is no justification in limiting the Article to suits against the *executant* himself and not extending it to suits against his legal representatives¹.

Article 67

67.* On a single bond, where no such day is specified.	Three years.	The date of executing the bond.
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Synopsis

1. On a single bond.
2. "Where no such day is specified."
3. Registered bonds.
4. Security bonds.
5. Starting point.

1. On a single bond.—As to the meaning of the expression "single bond," see Notes to Article 66, *ante*.

* Act of 1877, Article 67 and Act of 1871, Article 56.

Same as above

Act of 1859.

No corresponding provision

- 4 (1929) A I R 1929 Mad 53 (59) 52 Mad 105 116 Ind Cas 817 (F B), *Ratnasabapathy Chettiar v Dadasigamony Pillai*
 (1933) A I R 1933 Cal 268 (269) 143 Ind Cas 472, *Dharanidhar Ghose v Indranarain Sinha* (Application under O 34 R 6, Civil Procedure Code, is governed by Art 116)
 (1931) A I R 1931 Cal 801 (801) 133 Ind Cas 101, *Umapada Triwedi v. Haripada Saha*
 (1930) A I R 1930 All 69 (72) 123 Ind Cas 321 52 All 363 (F B), *Radhakrishna v Tej Saroop*
 (1934) A I R 1934 Pat 578 (579) 13 Pat 228 153 Ind Cas 120 *Bala Dux v Nath Mull*
 (1929) A I R 1929 Mad 1121 (1126) 114 Ind Cas 310, *Chengalamma Garu v Viraraghava Naidu*
 (1928) A I R 1928 Oudh 465 (467) 4 Luck 107 113 Ind Cas 489, *Jas Indra Bahadur Singh v Khairatullah*
 (1937) A I R 1937 Rang 481 (499) 1933 R L R 35 172 Ind Cas 75 (F B), *U Sein v U San*
 5 (1937) A I R 1937 Cal 847 (850) 171 Ind Cas 905, *Saileendra Nath v Kesab Chandra*

Note 5

- 1 (1937) A I R 1937 All 559 (560) 169 Ind Cas 359, *Deo Saran Singh v Loknath Lai*

2. "Where no such day is specified."—As to where a day may be said to be specified for payment, see Notes to Article 66. In cases where the bond is a single one but it cannot be said that any day is specified for payment, this Article will apply. Thus, where a bond is *payable on demand*, it cannot be said that a date is specified for the payment of the money. A suit to enforce such a bond is governed by this Article.¹ Where a bond provided that the amount would be paid at the time of the payment of another debt of the obligor, it was held in the undermentioned cases² that the bond was one in which no day was specified for payment. In a similar case of the High Court of Madras, White C J expressed the opinion that in such a case a day must be held to be specified.³

Book entries of the balances struck in the plaintiff's account books by the defendant attested by witnesses have been held to be single bonds and, if no day is specified for the payment to be governed by this Article.⁴

See also the undermentioned cases.⁵

3. Registered bonds.—Where a bond is *registered*, the Article applicable is 116 and not this Article. See Notes to Article 66.

4. Security bonds.—A obtained a decree for costs against B. Pending appeal by B, A took out execution but on application by B the execution was stayed on C's furnishing security to the Court agreeing to pay up the amount of the costs whenever he would be called upon by the Court to do so. It was held that a day was specified in the bond that therefore this Article did not apply but that Article 80 applied. The applicability of Article 66 does not seem to have been considered.¹

Article 67 — Note 2

- 1 (1881) 8 All 415 (416) 5 Ind Jur 603 *Rup Kishore v Mohan*
(1874) 1874 Pun Re No 3 *Shadi Ram v Abdul Rahman*
- 2 (1889) 1889 Pun Re No 139 *Bahadur Lal v Gaman* (Art 67 applies)
(1938) A I R 1938 Lah 84 (85) 140 Ind Cas 855 *Bhagwan Sahai v Bhuria*
(1916) A I R 1916 Lah 251 (251) 32 Ind Cas 575 *Kurpa Ram v Churu* (It was however held that the bond was a conditional one not governed by this Article)
- 3 (1914) A I R 1914 Mad 4 (6) 22 Ind Cas 60 *Balakrishnadu v Narayanaswamy*
- 4 (1925) A I R 1925 Lah 75 (75 76) 5 Lah 406 84 Ind Cas 524 *Narain Das v Miran Bakhsh*
(1920) A I R 1920 Lah 175 (175) 56 Ind Cas 117 *Harj Singh v Fazal*
- 5 (1927) A I R 1927 Lah 101 (102) *Ghulam Murtaza Khan v Fazal Illahi* (Suit to recover personally the amount due on a mortgage bond to which as mortgage was void Art 67 was held to apply. The facts are not clear but it must be assumed that no day was specified in the bond)
(1912) 16 Ind Cas 222 (223) (All) *Ramparsad Rai v Nawab Chowdhury* (Where the obligee might have enforced payment at any time after the execution of the document suit will be governed by Art 67)

Note 4

- 1 (1897) 1 Cal W N 223 (223) (Notes) *Surandranath Das v Nabin Chandra Mukerjee*

Article 67
Note 5

5. **Starting point.** — Time runs under this Article from the date of the execution of the bond¹ Where a bond stipulated that the money due under it should be paid before the payment of the amount advanced to the obligors by the obligee, under a lease, it was held that no day was specified for payment and that the period of limitation should be reckoned under this Article from the date of the execution of the bond, the bond not being one subject to a condition so as to bring it under Article 68²

Article 68

68. On a bond subject to a condition.	Three years.	When the condition is broken
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Synopsis

1. "Bond subject to a condition," meaning of.
2. Suit by assignee of administration bond.
3. Starting point.

1. "Bond subject to a condition," meaning of. — The expression 'bond subject to a condition' has been borrowed from the English law and means a bond accompanied by a condition in the nature of a defeasance, providing that on the performance of the conditions the bond shall become void¹ A bond subject to a condition is generally in the following form —

'Know all men by these presents that I, X Y, am bound to Z in the sum of Rs . . . to be paid to Z for which payment I bind myself, my heirs and my executors and administrators by these presents

Dated

Whereas the properties of Z have been left in the charge of the said X Y,

* Act of 1877, Article 68 and Act of 1871, Article 67
Same as above
Act of 1859.
No corresponding provision

Note 5

- 1 (1891) 8 All 340 (341), *Bann Dhar v Harsalal* (Bond payable on demand)
 (1874) 1874 Pun Re No 3 *Shad Ram v Abul Rahman* (Do)
 (1879) 1879 Pun Re No 77 (F B) *Nathu v Darbari* (Do)
 2 (1888) 1888 All W N 234 (234), *Tad Ali v Aisha Bibi*

Article 68 — Note 1

- 1 (1923) A I R 1923 All I (6, 7) 69 Ind Cas 281 45 All 27 (I B) *Shib Dayal v Meherban*
 (1905) 6 Oudh Cas 77 (60), *Har Narain v Beni Pershad*
Halstury's Laws of England Vol III Page 80
 (1852) 6 Cal 281 (286) 10 Cal L R 219, *Osborne & Co v Subal Bouri*

Article 68
Note 1

Now the condition of the bond is such that if the above bounden X Y, shall duly account and pay up the proceeds of such properties as and when asked for by Z, then this obligation shall be void and of no effect, otherwise it shall remain in full force."

A bond subject to a condition thus contains two parts *first*, the *obligation* and secondly, the *condition*. The condition specifies the real agreement between the parties (that is to say, the acts to be performed, the performance of which is intended to be secured by the bond), and provides that, on due performance of the condition, the bond shall be void.²

Administration bonds³ and bonds given by grantees of succession certificate⁴ under the Indian Succession Act 1925, bonds executed by sureties under the Guardians and Wards Act 1890⁵ and bonds executed by the custodian of attached property, under Order 21 Rule 43 of the Code of Civil Procedure,⁶ are all bonds subject to a condition within the meaning of this Article. A bond which stipulates that the money due under it should be paid before the payment of another debt is not a bond subject to a condition⁷. Similarly, a bond such as a mortgage bond providing for immediate payment of the principal and interest in default of regular payment of interest, is not a bond subject to a condition⁸. The reason is that there is no *condition of defeasance* in such cases. A contrary view has however been expressed in two cases. X executed an instrument in favour of a Taluk Board reciting that he would collect certain fees and market dues according to certain conditions specified and that if he were to act contrary thereto, he would pay a fine not exceeding Rs 50 imposed by the Taluk Board President. It was held by the High Court of Madras that the Article applicable to a suit against X for

² Halsbury's Laws of England, Vol. III, page 80

(1938) A I R 1938 Nag 13 (13) 173 Ind Cas 463, *Yeshwant Rao v Lazman Rao*

8 (1924) A I R 1924 Rang 68 (69) 1 Rang 463 76 Ind Cas 802, *Maung San U v Maung Kyaw Mye*

(1921) A I R 1921 Upp Bur 25 (27) 4 Upp Bur Rul 22, *Ma Myo Zin v Ma*
Ma

(1914) A I R 1914 Low Bur 261 (262) 8 Low Bur Rul 99 26 Ind Cas 505,
Ahmad Moola Daudood v Mt Fatima Beebee

(1915) A I R 1915 Mad 1184 (1187) 27 Ind Cas 849, *Ramnathan Chetty v Rammial*

$$C_1 \in \Gamma \Rightarrow N \in \Gamma \Rightarrow \nabla \text{ is a } \mathcal{C}^\infty \text{ surface}$$

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t to the

4 See Form No 12 of App V of the Madras Civil Rules of Practice

5 (1919) AIR 1919 Mad 432 (434) 42 Mad 302 49 Ind Cas 587, *Arishna Chettiar v Venkatchalla Chettiar*
See also Form No 8 of App IV of the Madras Civil Rules of Practice

6 See Form Nos 15 A and 15 B of App E to the Code of Civil Procedure

7 (1888) 1889 All W N 234 (234), *Fad Ali v Aisba Bibi*

8 (1923) A I R 1923 All 1 (7) 69 Ind Cas 981 45 All 27 (F B). *Shub Dayal v. Meherban* (Overruled in A I R 1934 All 397 (F B) on another point)

(1905) 8 Oudh Cas 77 (78, 80) *Har Narain v Beni Pershad* (Simple bond)

1 -- 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 9

consists in the performance of several acts, the failure to perform each act is a fresh breach of the condition and gives a fresh cause of action for a suit to enforce the bond. The fact therefore that there has been several breaches and one or more of such breaches is or are beyond three years of the suit will not affect the maintainability of the suit, if it has been brought within three years of the particular breach complained of¹

As to when a condition in a bond is broken depends upon the terms of the condition and the conduct of the party concerned. Where an administration bond contained a condition that the administrator should duly administer the estate and, in the course of administration the Court found a certain deficit in the accounts and called upon the administrator to pay it up and he failed to pay the same, it was held that such failure to pay was also a breach of the condition which would give rise to a cause of action for a suit to enforce the bond². Where the condition in an administration bond was to the effect that the administrator would file inventories at certain periods and would administer the assets of the deceased person, and the administrator died without having filed the inventories or administering the assets, it was held that a suit within three years of the death of the administrator without administering the assets was within time even though the other condition as to the filing of the inventory was beyond three years of the suit³. It was however held in a recent Bombay case^{3a} that the condition is not necessarily broken until some person, who is able to give a valid discharge for the estate, claimed it from the administrator or his representatives and failed to obtain it. Where the condition in a bond by sureties under the Guardians and Wards Act 1890 provided that the guardian would duly account at such periods as were appointed by the Judge and would "pay or dispose of the balance which shall from time to time be found due from him as the Court has directed or shall hereafter direct" it was held that there was no cause of action until an order of the Court was made against the guardian directing him to pay any particular sum into Court or to any other person⁴.

Note 3

- 1 (1924) A I R 1924 Rang 68 (69) 1 Rang 463 76 Ind Cas 802 *Maung San U v Maung Kyaw Mye* (A I R 1919 L B 12 Dissented from A I R 1914 L B 261 Explained)
- (1915) A I R 1915 Mad 1184 (1187) 27 I C 849 *Ramanathan v Pagammal*
- 2 (1927) A I R 1927 Rang 28 (29) 4 Rang 358 98 Ind Cas 459 *Hamadanee v Ma Shwe Gon* (A I R 1924 Rang 68 Followed)
- (1924) A I R 1924 Rang 68 (70) 1 Rang 463 76 Ind Cas 802 *Maung San v. Maung Kyaw Mye*
- (1921) A I R 1921 U B 25 (27) 4 Upp Bur Rnl 22 *Ma Myo Zin v Ma* (A I R 1914 Low Bur 261, Dissented from)
- 3 (1911) 9 Ind Cas 935 (937) 33 All 414 *Kantee Chandra*
- 3a (1936) A I R 1936 Bom 363 (364) 60 Bom 1027 165 I C
Chunilal v General Accident Fire and Life
- 4 (1919) A I R 1919 Mad 432 (434) 42 Mad 302 49
Chettiar v Venkatachalla Chettiar

Article 69

<p>69. On a bill of exchange or promissory note payable at a fixed time after date.</p>	<p>Three years.</p>	<p>When the bill or note falls due.</p>
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Synopsis

1. Scope of the Article.
2. Starting point.
3. Payable at a fixed time after date.

1. Scope of the Article. — This and the following Articles ending with Article 80 prescribe the period of limitation for suits on bills of exchange and promissory notes. The expression 'bill of exchange' in this and the following Articles includes a *hund* and a cheque¹

Suits on bills of exchange or promissory notes may, in cases where Order 37 of the Code of Civil Procedure applies, be instituted either as summary suits under that Order or as ordinary suits. This and the following Articles apply only to ordinary suits on such instruments, inasmuch as there is a special Article (Article 5) dealing with summary suits.

It is only a suit on a bill of exchange or promissory note that is governed by this Article. A suit not based on the note or bill is not within this Article²

2. Starting point. — Time runs, under this Article, from the time when the note or bill "falls due". In ascertaining when a note or bill falls due for the purposes of limitation, regard must be had to the provisions of the Negotiable Instruments Act (26 of 1881) on the subject¹

Section 22 of that Act provides that a bill or note not payable on demand 'falls due,' or in other words, is *at maturity* on the third day after the day on which it is expressed to be payable.

Section 23 provides for the method of calculating the maturity when the note or bill is payable so many *months* after date, and Section 24 provides for such calculation when the note or bill is payable so many *days* after date.

Section 25 enacts that when the note or bill is at maturity on a day which is a public holiday, it shall be deemed to fall due on the next *preceding* business day.

* Act of 1877, Art. 69 and Act of 1871, Art. 68 — Same as above
Act of 1859 — No corresponding provision

Article 69 — Note 1

1 See Section 2 clause 2 ante

[See also (1927) A I R 1927 Rang 159 (160) 101 Ind Cas 641, *Singh & Co v T Chettyar Firm*]

2 (1903) 5 Bom L R 725 (727) *Hajee Haxam v Noor Mohame I Hussein*.

Note 2

1 (1915) A I R 1915 Lah 297 (297) 27 I C 603, *Nanal Singh v. Kesho Das*

It has been held by the High Court of Madras that the days of grace may be waived by agreement between the parties and that in such cases, time will run from the date on which the note is expressed to be payable and not from the expiry of the period of grace.²

3. Payable at a fixed time after date.—It has been held by the High Court of Madras that it is not necessary for the applicability of the Article that the note or bill should itself embody the stipulation as to the period of payment, but that evidence of a contract fixing such a period may be admissible in cases where the note or bill is silent on the point.¹ Of course, where the note or bill actually fixes a date, evidence showing that the terms of the contract are different is not admissible under Section 91 of the Evidence Act.²

70.* On a bill of exchange payable at sight, or after sight, but not at a fixed time.	Three years.	When the bill is presented.
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Synopsis

1. Bill of exchange payable at sight.
2. Bill payable after sight.

1. Bill of exchange payable at sight. — The expression "at sight" means, under Section 21 of the Negotiable Instruments Act 1881, "on demand," so that a bill payable at sight is a bill payable "on demand." But a bill payable *at sight* is provided for by this Article and a bill payable on demand falls under Article 73 *infra*. The starting points in the two Articles are different. On a first impression there appears to be a redundancy between this Article and Article 73 so far as a bill payable at sight is concerned. But, as has been pointed out in the Notes to Article 73 *infra*, there is really no redundancy inasmuch as the two Articles provide for different classes of cases. See Note 3 to Article 73 *infra*.

2. Bill payable after sight. — The expression "after sight" on a bill of exchange means "after acceptance," or "noting for non-acceptance," or "protest for non acceptance." See Section 21 of the Negotiable Instruments Act, 1881.

* Act of 1877, Article 70 — Same as above

Act of 1871, Article 69

69 — On a bill of exchange payable at sight or after sight

Act of 1859 — No corresponding provision

2 (1914) A I R 1914 Mad 430 (431) 23 I C 431, *Valluappa v Subramanian*
Note 3

1 (1920) A I R 1920 Mad 486 (487, 488) 56 Ind Cas 384, *Ponnusamy Chetty v Vellore Commercial Bank Ltd*

2 (1919) A I R 1919 Cal 347 (348) 51 I C 945, *Gobinda Kumar v. Ram Chandra*

Article 70
Note 1

Under Section 61 of the said Act, a bill payable after sight must be presented to the drawee for *acceptance* and subsequently presented to the acceptor for *payment*

Article 71

71.* On a bill of exchange accepted payable at a particular place	Three years.	When the bill is presented at that place.
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1. Scope of Article.—The Article applies to suits on bills which have been accepted with a qualification as to the place of payment. In such cases time under this Article runs from the date when the bill is presented at that place for payment.

In *Rowe v Young*,¹ where a bill of exchange was "accepted payable at the house of P & Co" it was held that the holder was bound to present the bill at the house for payment in order to charge the acceptor. Referring to this decision, Schwabe, C J, observed in *Secretary of State v Radhika Prasad*² as follows: "It is true, as pointed out by Countess Trotter, J, that that particular rule has since been altered by statute (in England) but the principle of the decision is, in my judgment in no way thereby affected, and I consider it directly in point. Further, it is worth observing that there has been no similar statutory alteration of the law in India."

Where a promissory note or bill is payable at two places it can be presented at either of the places.³

Article 72

72.† On a bill of exchange or promissory note payable at a fixed time after sight or after demand.	Three years.	When the fixed time expires
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* Act of 1877, Article 71 and Act of 1871, Article 70

Same as above

Act of 1859.

No corresponding provision

† Act of 1877, Article 72 and Act of 1871, Article 71

Same as above

Act of 1859

No corresponding provision

Article 71 — Note 1

1 (1820) 21 R R 91 (90 77) 2 High 321 2 Brod & B 165 (180)

2 (1921) A I R 1923 Mad 677 (672) 46 Mad 259 74 Ind Cas 785

3 (1926) A I R 1926 Ma 1792 (790) 91 Ind Cas 394, *Chegganmull Sonecar v Manickla Mudaliar*

(1816) 17 R R 641 (644) 1816 Holt N P 313, *Fleeching v Cower*

1. **Scope of the Article.** — The expression "after sight" means, in a promissory note, after presentment for sight, and in a bill of exchange, after acceptance, or noting for non acceptance, or protest for non acceptance (Section 21 of the Negotiable Instruments Act, 1891)

Article 72
Note 1

As to the mode of calculating maturity in cases of notes and bills payable, a stated number of days or months after date or sight, see Sections 23 and 24 of the Negotiable Instruments Act, 1891

The words "after demand" do not mean the same thing as "on demand," but mean after *actual* demand. In *Thorpe v Coombe (or Booth)*,¹ where a bill was payable two years after demand, it was held that the statute did not run until the two years after demand had elapsed. In *Moore v Peitchell*,² where the note was payable at "six months' notice," it was held that time did not run until the six months' notice was given and had expired

73.* On a bill of exchange or promissory note payable on demand and not accompanied by any writing restraining or postponing the right to sue.	Three years.	The date of the bill or note.
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Article 73

Synopsis

1. Legislative changes.
2. "On a bill of exchange or promissory note."
3. "Payable on demand," meaning of.
4. "Writing restraining or postponing the right to sue."
5. Computation of time.

1. Legislative changes.

- 1 Act 14 of 1859 made no special provision regarding limitation of suits on bills of exchange, or promissory notes payable on demand, and consequently such suits were governed by clause 16 of Section 1 of that Act, under which a period of

* Act of 1877, Article 73.

Same as above.

Act of 1871, Article 72.

Columns one and two, same as above, the third column was . — When the demand is made

Act of 1859.

No corresponding provision

Article 72 — Note 1

1 (1826) 29 R R 485 (486) 8 Dowl & Ry 347 Ry & Moo 388

2. (1856) 111 R R 316 (316) 22 Beav 172

Article 73
Notes
1—2

limitation of six years from the accrual of the *cause of action* was provided for all cases not specifically provided for by that Act. Under the English law, the cause of action in the case of bills and notes payable on demand arose on the *date of the instrument* and not from the time of demand and this view was generally followed by the Courts in India.¹

2 Act 9 of 1871 introduced a change in the law, by providing in Article 72 thereof a period of three years for such suits, the starting point being *the date of demand*. This was a departure from English law and the Article had been founded on a misapprehension of English law.³

3 The Article was amended to its present form by Act 15 of 1877 and the old rule of English law as to the cause of action in such cases was restored, limitation being thus computed from *the date of the instrument*.

2. "On a bill of exchange or promissory note."—This Article applies only where the suit is on a bill of exchange or promissory note. It has no application to suits based on *other causes of action*. Thus, a suit against the *endorser* of a promissory note,¹ or against a surety for a debt due on the note,² is not a suit on the note and is not

Article 73 — Note 1

1 (1870) 7 Bom II C R O C 36 (38), *Jeanunissa Ladli Begam v Manikj Kharsetji*;

(1880) 3 All 340 (341), *Bansi Dhar v Harsahas*;

(1876) 1 Bom 805n (307) 1 Ind Jur 183n *Ramachandra v Soma*

(1879) 4 Bom 230 (234) 5 Ind Jur 90, *Vinayak Gotsind v Babaji*;

(1873) 7 Mad II C R 288 (288), *Molakatalla Naganna v Pedda Narappa*

(1874) 7 Mad II C R 293 (800), *Venkataramanier v Manche Reddy*

(1874) 7 Mad II C R 392 (394), *Chinnasamy Iyengar v Gopalachary*

(1876) 1 Mad 301 (303) 1 Ind Jur 736, *Madharan v Achuda*

[But see (1873) 10 Bom II C R 487 (490) *Madharbhas Shitbhas v Fattesing Nathubhas* (It was doubted whether this rule was applicable to Hindus and Muhammadans in respect of hundies and notes drawn up in forms usual in India.)

(1872) 17 Suth W R 87 (88) *Poornachunder Dutt v Gopal Chunder Doss* (In the case of promissory notes payable on demand executed by Hindus, time runs from the date of demand.)

(1871) 7 Beng L R 489 (496) 16 Suth W R 164, *Bramanaydas v Abbas Charan Choudhry* (By Hindu law a demand would be necessary—Per Norman J.)

(1871) 6 Beng L R 292 (295), *Munshi Abdul Ali v Tarachand Ghose*]

2 (1878) 2 Cal L R 426 (427), *Omrulolall Dey v A Howell*

(1873) 10 Bom II C R 487 (489), *Madharbhas Shitbhas v Fattesing Nathubhas*

(1879) 4 Bom 87 (89) 4 Ind Jur 576 *Ichhashanker Shushanker v Ailla*

[See (1878 80) 2 Mad 113 (116) 3 Ind Jur 415, *Appasami v Aghilanda*]

Note 2

1. (1925) A 1 R 1925 Mad 132 (152) 60 Ind Cas 932, *Jagannadha v Lakshmana*

2 (1918) A 1 R 1918 Cal 707 (709) 39 Ind Cas 705 44 Cal 978 *Brajendra Kishore v Hindustan Co-operative Insurance Co* (Cause of action arises only on default of principal debtor, though the default may occur at the same time as the promissory note. Art 65 or Art 115 applies.)

governed by this Article. It has been held by the Bombay High Court in the undermentioned case³ that a suit against a Hindu son to enforce his Hindu law liability to pay his father's promissory note debt is governed by this Article, the reason given being that the suit against the son is based on the *same cause of action* as that against the father. A different view was expressed by the High Court of Allahabad in *Narsingh Misra v. Lalji Misra*⁴. In that case, the obligee under a bond executed by the father brought a suit against the sons to enforce the debt due on the bond. Their Lordships observed: "We wish to point out that the suit against the sons of the deceased debtor is not based upon any contractual relation between them and the plaintiff, but is an obligation imposed upon them by virtue of their status as sons of a Hindu father." Accordingly they applied Article 120 to the suit and not the Article that would be applicable to a suit to enforce the bond. It is submitted that the Bombay view is not correct.

3. "Payable on demand," meaning of. — It has been seen in Note 6 to Article 59 *ante* that the words "on demand" have, under the English Common Law, a technical meaning, whereby money lent and repayable on demand is payable *at once and without demand*¹. The Legislature has adopted this meaning in respect of transactions falling within this Article² and Article 59 *ante*. It has not adopted this meaning in respect of transactions falling within Article 60. In the case of transactions not falling within these Articles where the words "on demand" are used, there is a difference of opinion as to whether they bear the same meaning as in the English law. See Note 6 to Article 59 and the Notes to Articles 75 and 80 *infra*.

(See also (1932) A I R 1932 Oudh 286 (286), 140 Ind Cas 460, *Bens*

3 (1931) A I R 1931 Bom 542 (544) 135 Ind Cas 604, *Lakshman Vithoba v. Mahabaleshwar Doda*

4 (1901) 23 All 206 (209) 1901 All W N 34

Note 3

1. (1820) 2 Brod and B 165 (180) 2 Blq 391 21 R R 94, *Touce v. Young*
(1890) 53 L J Ch 703 (711) 44 Ch D 627 63 L T 49 38 W R (Eng) 617,
Francis v. Bruce
- (1837) 2 M & W 461 (464) 1 M & H 69 1 Jur 493 6 L J (N S) Ex 121
46 R R 646, *Norton v. Ellam*
- 2 (1928) A I R 1928 Bom 35 (42) 52 Bom 88 107 Ind Cas 257 (F B), *Ganpat v. Sopana*
- (1926) A I R 1926 Bom 241 (241) 94 Ind Cas 21 50 Bom 266, *Framroz v. Mahomad*

v. Johnson

(1876) 1 Bom 305n (307) 1 Ind Jur 133n, *Ramachandra v. Soma*

(1880) 4 Bom 230 (234) 5 Ind Jur 90, *Pinayal Gorind v. Babaji*

Article 73

Note 3

A promissory note or bill of exchange, in which no time is fixed for payment is, under Section 19 of the Negotiable Instruments Act 1881, payable on demand^{2a} It has accordingly been held that a suit on an instrument of this kind is governed by this Article³

Under Section 21 of the Negotiable Instruments Act, the expressions "at sight" and "on presentment," when used in promissory notes and bills of exchange, mean "on demand" The High Court of Calcutta has held, applying the above meaning that a promissory note payable at sight is a promissory note payable on demand within the meaning of this Article and that therefore a suit thereon is governed by this Article It has however held that a bill of exchange payable at sight even though it be equivalent to a bill of exchange payable on demand, is not governed by this Article but by Article 70⁴ The reasoning of the decision is not clear If the words "at sight" have the same meaning as the words "on demand" in this Act also, there appears, on a first impression, to be a redundancy between Article 70 and this Article so far as a bill of exchange payable at sight is concerned On a closer consideration, however, it seems to be clear that the Articles really prescribe the period of limitation for two different classes of cases This Article applies to suits where the claim does not depend upon a presentment for payment while Article 70 applies to suits where the claim is not sustainable unless a presentment had been made for payment Thus, where a bill of exchange is payable on demand or at sight and the suit is against the drawer of the bill, this Article will apply No presentment is necessary in order to make the drawer or maker liable⁵ If the suit is against the acceptor or drawee, the Article applicable would be Article 70, inasmuch as in such cases no liability at all arises on the part of the defendant unless a presentment for payment had been made

It has been held in the case noted below⁶ that in determining when a negotiable instrument payable on demand 'became payable' within the meaning of Section 9 of the Negotiable Instruments Act, the principle adopted in the Limitation Act, namely that such

(1870) 7 Bom II C R O C 36 (38), *Jeeunissa Iadli Begam v Maniky Kharseli*

(1865) 2 Mad II C R 472 (472), *Hempammal v. Hanuman*

(1931) A I R 1931 Cal 140 (142) 59 Cal 290 180 Ind Cas 134, *Premalal Sein v Radha Bullat Kankra*.

[See (1917) A I R 1917 Pat 533 (534) 2 Pat L Jour 951 40 Ind Cas 350 *Bishunchand v. Audh Bihari Lal*]

2a See (1918) A I R 1918 Mad 317 (318) 45 Ind Cas 22, *Gopalachariar v Mayappa Chetty*

3 (1891) 1891 Bom P J 112, *Ras Kashi v Perabhai*

4 (1921) A I R 1924 Cal 1005 (1006) 81 Ind Cas 475 *Durga Prosad Sen v Kali Charan Aichra*

5 (1929) A I R 1929 Lah 210 (211, 212) 10 Lah 755 115 Ind Cas 860 *Ghanis Lal v Karam Chand*

6 (1921) A I R 1921 Cal 302 (302) 60 Ind Cas 210 47 Cal 801, *D. N. Shaha & Co v Bengal National Bank Ltd*

Article 73
Notes
4—5

subsequent to the date of the promissory note payable on demand, the maker paid interest in advance up to a particular date on condition that the holder should make no demand until that date, it was held that the transaction amounted to a substitution of a new contract and that time for enforcing the same began to run from the time fixed therein²

5. Computation of time.—Section 12 sub section 1, *ante* embodies the general principle of law that in computing the period of limitation prescribed, the date from which such period is reckoned shall be excluded¹ In computing the period, therefore, for a suit governed by this Article the day on which the bill or note was executed must be excluded Thus, if a promissory note is executed on 7th May 1907, that day should be excluded and so excluding it, the three years' period of limitation will expire on the midnight of 7th May 1910²

Article 74

74.* On a promissory note or bond payable by instalments.	Three years.	The expiration of the first term of payment as to the part then payable; and for the other parts, the expiration of the respective terms of payment.
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Synopsis

1. Legislative changes.
2. Scope.
3. Registered bonds.

1. Legislative changes.—There was no provision corresponding to this in the Act of 1859 but clause 10 of Section 1 of that Act was applied to such cases and each instalment was regarded as furnishing a cause of action from which limitation would run¹

* Act of 1877, Article 74 and Act of 1871, Article 74.

Same as above

Act of 1859.

No corresponding provision

0 (1876) 1 Bom 503 (505) *Natha Hira v Janardhan Ramchandra*

Note 5

1 (1871) 8 Beng L R 21 (26) 16 Suth W R O C 1, *Tarachand Ghose v Munsif Abdul Ali*

(1869) 1 Bom H O R A C 51 (53), *Lakshuman Sakharani v Hanu Sidosi*

2 (1912) 18 Ind Cas 574 (575) (1912) Upp Bur Rul 146, *Nga Po Yin v Ma Shan Au*

Article 74 — Note 1

1 (1875) 2 Suth W R 39 (39) *Fateullah Chowdhry v Hiron Chunder Das* (Each instalment of a hstbandee as it becomes due constitutes a fresh cause of action)

Article 74
Note 2

2. Scope. — The general principle adopted in the Act is that where money is payable on a particular date, time for a suit for its recovery will run from that date. This principle will apply to instalment bonds also, and this Article accordingly provides that time will, in respect of each instalment, run from the date on which such instalment falls due. Parties cannot, in fact, contract themselves out of the law of limitation by providing that though an instalment is due on a particular date, the creditor may wait till the date of the last instalment. Notwithstanding any such contract, time will, in respect of each instalment, run from the date on which it falls due and the creditor cannot recover instalments due beyond three years of the suit¹.

Article 75 *infra* also applies to suits on instalment bonds, but two conditions are necessary to be satisfied before it can be applied —

- 1 The bond must provide that if default be made in payment of one or more instalments, the whole shall become due

This is made clear by column 1 of the Article

- 2 Such default must have been made causing the whole amount to fall due² and should not have been waited by the creditor. This is clear from the words "when the default is made" etc., in the third column of the Article

The Article (i.e. Article 75) will not apply unless both the conditions are satisfied. Thus, where the bond contains a default clause, but there has been no default, or where, though a default has been committed, it has been waited, a suit for the instalments that have accrued due would not be governed by Article 75, but only by Article 74.

This Article is thus a general Article applicable to all suits on instalment bonds except where they fall within the applicability of the special Article 75. Where however, Article 75 applies then Article 74 will not apply³ in accordance with the general rule that a special provision will prevail over a general one.

[See also (1864) 1 Suth W R 121 (122) *Mt Munna Jhunna Aoonwar v Laljee Roy* (Three years limitation, as provided by Cl 10, S 1 Act 14 of 1859 is applicable to a suit under an instalment bond the limitation commencing from the date of the last unsatisfied payment)]

Note 2

- 1 See (1934) A I R 1934 All 661 (663) 151 Ind Cas 585 (F B), *Jawahar Lal v Mathura Prasad*
[See also (1915) A I R 1915 Mad 979 (982) 21 Ind Cas 24 (26) 38 Mad 374 *Sitarama Chetty v Krishnasami Chetty*]
- 2 (1932) A I R 1932 Nag 1 (2) 28 Nag L R 44 135 Ind Cas 414 (F B), *Vishwanath v Sadashita*
[See also (1934) A I R 1934 All 661 (665) 151 Ind Cas 585 (F B), *Jawahar Lal v Mathura Prasad*]
- 3 (1934) A I R 1934 All 661 (667) 151 Ind Cas 585 (F B) *Jawahar Lal v Mathura Prasad*
(1932) A I R 1932 Nag 1 (2) 28 Nag L R 44 135 Ind Cas 414 (F B), *Vishwanath v Sadashita* (Overruling A I R 1927 Nag 23 Art 75 must not be construed so as to conflict with Art 74]

2. Scope. — The general principle adopted in the Act is that where money is payable on a particular date, time for a suit for its recovery will run from that date. This principle will apply to instalment bonds also, and this Article accordingly provides that time will, in respect of each instalment, run from the date on which such instalment falls due. Parties cannot in fact, contract themselves out of the law of limitation by providing that though an instalment is due on a particular date, the creditor may wait till the date of the last instalment. Notwithstanding any such contract, time will, in respect of each instalment, run from the date on which it falls due and the creditor cannot recover instalments due beyond three years of the suit¹

Article 75 *infra* also applies to suits on instalment bonds, but two conditions are necessary to be satisfied before it can be applied —

- 1 The bond must provide that if default be made in payment of one or more instalments, the whole shall become due

This is made clear by column 1 of the Article

- 2 Such default must have been made causing the whole amount to fall due² and should not have been waived by the creditor. This is clear from the words "when the default is made" etc., in the third column of the Article

The Article (i.e. Article 75) will not apply unless both the conditions are satisfied. Thus where the bond contains a default clause, but there has been no default, or where though a default has been committed, it has been waived, a suit for the instalments that have accrued due would not be governed by Article 75, but only by Article 74.

This Article is thus a general Article applicable to all suits on instalment bonds except where they fall within the applicability of the special Article 75. Where, however, Article 75 applies then Article 74 will not apply³ in accordance with the general rule that a special provision will prevail over a general one.

[See also (1864) 1 Suth W R 121 (122) *Mt Munna Jhunna Koonwar v Laljee Roy* (Three years limitation as provided by Cl 10, S 1 Act 14 of 1859 is applicable to a suit under an instalment bond the limitation commencing from the date of the last unsatisfied payment)]

Note 2

- 1 See (1934) A I R 1934 All 661 (663) 151 Ind Cas 585 (F B) *Jawahar Lal v Mathura Prasad*

[See also (1915) A I R 1915 Mad 979 (982) 21 Ind Cas 24 (26) 38 Mad 374 *Sitarama Chetty v Krishnasami Chetty*]

- 2 (1932) A I R 1932 Nag 1 (2) 28 Nag L R 44 135 Ind Cas 414 (F B), *Vishwanath v Sadashiva*

[See also (1934) A I R 1934 All 661 (665) 151 Ind Cas 585 (F B), *Jawahar Lal v Mathura Prasad*]

- 3 (1934) A I R 1934 All 661 (667) 151 Ind Cas 585 (F B) *Jawahar Lal v Mathura Prasad*

(1932) A I R 1932 Nag 1 (2) 28 Nag L R 44 135 Ind Cas 414 (F B), *Vishwanath v Sadashiva* (Overruling A I R 1927 Nag 29 Art 75 must not be construed so as to conflict with Art 74)

Article 73

Notes

4—5

subsequent to the date of the promissory note payable on demand, the maker paid interest in advance up to a particular date on condition that the holder should make no demand until that date, it was held that the transaction amounted to a substitution of a new contract and that time for enforcing the same began to run from the time fixed therein⁹

5. Computation of time.—Section 12 sub section 1, *ante* embodies the general principle of law that in computing the period of limitation prescribed, the date from which such period is reckoned shall be excluded¹ In computing the period, therefore, for a suit governed by this Article the day on which the bill or note was executed must be excluded Thus, if a promissory note is executed on 7th May 1907, that day should be excluded and so excluding it, the three years' period of limitation will expire on the midnight of 7th May 1910²

Article 74

74.* On a promissory note or bond payable by instalments.

Three years.

The expiration of the first term of payment as to the part then payable; and for the other parts, the expiration of the respective terms of payment.

Synopsis

1. Legislative changes.
2. Scope.
3. Registered bonds.

1. Legislative changes.—There was no provision corresponding to this in the Act of 1859 but clause 10 of Section 1 of that Act was applied to such cases and each instalment was regarded as furnishing a cause of action from which limitation would run¹

* Act of 1877, Article 74 and Act of 1871, Article 74

Same as above

Act of 1859.

No corresponding provision

9 (1876) 1 Bom 503 (505) *Natha Hira v Janardhan Ramchandra*

Note 5

1 (1871) 8 Beng L R 21 (26) 16 Buth W R O O 1, *Tarachand Chose v Muns' Abdul Ali*

(1869) 6 Bom H O R A C 51 (58), *Lakshuman Salharam v Ranu Sidoji*

2 (1912) 18 Ind Cas 574 (575) (1912) Upp Bur Rul 146, *Aga Po 1 in v M' Sian Au*

Article 74 — Note 1

1 (1865) 2 Buth W R 39 (39) *Fnatollah Chowdhry v Hurro Chunder Da* (Each instalment of a *kistbandee* as it becomes due constitutes a fresh cause of action)

2. Scope. — The general principle adopted in the Act is that where money is payable on a particular date, time for a suit for its recovery will run from that date. This principle will apply to instalment bonds also, and this Article accordingly provides that time will, in respect of each instalment, run from the date on which such instalment falls due. Parties cannot, in fact, contract themselves out of the law of limitation by providing that though an instalment is due on a particular date, the creditor may wait till the date of the last instalment. Notwithstanding any such contract, time will, in respect of each instalment, run from the date on which it falls due and the creditor cannot recover instalments due beyond three years of the suit¹.

Article 75 *infra* also applies to suits on instalment bonds, but two conditions are necessary to be satisfied before it can be applied —

- 1 The bond must provide that if default be made in payment of one or more instalments, the *whole shall become due*

This is made clear by column 1 of the Article

- 2 Such *default must have been made* causing the whole amount to fall due² and should not have been *wasted* by the creditor. This is clear from the words “when the default is made” etc., in the third column of the Article

The Article (i. e. Article 75) will not apply unless *both* the conditions are satisfied. Thus, where the bond contains a default clause, but there *has been no default*, or where, though a default has been committed, it has been *wasted*, a suit for the instalments that have accrued due would not be governed by Article 75, but only by Article 74.

This Article is thus a *general* Article applicable to all suits on instalment bonds except where they fall within the applicability of the special Article 75. Where, however, Article 75 applies, then Article 74 will not apply³ in accordance with the general rule that a special provision will prevail over a general one.

[See also ...]

Note 2

- 1 See (1934) A I R 1934 All 661 (663) 151 Ind Cas 585 (F B) *Jauahar Lal v Mathura Prasad*

[See also (1915) A I R 1915 Mad 979 (982) 21 Ind Cas 24 (26) 38 Mad 374 *Sitarama Chetty v Krishnasami Chetty*]

- 2 (1932) A I R 1932 Nag 1 (2) 28 Nag L R 44 135 Ind Cas 414 (F B), *Vishwanath v Sadashiva*

[See also (1934) A I R 1934 All 661 (665) 151 Ind Cas 585 (F B), *Jauahar Lal v Mathura Prasad*]

- 3 (1934) A I R 1934 All 661 (667) 151 Ind Cas 585 (F B) *Jauahar Lal v Mathura Prasad*

(1932) A I R 1932 Nag 1 (2) 28 Nag L R 44 135 Ind Cas 414 (F B), *Vishwanath v Sadashiva* (Overruling A I R 1927 Nag 28 Art 75 must not be construed so as to conflict with Art 74)

Article 74
Note 2

Illustrations.

- 1 An instalment bond provided that on default of payment of certain instalments the whole amount should become due. Such default was committed and there was no waiver thereof. More than three years after the default, the obligee sued for the instalments which would have accrued due within three years of the suit. It was held that the case clearly fell within Article 75, that therefore Article 74 did not apply and that time having begun to run from the date of default, the suit brought after three years thereof, whether for the whole amount or for a fractional part thereof, was barred.⁴

The High Court of Lahore has, however, held in a similar case that Article 74 may be applied and a decree granted to the creditor for instalments that have fallen due within three years of the suit. The ground of the decision appears to be that the creditor has an option to sue immediately after default or to wait till the last instalment.^{4a} This view has been dissented from by the Allahabad High Court in *Jauahar Lal v Mathura Prasad*^{4b} and, it is submitted, does not seem to rest upon any principle.

- 2 An instalment bond provides that on default of four instalments the whole amount shall become due. Three instalments are not paid and before the fourth instalment falls due, the creditor sues for the three instalments unpaid. The suit would be governed by Article 74 and not by Article 75 inasmuch as the second condition for the applicability of Article 75 has not been satisfied.⁵
- 3 A agrees to pay Rs 99 in eighteen annual instalments. There is no default clause. A suit for the instalments accrued due would be governed by Article 74. Article 75 will not apply as the bond does not provide that on default of one or more instalments the whole shall become due.⁶
- 4 A promissory note for Rs 30,000 provided that the promisor should pay the amount in monthly instalments of Rs 1000 to the promisee. The last of such payments was made in April 1906 and thereafter the promisee refused to receive the instalments when tendered. On a suit brought more than

4 (1932) A I R 1932 Nag 1 (2) 3. 28 Nag L R 44. 135 Ind Cas 414 (F B), *Vishwanath v Sadashiva*.

(1934) A I R 1934 All 661 (667). 151 Ind Cas 585 (F B) *Jauahar Lal v Mathura Prasad*. (If a case falls within Art 75, creditor cannot fall back on Art 74 and say that he will give up a part of the whole amount and claim only instalments and take advantage of Art 74.)

4a (1937) A I R 1937 Lah 1 (2). 169 Ind Cas 929, *Fazal Ilahi v Gudsar Shah*.

4b (1934) A I R 1934 All 661 (667). 151 Ind Cas 585 (F B).

5 See (1934) A I R 1934 All 661 (667). 151 Ind Cas 585 (F B), *Jauahar Lal v Mathura Prasad*.

6 (1927) A I R 1927 Oudh 539 (539). 4 Luck 480. 121 Ind Cas 891, *Gaura v Lajm Charan*.

(1869) 1869 Pun Ilc No 64, *Ram Das v Mohur Singh*.

three years after such refusal, it was held that inasmuch as the promisee *refused* the tenders, there was no *default*, that consequently Article 75 did not apply, that Article 74 applied to the case and that the promisee could recover such instalments as fell due within three years of the suit ⁷

- 5 An instalment bond dated 11th September 1917 provided that Rs 50 was payable in ten monthly instalments of Rs 5 each, provided that the whole shall be payable *on demand* if any one of the instalments was not paid on the due date. A suit on the bond was filed on 4th July 1921 for the recovery of the whole amount due on the bond with interest. It was held that the plaintiff could recover only the instalments that fell due within three years of the suit under Article 74, i.e. after 4th July 1918. Article 75 was held inapplicable inasmuch as the whole amount was payable not on default of the payment of the instalments, but only *on demand*. It was also held that the option of making a demand was lost after the expiry of the date of the last instalment, so that the claim could only be considered to be for the instalments due under an ordinary instalment bond ⁸

3. Registered bonds. — A suit upon a *registered* instalment bond is governed by Article 116 and not by this Article. The reason is that Article 116 applies to all contracts in writing registered whether there is, or is not an express provision in the Act for similar contracts not registered ¹

75. On a promissory note or bond payable by instalments, which provides that, if default be made in payment of one or more instalments, the whole shall be due.	Three years	When the default is made, unless where the payee or obligee waives the benefit of the provision, and then when fresh default is made in respect of which there is no such waiver.
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Article 75

* Act of 1877, Article 75

75 — On a promissory note or bond payable by instalments which provides that if default be made in payment of one instalment the whole shall be due	Three years	When the first default is made unless where the payee or obligee waives the benefit of the provision and then when fresh default is made in respect of which there is no such waiver
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7 (1915) A I R 1915 Mad 979 (932) 21 Ind Cas 24 (27) 38 Mad 374 *Sitarama Chetty v Krishnasami Chetty*

8 (1924) A I R 1924 Mad 310 (312) 77 Ind Cas 48, *Periannan Chetty v Marappan Asari*

Note 3

1. (1891) 18 Cal 506 (507) *Din Doyal Singh v Gopal Saran Narain Singh*

Article 75

Synopsis

1. Legislative history.
2. Scope of Article.
3. The suit must be on a promissory note or bond.
4. Such bond or note must be payable by instalments.
5. Bond or note must provide for a default.
6. There must have been a default.
7. Article does not apply where default has been waived and fresh default has not occurred.
8. Article, if applies where obligee has an option to demand payment.
9. Article, if applies when, on default, whole amount is payable on demand.
10. Starting point.
 11. Waiver, meaning of.
 12. Demand of overdue instalment is not waiver.
 13. Part payment of instalment or payment generally towards account is not waiver.
14. Starting point in respect of surety for instalment bond.
15. Question of waiver is one of fact.
 16. Onus of proof.
 17. Pleadings and waiver.
18. Waiver of one default does not bar suit on second default.
19. Default clause is not penalty.
20. Registered instalment bond.
21. Instalment bond creating charge on property.
22. Punjab Loans Limitation Act, 1904, and this Article.
23. Section 20 and this Article.

Act of 1871, Article 75.

75.—On a promissory note or bond payable by instalments, which provides that, if default is made in payment of one instalment, the whole shall be due.	Three years	The time of the first default, unless where the payee or obligee waives the benefit of the provision, and then when fresh default is made
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Act of 1859.

No corresponding provision.

Other Topics

Article 75 Note 1

Acceptance of overdue instalment—Whether amounts to waiver	See Note 11, Pts 4 to 9
Applicability of Article—Essentials	See Note 2
Article not applicable to application for execution of instalment decrees	See Note 3 Pt 1
Instalment mortgage bond	See Note 21
Interest payable on particular dates—On default principal and interest payable immediately—Bond is not instalment bond	See Note 4 Pts 1 2
Mere failure to sue is not waiver—Overt act necessary	See Note 11 Pts 1 to 3a
Principal debtor and surety	See Note 14
Refusal by creditor to accept instalment—No default	See Note 6 Pts 2 3
Verbal contract under which money payable in instalments—Article is not applicable	See Note 3 Pt 2
Waiver—Whether to be bilateral or unilateral transaction	See Note 11, Pts 10 to 15

1. Legislative history.

- Under the Act of 1859 there was no provision corresponding to this Article. A suit on an instalment bond with a default clause was in some cases, held to fall under Section 1 clause 9 of that Act¹ in some cases under Section 1 clause 10² and in some cases under Section 1 clause 16 of that Act.³ As to the starting point it was held in some cases that it arose on default and that the running of time from that date could not be arrested by the subsequent waiver by the creditor of the default.⁴ A contrary view was taken in the undermentioned cases⁵ that a waiver of the condition of forfeiture “puts an end to the cause of action which had accrued so that the bond is set up again as a bond payable by instalments and no cause of action under the condition arises until some fresh default is made in payment of a subsequent instalment.”
- The last mentioned principle appears to have been given effect to by the Legislature in enacting Article 75 of the Act of 1871 corresponding to the present Article. Under that Article time was made to run from the date of the first default unless the payee or obligee waived the benefit of the provision and then

Article 75 — Note 1

- (1873) 5 N W P H O R 35 (39) *Madho Singh v Thakoor Prasad*
- (1876) 1 Bom 125 (131) (F B) *Gumna Damber Shet v Bhiku Hariba* (5 Bom H O R A C 35 Overruled)
- (1863) 1 Mad H O R 209 (210) *Karupanna Nayak v Hallamma Nayak*

Iah Moolah

- (1873) 5 N W P H O R 35 (39) *Madho Singh v Thakoor Pershad* (Clause 9 will apply)
- (1869) 5 Mad H O R 193 (199) *Sri Rajah Payamma Row Garu v Toleti Venkayya*
- (1864) 1 Suth W R 189 (190) *Hullobhur Bangal v C S Hogg*
- (1870) 2 N W P H O R 83 (84), *Gyae Chund v Javahur*

Article 75
Notes
1—3

when *fresh default was made* This gave rise to a doubt whether there could be a waiver of the *fresh default* also ⁶

3 This doubt was removed by the addition of the words "in respect of which there is no waiver" in the third column of Article 75 of the Act of 1877 There was, however, a conflict of opinion arising from the words in the first column "if default be made in payment of one instalment" It was held in some cases that this Article would not apply to bonds where it was provided that on failure of *two or more* instalments, the whole amount shall become due ⁷ In other cases it was held that the Article or at least the principle thereof would apply to such cases ⁸

4 The words "if default be made in payment of one instalment" have now been substituted by the words 'if default be made in payment of one or more instalments'

2. **Scope of Article.** — It has been seen in Note 2 to Article 74 *ante*, that that Article is a *general* Article applicable to all suits on instalment bonds and promissory notes and that this Article is a *special* provision applicable to a particular class of instalment bonds Where therefore this Article applies Article 74 will not apply, in accordance with the general rule of interpretation of statutes that a special provision will prevail over a general one See Notes to Article 74, *ante*

In order that this Article may apply, it is essential that —

- 1 the suit is on a promissory note or bond (Note 3)
- 2 such bond or note is payable by instalments (Note 4),
- 3 such bond or note must provide that if default be made in payment of one or more instalments, the whole shall become due (Note 5),
- 4 there must have been a *default* in payment as provided by the note or bond (Note 6), and
- 5 such default should not have been *waived* (Note 7)

3. **The suit must be on a promissory note or bond.** — The Article applies only to *suits* It does not apply to *applications* such as an application for execution of a *decree* payable by instalments Such applications would be governed by Article 175 or Article 182 as the case may be ¹

6 (1860) 3 Mad C1 (C4) 4 Ind Jur 557, *Sri Rajah Sattracherla v Sri Raja Selarama*

(1874) 6 N W P H O R 88 (91), *Uncovenanted Servants Bank v Kellermohun Ghose*

7 (1909) 4 Ind Cas 956 (957) (Lah) *Ragfath v Wali* (Article 71 would apply) [See (1921) A I R 1921 Lah 280 (281) *Siba Singh v Sundur Singh* (1901) 1901 Pun Re No 74 (Page 236) 1901 Pun L R 111, *Sobha v Jam Partab*]

8 (1880) 3 Mad C1 (C4) 4 Ind Jur 557 *Sri Raja Sattracherla v Sri Raja Selarama* (5 Mad H C R 193 (193), followed) (1900) 10 Oudh Cas 6 (8), *Girdhari Lal v P t Labanti*

Note 3

1 (1862) 4 All 83 (85) 1861 All W N 121, *Ugrah Nath v Laganmani*

Since the Article applies only to suits on *bonds* and *promissory notes*, it will not apply to suits on *verbal* contracts under which money would be payable in instalments²

Article 75
Notes
3-4

4. Such bond or note must be payable by instalments — The Article applies only where the bond or note is *payable by instalments*. A bond or note is "payable by instalments" when the *principal amount* thereof is payable by instalments and not where the *interest alone* is payable on particular dates but the whole of the principal is payable after a fixed date¹ In *Ball v Stowell*² where a bond provided that the principal amount would be payable after three years, that interest would be payable every half year and that in the event of failure to pay the interest regularly the principal as well as the interest would be payable immediately Sir Robert Stuart, C J, observed "I am quite clear that the bond sued on is not an instalment bond but a bond simply acknowledging the debt with interest payable half yearly, with a proviso that if not so paid, the obligors should be liable to pay up the whole amount from date of such default, that is from the date of failure in payment of interest and Spankio, J observed in the same case as follows "I am not prepared to admit that the bond in suit is one payable by instalments There was no contract between the parties that the sum borrowed should be paid off by instalments that is to say, there was no agreement that the money borrowed and secured by the bond should be repaid in certain portions at different times

- (1881) 7 Cal 56 (60) 5 Ind Jur 525 *As utullah Dalal v Kally Churn Mitter*
2 (1878) 3 Cal 619 (620) 2 Cal L R 167, *Koylash Chunder Dass v Doj Koono Nath Chundra*

Note 4

- 1 (1879) 2 All 322 (328, 330) 4 Ind Jur 461, *Ball v Stowell*
(1923) A I R 1923 All 1 (7) 45 All 27 69 Ind Cas 981 (F B) *Shib Dayal v Meherban*
(1880) 5 Cal 21 (28) 4 Ind Jur 407 *Narasimhabu v Gours Persad* (Art 65 applies to such cases)
(1929) A I R 1929 Sind 140 (144) 116 Ind Cas 581 *Nenomal Jiamal v Chandumal Assanival*
(1923) A I R 1923 Oudh 19 (20) 26 Oudh Cas 121 70 Ind Cas 85 *Horilal v Thaman Lal* (Art 75 was not applied)
(1917) A I R 1917 Oudh 181 (181) 40 Ind Cas 229 20 Oudh Cas 152 *Amir Haidar Khan v Ram Dal*
(1925) A I R 1925 Oudh 502 (504) 27 Oudh Cas 318 85 Ind Cas 280 *Pheras v Pudas Ram*
(1915) A I R 1915 Sind 37 (37) 9 Sind L R 90 31 Ind Cas 479, *Ushindas Wadhuram v Holomal Dastomal* (Art 65 or Art 66 or Art 68 applied)
- - -
v *Tota Ram* (Art 65
d Cas 828 *Babu Lal v*

[See also (1917) A I R 1917 Oudh 252 (253) 41 Ind Cas 423 *Babu Ram v Abdhoot Singh*

(1921) A I R 1921 All 104 (104) 63 Ind Cas 477, *Mata Tahal v Bhagwan Singh*]

- 2 (1879) 2 All 322 (328, 330) 4 Ind Jur 461

Article 76
Notes
4—6

Interest may not be a part of a contract between the parties to it. If there is a condition in a bond that simple interest should be paid at a certain rate, then it is as much payable by virtue of the contract as the principal. It is a necessary incident to the original debt, but it is not a part of the original sum borrowed. It is the sum of money paid or allowed for the use of the money lent for a certain time at a fixed rate per cent. It is not added to the principal as a part of the original debt, but principal and interest in case of failure to pay make up the amount due under the bond."

5. Bond or note must provide for a default.—The bond or promissory note must, if the Article is to apply, provide that if default be made in payment of one or more instalments, the whole shall become due. Where there is no such default clause in the bond or note, this Article will not apply but only the general Article 74.¹

6. There must have been a default.—Where, even though an instalment bond or promissory note does contain a default clause, but *there has been no default* by the defendant, a suit to recover instalments fallen due under it will be governed by Article 74 and not by this Article.

A mere non-payment of the instalments due is not necessarily a default within the meaning of this Article.¹ Thus, where a bond provides that a certain amount is payable by *monthly* instalments, and that on failure to pay *five* instalments the whole amount shall become due, a failure to pay the first four instalments will not constitute "defaults" for the purposes of this Article. Again, where the debtor is ready and willing to pay the instalments but the creditor *refuses to accept it*, it cannot be said that there is 'default' within the meaning of this Article.²

Where therefore no default such as is contemplated by this Article has been made, a suit for recovery of money due on the bond or note, as the case may be, would be governed not by this Article but by Article 74. In *Sitaram Chetty v Krishnaswamy Chetty*,³ where the obligor offered to pay the instalments on the dates on which they fell due, but the obligee refused to accept them, it was held that there was no 'default,' that Article 75 did not therefore apply

Note 5

- 1 (1927) A I R 1927 Oudh 539 (539) 4 Luck 480 121 Ind Cas 891, *VI Gaura v Ram Charan* (Bond provided that the money due under it would be payable within 18 years by 18 annual instalments)
 (1893) 6 C I L R 24 (25) *Gulabai Padamsa v. Amra*
 (1934) A I R 1934 All 661 (665) 151 Ind Cas 595 57 All 109 (F B), *Jauahar Lal v Mathura Prasad*

Note 6

- 1 (1915) A I R 1915 Mad 244 (249) 24 Ind Cas 507, *Sitarama Chetty v. Krishnaswamy Chetty*
 2 (1915) A I R 1915 Mad 244 (249) 24 Ind Cas 507, *Sitarama Chetty v. Krishnaswamy Chetty*
 3 (1915) A I R 1915 Mad 244 (247, 249) 24 Ind Cas 507, (Default must have occurred)

but that Article 74 applied, so that the obligee could recover the instalments that fell due within three years of the date of the suit Sir Arnold White, C J, observed as follows —

Article 75
Notes
6—7

"It was contended for the appellant that default meant nothing more than non payment and that default was made in June or July 1906 I cannot accept this contention The defendants sent cheques in May and June which were returned It is their case that at any rate up to the institution of the present suit they were ready and willing to pay On these facts I am prepared to hold that there was no default within the meaning of the Article "

And Oldfield, J, in the same case observed as follows —

"Throughout these, the absence of completed payments has been the result not of any failure, unreadiness or unwillingness on the part of the appellants but of the conduct of the respondent alone The provisions for immediate recovery in the promise sued on, Exhibit A, must be regarded as introduced for respondent's benefit. The construction of it required by appellant's contention is that he could at any time have secured the advantage of a special method of recovery though his debtors were not in fault, and that cannot have been contemplated by either party to the contract It follows that the mere absence of completed payments, for which throughout appellants have not been responsible, cannot be treated as equivalent to the default referred to in the first column of Article 75 "

In *Jawaharlal v Mathura Prasad*,⁴ Sulaiman C J observed as follows —

"I can conceive of other cases also where although there is a bond with a default clause, the appropriate Article applicable would be Article 74 Such an instance would be where the suit is brought for the recovery of the instalment that has fallen due, and before there is such a default as makes the whole amount become due In such a case, although the bond is a bond payable by instalments and there is a default clause Article 74 would nevertheless be applicable "

7. Article does not apply where default has been waived and a fresh default has not occurred. — Where a bond has a default clause and there has been also a default but the default has been waived and a fresh default has not occurred a suit on the bond would not be governed by this Article but by Article 74 *ante* The reason is that the effect of waiver in such a case is to remit the parties to the same position as they would have been if no default had occurred, and consequently on the principles stated in Note 6 Article 74 and not this Article will apply to such cases² A contrary

⁴ (1934) A I R 1934 All 661 (GG") 151 Ind Cas 585 57 All 109 (F B)

Note 7

1 (1915) A I R 1915 Mad 244 (1915) 24 Ind Cas 50", *Sitarama Chetty v Krishnasamy Chetty*

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view, namely that Article 75 will apply to such cases, was expressed in the undermentioned case ² It is submitted that it is not correct

8. Article, if applies where obligee has an option to demand payment. — There is a difference of opinion on the question whether the first column of the Article applies to cases of bonds and promissory notes which provide not merely that on default of one or more instalments the whole amount shall become due but that the whole amount shall become due *at the option of the obligee or promisee*. One view is that, in such cases, the obligee or promisee

within 3 years of the suit under Article 74 of the Act ¹ The general trend of opinion is however, contrary to the above view. According to the general view there is no distinction between cases where the bond provides that the amount *shall become due* and cases where the

- 2 (1929) A I R 1929 All 812 (812) 121 Ind Cas 272 *Mt Kaunsilla v Dip Singh* (The decision is not also correct in holding that even though the payments alleged by the plaintiff were found to be untrue still the failure to sue was a waiver)

Note 8

- 1 (1937) A I R 1937 Lah 1 (2) 169 Ind Cas 929 *Fazal Ilahi v Guddar Shah* (Reversing A I R 1936 Lah 570)
 (1936) 163 Ind Cas 165 (166) (Lah) *Kundan Lal v Indar Singh* (Can sue for instalments within limitation)
 (1933) A I R 1933 Lah 849 (849) 149 Ind Cas 861 *Chhajju v Nanak Bakhsh* (Instalment bond giving promisee option to sue for whole amount in default of any one instalment—Right to realize amount by instalment is not lost by failure to exercise option)
 (1883) 1883 Bom P J 330 *Huralal v Balakrishna* (Suit after default based on default—Art 75 applies)
 (1908) 90 All 123 (125) 5 All L Jour 72 1908 All W N 36 *Ajudhia v Kunjal*
 (1907) 29 All 431 (433) 4 All L Jour 336 1907 All W N 189 *Maharaja of Benares v Nand Ram*
 (1914) A I R 1914 All 129 (129) 23 Ind Cas 830 *Dohra Moti Ram v Lal Khan* (If All 371 and 29 All 431, Relied upon)
 (1929) A I R 1929 All 812 (812) 121 Ind Cas 272, *Mt Kaunsilla v Dip Singh* (But it was held that Art 75 would apply even for the suit for instalments)
 (1933) A I R 1933 All 235 (241) 85 All 283 149 Ind Cas 181 *Lalla Prasad v Gayadhar Shukul* (Creditor held to have waived default by suing after the full period A I R 1932 P C 207 Followed)
 (1929) A I R 1929 Cal 393 (400) *Umedmul Mangal Chand v Maniram Agarwalla*
 (1925) A I R 1925 Mad 233 (231) 81 Ind Cas 118 *Mohideen Karia v Terapanayakam Pillai* (Non exercise of option—Cause of action cannot be said to have arisen on the default itself)
 (1927) A I R 1927 Nag 28 (29) 97 Ind Cas 554 22 Nag L R 120, *Rajaram v Narain*
 (1911) 172 Ind Cas 112 (112) (Pat) *Sri Ram Chandra Nayek Kalia v Ghar-lharan Ali*
 (See also (1907) 11 Cal W N 903 (904) *Rup Narain Bhattacharya v Corp Nath Mond I* (As a fact the plaintiff was inactive and it was held he had waived the default)
 (1923) A I R 1923 Mad 105 (105) 112 Ind Cas 270, *Mulayaprana Pillai v Kulu Nambiar*)

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bond gives an option to the obligee to call in for the money.² In either case, the bond or note falls within column 1 of this Article and time will start to run from the date of the first default *unless* such default is waived by the obligee or promisee,³ with the result that after the expiry of the period prescribed by the Article from the date of the first default not only a suit for the whole amount but also a suit for the instalments due within three years of suit, would become barred.^{3a} In *Visvanath v Sadasita*,⁴ it was observed by a Full Bench of the Judicial Commissioner's Court of Nagpur as follows

"The question is not what the creditor may do but what the debtor is liable for. However the bond may be worded, it is clear that when on default the creditor is entitled to recover the whole sum, the debtor on default at once becomes liable to pay the whole sum and the whole sum does become due within the meaning of Article 75, Schedule 1 to the Limitation Act. Any suit on the bond must therefore be governed by that Article and when a suit is barred by that Article the creditor cannot sue for instalment which under the primary terms, would have fallen due after the said default."

In *Vishandas Wadhuram v Hotomal Ditomal*,⁵ the Sind Judicial Commissioner's Court observed as follows

"It matters not by what form of words the right to immediate payment of the principal in default of payment of an instalment or

- 2 (1917) A I R 1917 Mad 47 (48) 88 Ind Cas 302 *Nicholson Bank Tanjore v Rajagopala Aiyar* (21 Cal 542 24 Cal 281 and 31 Cal 297 Followed)
(1925) A I R 1925 Oudh 34 (35) 79 Ind Cas 818 *Mohanya v Panna Lal*
3 (1932) A I R 1932 Nag 1 (3) 29 Nag L R 44 135 Ind Cas 414 (F B) *Visvanath v Sadasita* (A I R 1927 Nag 28 Overruled)
(1926) A I R 1926 Cal 789 (790) 53 Cal 277 96 Ind Cas 591 *Basant Kumar Singha v Nabin Chandra*
3a (1934) A I R 1934 All 661 (667) 57 All 108 151 Ind Cas 585 (F B) *Jauahar Lal v Mathura Prasad*

- (1929) 65 Ind Cas 257 (259) (Cal) *Syama Charan Borman v Narattam Bortian* (1 Ind Cas 49 and 4 Ind Cas 17 Followed)

v *Bhoora*
Panna Lal
Vand Lal v

- (1879) 4 Bom 96 (99) 4 Ind Jur 577 *Ragho Gobind v Dychand*
(1880) 5 Cal 97 (100) 4 Ind Jur 517 *Chem Bash Saha v Kadum Mundul*

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interest, is conferred Every creditor has an option to file a suit or not to file a suit and within certain limits to select his own time for filing it The test whether or not the period of limitation begins to run is has the payee or obligee a right to file a suit forthwith for the principal remaining due if he so chooses ?

In *Jawaharlal v Mathura Prasad*,⁶ Sir Shah Sulaiman, C J., in delivering the judgment of a Full Bench of the Allahabad High Court, observed as follows

" Apart from the authority of these numerous cases, it seems to me that there is a clear distinction between an imperative word like 'shall' used in an enactment which directs something to be done and the same word when used in a private document The expression in column 1, Article 75 'the whole shall be due' refers to the provisions in the bond sued upon To my mind it implies nothing more than a mere sense of futurity and Article 75 would not be inapplicable merely because the bond goes on to provide further that the creditor would have an option to wait The use of the word 'shall' in this Article does not imply that it shall be obligatory on the creditor to sue for the whole amount without waiting for the full term before Article 75 can apply "

The above view is also in consonance with the principles of English law In *Hemp v Garland*,⁷ where an instrument securing a debt payable by instalments provided that the obligee *was at liberty*, in case of any default, to have judgment and execution for the whole as if all the periods of payment had expired, Lord Denman observed as follows

In this case there was a default more than six years ago, and upon that the plaintiff might, if he pleased, have signed the judgment and issued execution for all that remained due, or he might have maintained his action If he chose to wait till all the instalments became due, no doubt he might do so but that which was optional on the part of the plaintiff would not affect the right of the defendant, who might well consider the action as accruing from the time that the plaintiff had a right to maintain it The statute of limitations runs from the time the plaintiff might have brought his action unless he was subject to any of the disabilities specified in the statute and, as the plaintiff might have brought his action upon the first default, if he did not choose to enter up judgment, we think that the defendant is entitled to the verdict upon the plea of the statute of limitations "

9. Article, if applies when, on default, whole amount is payable on demand. — Where an instalment bond provides that on default of one or more instalments, the whole amount shall be payable on demand, the question arises whether this Article applies to

G (1934) A I R 1931 All 661 (667) 131 Ind Cas 585 57 All 108 (F B) (30 All 123 and 29 All 431 must be considered to be overruled by this decision)

7 (1843) 62 R R 423 (426, 427) L R 4 Q B 519 3 G & D 402 12 L J Q B 154 7 Jur 802

the case. It has been held that if the words "on demand" be construed, in the light of the transaction with reference to which the bond is given, as a condition for enforcing the default clause, then time does not begin to run against the obligee until the demand is made.¹ If this is a correct view, then it is conceived that this Article will not apply. Where, however, the words "on demand" have been used in the document merely in the sense that the obligee or the promisee has an option to enforce the default clause, then the principle stated in Note 8 *ante* would apply, and time will run from the date of the first default unless the obligee has waived it.

But a demand, whether it amounts to an option or to a condition, must be made before the last instalment falls due, and cannot be postponed after that date. Where an instalment bond provided a condition that on failure to pay any one instalment the whole shall be due on demand, and though the last instalment fell due in 1910, a suit was filed in 1917 alleging a demand within three years thereof, it was held that the suit was barred.²

10. Starting point. — Time runs, under the Article, from the date —

- 1 when the default is made, or
- 2 where the payee or obligee *wastes* the benefit of the provision, when fresh default is made in respect of which there is no waiver.¹

As to what constitutes a waiver, see Notes 11 to 13 *infra*. Where under the terms of an instalment bond the whole amount was payable on default of "two or three instalments," it was held that time began to run on the default of the second instalment.²

Note 9

- 1 (1884) 8 Bom 561 (568), *Hanmantram Sadhuram Pity v Arthur Boyle*;
(1886) 9 Mad 271 (272) *Mackenzie v Thiruvengadathan*;
(1919) A I R 1919 Mad 462 (464) 50 Ind Cas 87, *Seetharamayyar v Muthusamy Mudaliar* (Chit transaction — Bond executed for payment of future instalments)
- (1911) 12 Ind Cas 57 (58) 86 Mad 66 *Karunakaran v Krishna Rao*;
(1930) A I R 1930 Lah 124 (124) 121 Ind Cas 80 *Wasu Ram v Mohan Bakhsh* (8 Bom 561 Followed)
- 2 (1924) A I R 1924 Mad 310 (311) 77 Ind Cas 48 *Periannan v Marudai Asari*;
(1919) A I R 1919 Mad 580 (580) 50 Ind Cas 916, *Kaliyappa Das v Grigori Pillai* (9 Mad 271 Followed)
- (1874 75) 7 Mad H C R 293 (295) *Ethamukala Subbammah v Joseph*

Note 10

- (1935) A I R 1935 Pesh 179 (181) 160 Ind Cas 134, *Gopichand v mad Omar Khan*

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Note 11

11 Waiver, meaning of.—It is agreed on all hands that mere inaction or the failure to sue the obligor on the occurrence of a default is not sufficient to constitute waiver,¹ though such failure to sue may be evidence from which a waiver may be inferred.² An overt act is therefore necessary to constitute a waiver.³ The leading case on the point is *Schwyn v Garfit*,^{3a} where Bowen, L. J., observed as follows

Note 11

- 1 (1915) A. I. R. 1915 Mad 244 (248) 24 Ind Cas 507, *Sitarama Chetty v Krishnasami Chetty* — — — — —

— — — — —

an

- (1916) A. I. R. 1916 Cal 757 (759) 31 Ind Cas 672 *Ram Chunder v Raveat Mull*

- (1932) A. I. R. 1932 Nag 1 (2) 28 Nag L. R. 44 135 Ind Cas 414 (F. B.) *Vishwanath v Sadashiv* (A. I. R. 1927 Nag 28 Overruled)

- (1912) 14 Ind Cas 685 (686) 8 Nag L. R. 44 *Gopal v Dhondya*

- (1919) A. I. R. 1919 Cal 950 (951) 47 Ind Cas 943 *Hara Kumar Saha v Ram Chandra Pal*

- (1884) 7 Mad 577 (579) *Sethu v Nayana*

- (1884) 7 Mad 583 (584) 8 Ind Jur 614 *Gopala v Paramma*

- (1937) A. I. R. 1937 Lah 863 (864) *Firm Ram Sahai Chuni Lal v Moti Ram*

- (1924) A. I. R. 1924 Bom 301 (301) 82 Ind Cas 203 *Ganpat Dalays Kale v Narayan Saicaliram*

- (1915) A. I. R. 1915 Lah 292 (293) 31 Ind Cas 808 *Sham Sundar v Abdul Wahad*

- (1900) 4 Ind Cas 17 (18) (Cal) *Abinash Chandra Bose v Bama Beua*

- (1900) 4 Ind Cas 38 (42) 32 Mad 284 *Seshan Pattar v Yeera Raghavan Pattar*

- (1924) A. I. R. 1924 Lah 702 (706) 75 Ind Cas 1048 *Nanak Chand v Mir Muhammed Khan*

- (1929) A. I. R. 1929 Cal 292 (296) 121 Ind Cas 565 *Sarat Lakshmi Dass v Narendrasingha*

- (1900) 2 Ind Cas 653 (653) (Cal) *Jagdeo Singh v Rai Gouind Singh*

- (1925) A. I. R. 1925 Oudh 34 (35) 79 Ind Cas 848 *Mt Mohanaya v Panma Lal*

- (1934) A. I. R. 1934 All 1039 (1041 1042) 153 Ind Cas 205 57 All 561 *Sakhi Lal v Bhoora*

- (1897) 14 Cal 397 (399) *Nobodip Chunder Shah v Pami Krishna Roy Chowdhury*

- (1913) 18 Ind Cas 690 (691) (All) *Labu Pami v Jodha Singh*

[See also (1916) A. I. R. 1916 Lah 451 (451) 29 Ind Cas 854 *Jahan Khan v Chanda Shah*]

- 2 (1917) A. I. R. 1917 Mad 47 (49) 79 Ind Cas 309 *Nicolson Panik v Iyaga gopala Iyagar*

- (1906) A. I. R. 1906 Oudh 384 (385) 101 Ind Cas 431 *Jagat Lal Singh v Manohar*

- (1911) 12 Ind Cas 57 (58) 96 Mad 66 *Karunakaran Nair v Krishna Menon*

- (1914) A. I. R. 1914 Sind 60 (60) 8 Sind L. R. 67 27 Ind Cas 979 *Kunjalrai v Badero Sher Volome I*

- 3 (1929) A. I. R. 1929 Cal 292 (293) 121 Ind Cas 565 *Sarat Lakshmi Dass v Narendrasingha*

See also the cases cited in Foot Note (1)

- 7 (1884) 57 L. J. Ch 607 (615) 78 Ch D 277 52 L. T. 273 70 W. R. (Eng) 515

“What is a waiver? Delay is not waiver. Inaction is not waiver, though it may be evidence of waiver.”

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There is a difference of opinion, however, as to the nature of the overt act that is necessary to constitute waiver. On the one hand, it has been held that a waiver can be effected only by the acceptance by the obligee of the overdue instalment and in no other way⁴. On the other hand, it has also been held that an acceptance of an overdue instalment cannot by itself prove waiver⁵. The true view seems to be that a waiver may be effected in a variety of ways and may be inferred from various circumstances⁶ and that the acceptance of the overdue instalment may amount to a waiver⁷ though not necessarily

- 4 (1879) 5 Cal 97 (100) 4 Ind Jur 517 *Chenai Dash Shah v Kadum Mundul*
(1894) 21 Cal 542 (547) *Hurri Pershad Chowdhury v Nasib Singh*
(1904) 31 Cal 297 (299) *Jadab Chandra Balshi v Bhairab Chandra Chakraborty*
(1909) 1 Ind Cas 49 (51) 36 Cal 394 *Girindra Mohun Roy v Bocha Das*
(1881) 1881 Bom P J 323 (323) *Shekh Husen v Shekh Madar* (Question raised but not decided)
- 5 (1876) 1 Bom 125 (130) (F B) *Ganma Dambershet v Bhisu Hariba*
(1892) 17 Bom 555 (559) *Balaji Ganesh v Sakharam Parashram*
(1902) 27 Bom 1 (12 13) 4 Bom L R 688 (FB) *Kashiram v Pandu*
(1880) 2 All 857 (864) *Mumford v Peal*
(1936) 159 Ind Cas 96 (96) (Nag) *Tularamappa v Lazmanappa* (19 Ind Cas 741 Followed)
(1881) 8 All 514 (516) 1881 All W N 17 *Ahmad Ali v Hafiza Bibi*
(1911) 12 Ind Cas 57 (58) 36 Mad 66 *Karunakaran Nair v Krishna Venon*
(1911) 12 Ind Cas 741 (744) 7 Nag L R 147 *Ballabhadras Dalipsingh*
(1933) A I R 1933 Sind 365 (366) 147 Ind Cas 30 *Kalandas Balchand v Mahomed Khan*
(1933) A I R 1933 Nag 70 (72) 144 Ind Cas 211 *Senakrasi v Basod* (A I R 1927 Nagpur 28 Held overruled)
(1883) 1883 Bom P J 172 (172) *Hiralal v Budha* (Waiver implies forgoing of a right so that it cannot be enforced and this is something quite distinct from its non enforcement in fact)
(1888) 1888 Bom P J 381 (381) *Form of Sarbhurari Pralhaddas v Sadashiv*
(1896) 20 Bom 109 (113) *Kankuchand Shuchanil v Rustumji Horramji*
- 6 (1909) 4 Ind Cas 17 (18) (Cal) *Abinash Chandra Bose v Bama Deva*
(1916) A I R 1916 Cal 757 (759) 31 Ind Cas 672 *Pam Chunder v Rawat null*
(1929) A I R 1929 Cal 299 (293) 121 Ind Cas 565 *Sarat Lalshi Dassya v Narendrasingha*
(1933) A I R 1933 Nag 70 (72) 144 Ind Cas 211 *Senakrasi v Basod* (A I R 1927 Nag 28 Held overruled)
(1936) 159 Ind Cas 96 (96) (Nag) *Tularamappa v Lazmanappa*
(1932) A I R 1932 Oudh 176 (177) 13 Ind Cas 223 *Nageshar Prasad Dubey v Bakridi*
[See also (1917) A I R 1917 Mad 47 (47) 39 Ind Cas 309 *Nicholson Bank v Rajagopala Iyer*]
- 7 (1880) 3 Mad 61 (63) 4 Ind Jur 557 *Sri Raja Satracherla v Sri Raja Setarama* (Evidence of waiver)
(1889) 12 Mad 192 (195 196) 13 Ind Jur 176 *Nagappa v Imail*
(1909) 4 Ind Cas 39 (43) 32 Mad 281 *Seshan Jattar v Veera Raghava Jattar*
[See (1913) 19 Ind Cas 731 (733) 35 All 178 *Badrin Narayan v Kunj Behari Lal*]

'I think that the most cogent and conclusive proof must be demanded to establish that a party to a contract has abandoned a right accruing to him under its provisions on breach, and has entered into some fresh parol arrangement condoning such breach and creating new relations with the party in default'

And he cited with approval the observations made in the English case of the *Earl of Darnley v The London, Chatham and Dover Railway Co*,¹¹ that "a waiver must be an intentional act with knowledge and it is incumbent on any party insisting on a verbal agreement in substitution of a written contract to show that both parties understood the term of the substituted agreement

In *Kanku Chand Shuchand v Rustomji Hormusji*,¹² Mr Justice Tyabji cited with approval the remarks of Mr Justice Straight in *Mumford v Peat*¹³ referred to above but at the same time remarked

"I take it therefore, that there must be either an agreement between the parties or such conduct as will itself afford clear evidence of a legal waiver'

In *Kanhai v Amrit*,¹⁴ Mukerji, J after citing Halsbury's Laws of England, observed as follows

"What has been said there leads me to think that waiver is, in effect, a substituted contract for the previous one. This may be expressed or implied. As an illustration it is said that where one party consents at the request of the other to extend the time for performance or to accept performance in a different mode from that contracted for, etc. there is a waiver

In *Jauhar Lal v Mathura Prasad*,¹⁴ the question as to what would constitute waiver was raised but was not decided, but Sulaiman C J made the following observations

'The question what would constitute waiver need not be gone into in this case. Two views have been expressed. One is that waiver is used in the technical sense in which it is used when a defendant is allowed to set up the equitable defence of waiver. Another view is that the expression 'waives the benefit of the provision' is used in a more general sense and is capable of a liberal interpretation, and that a clear intention of the creditor making the choice and communicating that choice to the debtor would be enough, even though there is no contract between the creditor and the debtor and no fresh consideration passed from the debtor to the creditor"

The point, however, came up for actual decision before the same learned Judge in a later case, *Sulh Lal v Bhoora*,¹⁵ and he observed as follows

11 (1867) 36 L J Ch 404 (412 413) L R 2 H L 43 16 L T 217 15 W R (Eng) 817

12 (1895) 20 Bom 109 (113)

[See also (1897) 1897 Pun Re No 28 (p 139) *Achhar Mal v Hukman* (20 Bom 109 Relied on)]

13 (1925) 4 I R 1925 All 499 (500) 47 All 532 87 Ind Cas 162

14 (1934) 4 I R 1934 All 661 (669) 151 Ind Cas 555 (F B)

15 (1934) 4 I R 1934 All 1039 (1042) 153 Ind Cas 205

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'It seems to me that the words 'waives the benefit' in Article 75 do not mean the same thing as availing oneself of the equitable doctrine of waiver, for which either fresh consideration, a fresh agreement or something amounting to an estoppel is necessary. That doctrine is invoked against a creditor, whereas the waiver of the benefit spoken of in Article 75 is something exercised for the benefit of the creditor and not against him. The waiver therefore may be a purely one-sided act and need not be for consideration proceeding from the debtor. The waiver may be by expression of an intention to waive the benefit either by communication of the debtor or by any other overt act. Waiver is a mixed question of law and fact, and, as pointed out by my learned brother, it depends on the circumstances of each case.

'It necessarily follows that a mere inaction or omission to sue within the prescribed period cannot amount automatically to a waiver within the meaning of the third column of this Article. To hold so would make this Article nugatory and the first portion of the column altogether superfluous. Then in every case where there has been an omission to sue there would necessarily be a waiver inferred as a matter of law and no further question of limitation would arise. I do not think that this is the meaning of that word. There is abundant authority for the view that waiver is something more than mere inaction or omission. But in my opinion it is not necessary that it should amount to any novation of contract or any new agreement for consideration or that it should be any other bilateral arrangement.

12. Demand of overdue instalment is not waiver. — The demand of an overdue *instalment* is not a waiver of the right to sue for the whole amount fallen due on the default¹. On the other hand, it would clearly show that the obligee has not waived the default².

13. Part payment of instalment or payment generally towards account is not waiver. — It has been seen in Note 11 that a payment and acceptance of an overdue instalment may amount to a waiver. It is however necessary that the payment must be for the specific instalment in arrear: a mere payment on account generally will not suffice¹. A payment of *part* of an instalment or a payment for *interest* though accepted by the creditor, cannot by

Note 12

- 1 (1895) 20 Bom 109 (115) *Kankuchand Shitchan I v. Rustomji Hormusji*
2 See (1934) A I R 1934 All 661 (670) 151 Ind Cas 585 (F B) *Jauaharlal v. Mathura Prasad* (Demand notice served on defendant)

Note 13

- 1 (1921) A I R 1921 All 318 (300) 43 All 33 58 Ind Cas 7, *Hazarat Hussain v. Mohan Lal*
(1927) 106 Ind Cas 874 (874) (Lah) *Balla v. Bats I and Sita Ram*
(1935) A I R 1935 Pch 179 (181) 160 Ind Cas 131, *Copchand v. Molam and Umar Khan*
(1929) A I R 1929 Lah 390 (391) 113 Ind Cas 541, *Gopal Das v. Kanshi Lal* (Instalment decree)

itself amount to a waiver. The reason is that in such cases it cannot be said that there is no default.

14. Starting point in respect of surety for instalment bond.

—Where A executes an instalment bond in favour of B, and C stands as surety, a waiver of default by the debtor in paying the instalments will save limitation against the principal debtor but not against the surety.

The advantage of the waiver can be taken by the creditor against the principal debtor only and not against the surety, because the latter is not a party to the transaction. The underlying principle is that the debtor is shown an indulgence and he cannot turn round and say that the creditor's remedy has become barred because he was kind to him. But the same cannot be said of the surety. It is to his interest that the debt is cleared as early as possible and, if he is no party to the payment (of overdue instalment) which extends limitation, the cause of action arises against him on the date of the first default.¹

15. Question of waiver, if one of fact.—The question whether there has been waiver is one of fact.¹ No hard and fast rule can be laid down as to what would or would not constitute a waiver.² It

(1883) 1883 Pun Re No 168 (page 575) *Ahauruddin v Abu Val* (Acceptance of amounts subsequent to default would not constitute waiver if the amount paid and accepted did not correspond to that of any instalment.)

[But see (1934) A I R 1934 All 697 (698) 153 Ind Cas 559 *Nanah v Faqir Chand* (Even such payment may constitute waiver)]

2 (1864) 1 Suth W R 189 (190) *Hullodhar Bangal v U R C S Hogg*

(1917) A I R 1917 Cal 171 (172) 33 Ind Cas 606, *Peyaradhin v Ishraf Ali Pal* (Part of principal)

(1924) A I R 1924 Cal 139 (141) 79 Ind Cas 271 *Surendra Nath v Raja Reshee Case Lau* (Part of interest)

(1924) A I R 1924 Bom 264 (268) 87 Ind Cas 129 *Nadershaw v Shirinbai*
(1913) 20 Ind Cas 156 (157) (Cal) *Srimata a Prasad Singh v Sheo Gobind* (Part of instalment)

(1926) A I R 1926 Cal 789 (790) 53 Cal 277 96 Ind Cas 594, *Bisanla Kumar Singha v Nabin Chandra* (Interest)

(1881) 1881 All W N 157 (158) *Budhai Singh v Kalka Prasad* (Do)

(1901) 31 Cal 83 (87) 8 Cal W N 66 *Mohesh Chandra Banerji v Irosonna Lal Singh*

(1888) 12 Mad 161 (164) *Nanjappa v Nanjappa*

Note 14

1 (1935) A I R 1935 Pesh 179 (182) 160 Ind Cas 134, *Goji Chand v Muhammad Umar Khan*

Note 15

1 (1922) A I R 1922 All 113 (113) 66 Ind Cas 655, *Jairam Mal v Jogeshwar Kasondhan*

(1936) A I R 1936 Ondh 384 (385) 164 Ind Cas 431, *Jagatjit Singh v Manodatt*

(1911) 9 Ind Cas 22 (23) (Cal) *Omon Shaha v Mahomed Umar Sirkar*

(1913) 19 Ind Cas 894 (895) 37 Bom 480 *Sakharam v Sadashir*

(1914) A I R 1914 Cal 433 (433) 29 Ind Cas 391, *Pitambar Shah v Arulima Mohan Das*

2 (1934) A I R 1934 Outh 455 (456) 151 Ind Cas 652, *Gaya Din v Ahluja Ram*

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has, however, been held in the undermentioned cases³ that the question is one of mixed law and fact

16. Onus of proof.—The burden of proof as to waiver under this Article lies on the person who wishes to take advantage of the fact¹ Where a party sets up a plea of waiver, it is, however, not necessary for him to adduce affirmative evidence thereof It may be established and inferred from circumstances² If a party wishes to take advantage of a waiver, he must specifically set up the plea of waiver in his pleading³

17. Pleadings and waiver.—It has been held that waiver may be gathered from the prayer in the pleadings themselves¹ Where plaintiff distinctly set up payment in respect of certain instalments and it was found to be untrue, it was held that his conduct was inconsistent with the plea of waiver and that therefore there was no waiver² In a similar case, however, where the plaintiff stated that a particular instalment had been paid, but he was unable to prove

(1932) A I R 1932 Oudh 176 (177) 137 Ind Cas 223, *Nageshar Prasad v Bakridi*

3 (1917) A I R 1917 Mad 47 (49) 38 Ind Cas 302 *Nicholson Bank Tanjore v Rajagopala Iyer* (The question of waiver is a mixed question of law and fact the question of fact is whether circumstances exist from which waiver may be inferred and the question of law is whether from the facts proved waiver can be inferred The terms of the bond and the conduct of the creditor may be taken into consideration in deciding whether there has been waiver)

(1934) A I R 1934 All 1039 (1042) 153 Ind Cas 205 *Sukh Lal v Bhoora*

(1910) 6 Ind Cas 138 (140) (Cal) *Easin Khan v Abdul Wahab Sikdar*

Note 16

1 (1928) A I R 1928 Bom 444 (447) 113 Ind Cas 853 *Shital v Taniram* (Party setting up waiver must specifically plead the same and it is for him to prove it)

(1884) 7 Mad 583 (581) 8 Ind Jur 614 *Gopala v Paramma*

(1924) A I R 1924 Bom 301 (301) 82 Ind Cas 203 *Ganpat Dalaji v Narayan Sanaliram*

(1925) A I R 1925 Sind 144 (147) 20 Sind L R 395 31 Ind Cas 634, *Aishin das Purnimal v Menghray Khaildas*

(1895) 20 Bom 109 (113) *Kankuchand Shuchand v Rustomji Hormusji* (Most cogent and conclusive proof must be demanded 2 All 857, Followed)

(1932) A I R 1932 Oudh 176 (177) 137 Ind Cas 223 *Nageshar Prasad v Bakridi*

(1885) 7 All 677 (680) 1885 All W N 202 *Radha Prasad Singh v Dhanraj Rai*

2 (1936) A I R 1936 Oudh 381 (385) 164 Ind Cas 431, *Jagat Jit Singh v Manodat*

3 (1935) A I R 1935 Mad 303 (304) 156 Ind Cas 443, *Gopala Menon v Kallin galakath*

Note 17

1 (1922) A I R 1922 All 113 (113) 66 Ind Cas 655, *Jivan Mal v Jogeshwar Kasondhan*

(1929) A I R 1929 Cal 292 (293) 121 Ind Cas 565 *Sarat Lakshmi Dasgupta v Narendra Singha* (Waiver can be inferred from the plaint or pleading set up by the plaintiff)

[See (1916) A I R 1918 All 55 (56) 41 All 101 4th Ind Cas 926, *Mohan Lal v Tika Parri*]

2 (1910) 4 Ind Cas 17 (18) (Cal) *Ibinash Chandra Bose v Dama Deu a*

it, the Chief Court of Oudh held that the plaintiff must be deemed to have waived the default³ Where the plaintiff claimed the whole amount due but based his cause of action on the second default stating in his plaint that the first instalment was barred, it was held by the Chief Court of Oudh that that circumstance showed that he had waived the first default⁴ See also the undermentioned cases to the same effect⁵ But, where the plaintiff made the same statement in the plaint but claimed interest *from the date of the first default*, interest being leviable only on default, it was held that the first default was not waived by the plaintiff⁶

18. Waiver of one default does not bar suit on second default.—A creditor may waive a particular default But the forbearance to sue on the occurrence of one default does not affect the creditor's right to use the coercive measures provided by his bond in cases of future defaults¹

19. "Default clause" is not a penalty.—A clause in an instalment bond that on default in payment of one instalment the whole shall be due, is not a penalty within the meaning of Section 74, Contract Act¹

20. Registered instalment bonds.—Where an instalment bond with a default clause has been *registered*, a suit thereon would be governed by Article 116 *infra*¹ It has been held in the undermentioned case² that for the purpose of ascertaining the starting point for such a suit, Article 116 must be read with Article 75 and the starting point taken as the date of default or if the default has been waived, the date of the next default

- 3 (1938) A I R 1938 Oudh 42 (43) 171 Ind Cas 602 *Prag v Rampal Singh*
4 (1936) A I R 1936 Oudh 884 (885) 164 Ind Cas 431 *Jagat Jit v Manodat*
5 (1909) 1 Ind Cas 49 (51) 36 Cal 394 *Gurindra Mohun Roy v Bocha Das*
(1937) A I R 1937 Oudh 288 (288) 167 Ind Cas 293 *Shazade Singh v Dhoja*
(1936) A I R 1936 Oudh 884 (885) 164 Ind Cas 431 *Jagat Jit Singh v Manodat*

[See also (1870) 7 Bom H C R A C 125 (129) *Narayanappa v Bhaskar Parmaya* (*Herip v Garland* (1879) L R 4 Q B 519 Followed)]

- 6 (1937) A I R 1937 Lah 863 (864) *Feroz Ram Sahas Chuni Lal v Moti Ram*

Note 18

- 1 (1922) A I R 1922 Mad 67 (69) 67 Ind Cas 935 *Vaithunatha Iyer v Govinda sany Odayar*

2 (1922) A I R 1922 P 1 416 (416) 87 Ind Cas 603 30 Ind P 100

Note 19

- 1 (1879) 4 Bom 96 (99) 4 Ind Jur 577 *Pagho Gorind v Dipchand*
(1927) A I R 1927 Mad 965 (968) 105 Ind Cas 789 *Tatayya v Gangavva*

Note 20

- 1 (1909) 4 Ind Cas 17 (17) (Cal) *Abinash Chan Ira Bose v Bama Bewa*
(1922) A I R 1922 All 113 (118) 66 Ind Cas 655 *Jewan Mal v Jogeshwar Kawandhan*
(1909) 1 Ind Cas 570 (571) (All) *Kastha Prasad v Mt Muni Bibi*
2 (1913) 18 Ind Cas 690 (690) (All) *Diabu Ram v Jodha Singh*

Article 75
Notes
21—23

21. Instalment bond creating charge on property.—Where an instalment bond with a default clause creates a charge over immovable property, a suit to enforce the charge on the occurrence of a default would be governed by Article 132 *infra* and not by this Article¹ See Notes to Article 132 But a suit to enforce the *personal* remedy under such a bond would be governed by the Article applicable if the bond were a *registered* instalment bond, namely Article 116 read with Article 75²

22. Punjab Loans Limitation Act, 1904 and this Article.—In the Punjab a suit on a bond payable by instalments and containing a default clause is governed by Article 16 of the Punjab Loans Limitation Act, corresponding to Article 74 of this Act and not by this Article¹

23. Section 20 and this Article.—Where the plaintiff alleged that certain instalments had been paid up by the defendant and sought to reckon the limitation for his suit from the date of default made in payment of subsequent instalments, it was held in the undermentioned case¹ that the payments alleged being part payment of principal they could not be proved otherwise than by a written document signed by the defendant The High Court of Calcutta has dissented from this view and has held that it is not necessary to rely upon Section 20 in such cases, and that such payments can be proved in the same way as any other fact to be proved in the case²

Article 76

76. On a promissory note given by the maker to a third person to be delivered to the payee after a certain event should happen.	Three years.	The date of the delivery to the payee.
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* Acts of 1877 and 1871

Same as above

Act of 1859

No corresponding provision

Note 21

1 (1928) A I R 1928 Mad 952 (951) 103 Ind Cas 786 *Shanmuga v Ramalingam*

2 (1908) 90 All 33 (40) 4 All L Jour 690 1907 All W N 276 *Ladha Das v Kamod Singh*

(1900) 3 All L Jour 463 (464) 1900 All W N 103 *Dasant Lal v Gopal Prasad*

Note 22

1 (1921) A I R 1921 Lah 290 (281) *Sika Singh v Sunder Singh*

Note 23

1 (1912) 16 Ind Cas 901 (961) 1913 Pun Re No 33, *Jawan Lal v Sharf Din*

2 (1927) A I R 1927 Cal 102 (100) 93 Ind Cas 147, *Gobinda Chandra v Pulin Behari*

1. **Scope.**—In *Savage v. Aldien*,¹ where a promissory note was made and deposited with a banker to be delivered to the payee on his producing a certain other note cancelled, it was held that the cause of action to the payee on the first note accrued on receiving it from the banker. This Article is based on this principle

Article 76
Note 1

77.* On a dishonoured foreign bill, where protest has been made and notice given. | Three years. | When the notice is given.

Article 77

Synopsis

1. Foreign bill.

2. "Where protest has been made and notice given."

1. **Foreign bill.** — Sections 11 and 12 of the Negotiable Instruments Act, 1881, run as follows —

"Section 11 — A promissory note, bill of exchange or cheque drawn or made in British India, and made payable in, or drawn upon any person resident in British India, shall be deemed to be an inland instrument "

"Section 12 — Any such instrument not so drawn made or made payable shall be deemed to be a foreign instrument "

2. **"Where protest has been made and notice given."** — Section 104 of the Negotiable Instruments Act, 1881, provides that foreign bills must be protested for dishonour, when such protest is required by the law of the place where they are drawn and Section 102 provides that where an instrument is required by law to be protested, notice of such protest must be given instead of notice of dishonour, in the same manner and subject to the same conditions (see Sections 93 and 94 of the Act) Limitation is therefore made to run under this Article from the date when the notice is given

78.† By the payee against the drawer of a bill of exchange, which has been dishonoured by non-acceptance. | Three years. | The date of the refusal to accept.

Article

* Acts of 1877 and 1871 — Same as above
Act of 1859 — No corresponding provision

† Acts of 1877 and 1871 — Same as above
Act of 1859 — No corresponding provision

Article 76 — Note 1.

Article 78
Notes
1—2

Synopsis

1. Scope of the Article.
2. Starting point.
3. Suit on accounts.

1. Scope of the Article.—The Article applies only where the bill has been *presented for acceptance* and dishonoured by non acceptance. It does not apply when it has never been presented for acceptance but only for payment¹ Further, the Article applies only to a suit by a payee against the *drawer* of a bill of exchange and not against other persons

2. Starting point.— Under Section 93 of the Negotiable Instruments Act, 1881, where a bill of exchange is dishonoured by non acceptance, the holder or some party to the bill who remains liable thereon must give notice that the instrument has been so dishonoured, to all other parties whom the holder seeks to make severally liable thereon and to some one of several persons whom he seeks to make jointly liable thereon^{1a} But, time runs under this Article not from the date of notice but from the *date of the dishonour* by non-acceptance, i.e. the date of the refusal to accept. A subsequent dishonour by *non payment* when the bill is presented for payment does not furnish a fresh cause of action or a fresh starting point of limitation¹ It was held in *Whitehead v Walker*,² that on non acceptance of a bill, the holder has an immediate right of action against the drawer, and does not acquire a fresh right of action on the non-payment of the bill when due. Baron Parke observed as follows

"The holder thus acquires, by the non acceptance, the most complete right of action against the drawer which the nature of the case admits, and no subsequent act or omission of the drawee can give him a more extensive right against the drawer than he has already acquired. But further, on the failure of acceptance, the holder is bound to give immediate notice to the drawer, and if he omits to do so, he forfeits all right of action against him, not only in respect of the default of acceptance, but also in respect of the subsequent non payment. Now it is very difficult to reconcile this doctrine with the notion that a new right of action arises from the non payment. This seems to us to be a proposition so much fraught with inconsistency and so entirely destitute of principle and authority, that we cannot hold it to be law."

See also the undermentioned cases³

Article 78 — Note 1

- 1 (1888) 1888 Pun Re No 19, *Ram Chand v Shadi Ram*.

Note 2

- 1a See also (1903) 26 Mad 239 (241) 12 Mad L Jour 267, *Jambu v Sundararaja*
1 (1817) 19 W R (Eng) 604 (605) 40 L J C P 141 L R C C P 206 24 L T 82, *Wilkinson v Verity*
2 (1842) 60 R R 811 (818, 819) 9 M & W 506 11 L J Ex 168
3 (1878) 3 Bom 182 (185) *Seth Kalandas v Dahiabhai* (Case decided before the Negotiable Instruments Act of 1881—Cause of action was held to

3. **Snit on accounts.**—Where in settlement of accounts defendant sent to plaintiff a bill which was dishonoured on presentment for acceptance, and the plaintiff sued the defendants for recovery of the sum due on the accounts, it was held that Article 78 had no application to the case¹

Article 78.
Note 3

79.* By the acceptor of an accommodation-bill against the drawer.	Three years.	When the acceptor pays the amount of the bill.
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Article 79

Synopsis

1. "Accommodation-bill."
2. Applicability of the Article.
3. Commencement of limitation.

1. "Accommodation-bill."—An accommodation bill of exchange is one "to which the accommodating party, be he acceptor or drawer or indorser, has put his name without consideration for the purpose of benefiting or accommodating some other party who desires to raise money on it and is to provide for the bill when due. The person accommodated engages either himself to take up the bill when due, or to provide the accommodating party with the funds for that purpose or to indemnify him against the consequences of non payment"¹ The Negotiable Instruments Act, 1881 does not anywhere define 'an accommodation bill' or an 'accommodation party' in a bill, but the proviso in Section 59 dealing with the rights of a holder taking up a bill after maturity speaks of a bill "drawn or accepted without consideration, for the purpose of enabling *some party* thereto to raise money thereon", which includes all cases of accommodation.

An "acceptor for honour" must be distinguished from the acceptor of an accommodation bill. The former's right arises not under an implied contract of indemnity, and in fact, he accepts the bill for the honour of some person liable on it, without even (in most cases) the knowledge of such person, and his right is subject to the

* Act of 1877, Article 79 and Act of 1871, Article 81.

Same as above

Act of 1859.

No corresponding provision

arise on non acceptance and the notice consequent thereon. This however does not seem to be law under this Article.)

(1895) 20 Bom 133 (142), *Ram Rajs v Pralhaddas Sublarn*

Note 3

1 (1919) A I R 1919 Cal 531 (533) 46 Cal 168 45 Ind Cas 241, *Padmalochan Patar v Girish Chandra Kıl*

Article 79 — Note 1

1 Wharton's Law Lexicon.

See also Byles & Chitty on Bills

Article 79
Notes
1—3

formalities of protest, presentment, etc., provided in the Negotiable Instruments Act. The right of recourse of the acceptor-for-honour against the person for whose honour he accepted, is that of a holder, and his suit is on the bill itself (see Section 114 of the Negotiable Instruments Act), and hence this Article will not apply to his suit.

2. Applicability of the Article.—This Article applies only where the accommodating party is the acceptor and he sues the drawer for the loss caused to him as a result of the accommodation.¹ The suit contemplated is, in fact, one on the contract to indemnify implied in the transaction of accommodation. Article 83 is a general Article applicable to suits upon other contracts to indemnify.

A contract of indemnity between the accommodation acceptor and the drawer is implied on the general principle that when a person, acting at the request of and in pursuance of an authority given by another, has incurred a liability, and has, in consequence, been obliged to pay money in discharge of that liability, he is entitled to have the money repaid to him. If a person asks another to lead him his acceptance for his accommodation, the party accommodated impliedly undertakes to pay the bill at maturity, and further to indemnify the person accommodating him in case that person is compelled to pay the bill, the accommodator can, therefore, after payment, sue for recovery of the sum paid, on the basis of the implied contract of indemnity created by the contract of accommodation. Such a suit is thus not a suit on the bill but really one on the contract of indemnity.²

3. Commencement of limitation.—The suit contemplated being, as has been seen before, based on a contract of indemnity, the cause of action arises only when the plaintiff is damaged, i.e. when he is compelled to pay the bill, and time, therefore, commences to run only from that date.¹ (See also Article 83 and Notes thereto.)

The word *pays* in the third column should be understood in the same sense as in Articles 81 and 82, namely actual payment in money, or transfer of any property in lieu of money, and not the incurring of a mere pecuniary obligation like the execution of a promissory note or the allowing of a decree to be passed against the person. (See cases under Articles 81, 82 and 83 dealing with 'payment'.)

Note 2

- 1 See (1881) 7 Mad 392 (396) 8 Ind Jur 186, *Raman v Laxman* (Suit by indorser for accommodation of maker—Article does not apply—Indorser is in the position of a surety with respect to the maker and either Art 81 or Art 83 will apply.)
- 2 (1845) 69 R R 816 (823) 14 M & W 762 15 L J Fx 43 *Brittain v Lloyd*
(1850) 82 R R 754 (756) 5 Fx 514 19 L J Fx 345 *Sleigh v Sleigh*
(1840) 56 R R 527 (529) 1 Man & G 753 2 Scott N R 45, *Reynolds v Dayle*
(1865) 148 R R 870 (871) 11 L T (N S) 509, *Ingrove v Tippet*

Note 3

- 1 See (1902) 12 Vol L Jour 375 (Jour)

80.*
of exchange
sory note
herein e
vided for

Three years.	When the bill, note or bond becomes pay- able.
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Article 80

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Synopsis

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rting point.

1. Sec
limitation
exchange,
for cases

le. — Articles 69 to 79 *ante* provide for
ses of suits on promissory notes, bills of
Article is the residuary one and provides
*pressly provided for¹

Illustrations.

1 A s
anc
by

hich has never been presented for accept-
i by Article 78 and is therefore governed

2 A s

ry note payable on demand which is accom-
panied by a writing *restraining or postponing* the right to sue
is not governed by Article 73 but is governed by this Article³

* Act of 1877, Article 80.

Same as above

Act of 1871, Article 80

80 — Suit on a bill of exchange or promis- sory note not herein expressly provided for	Three years	When the bill or note becomes payable
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Act of 1859

No corresponding provision

Article 80 — Note 1

1 (1933) A I R 1933 Mad 376 (378, 380) 142 Ind Cas 266, *Secy of State v Kunhi Krishna*

(1923) A I R 1923 All 1 (7) 69 Ind Cas 981 45 All 27 (F B) *Shib Dayal v Maherdan*

(1920) A I R 1920 Mad 486 (488) 56 Ind Cas 391, *Ponnusamy Chetty v Vellore Commercial Bank Ltd*

(1915) A I R 1915 Mad 979 (983) 21 Ind Cas 24 38 Mad 374, *Sitarama Chetty v Krishnaswamy Chetty*

(1915) A I R 1915 Mad 244 (249) 24 Ind Cas 507, *Sitarama Chetty v Krishnaswamy Chetty*

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(1920) A I R 1920 All 353 (353) 42 All 55 52 Ind Cas 235 *Jurala Prasad v Shama Charan* (Promissory note accompanied by writing postponing right to sue)

Article 80
Note 1

- 3 A suit on a promissory note payable at a specified period after date and at a specified place is governed neither by Article 69 nor by Article 71 but by this Article ⁴
- 4 A suit on a bond providing for repayment on a future date on the happening of a contingency is outside the proper application of Article 66 or Article 67 and will be governed by this Article ⁵
- 5 A suit on a bond of a complex description providing for repayment either on demand or on the expiration of a stipulated period, whichever is earlier, is not within any of the specific Articles above referred to and is therefore governed by this Article ⁶ See also the undermentioned cases ⁷

It is clear from the language of the Article that where a particular suit on a bond, promissory note or bill of exchange is *specially provided for* this Article will not apply⁸

[See also (1927) A I R 1927 Mad 894 (897) 105 Ind Cas 796 *Mylapore Hindu Permanent Fund Ltd v Sabapathy Chetty*]

- 4 (1933) *Krishna Varma*
5 (1916) A I R 1916 Lah 251 (251) 32 Ind Cas 575 *Kierpa Ram v Churu*
(Where a bond provided that the money due upon it would be paid at
the time of payment of a certain sum of money due on two mortgage
deeds executed previously)
(1896) *Tabin* (Surety a bond pay-
able on the disposal
and hence comes within
(1912) 16 Ind Cas 220 (223) (All) *Ram Parshad v Nawab Choudhury*
(Case of a bond under which money was payable on the happening of
a contingency)
6 (1897) 1897 Bom P J 844 *Krishnaji Anant Dhade v Gobind*
7 (1883) 11 Mad 153 (156) *Fulla Kamta v Kalekara*
(1880) C

payment of the debt is not an instalment bond under Art 73 but falls within Art 80)

- (1933) A I R 1933 Lah 548 (550) 142 Ind Cas 851 *Sham Sundar Lal v Babu Lal* (Whole amount of bond payable on default of payment of interest—Suit on bond—Art 74 or Art 75 not applicable—Art 80 applies)
- (1936) A I R 1936 Oudh 299 (980) 169 Ind Cas 459 12 Luck 211 *Shri Narain v Badai* (Do)
- (1923) A I R 1923 Oudh 19 (20) 26 Oudh Cas 121 70 Ind Cas 85 *Hare Lal v Thamman Lal* (Do)
- Rao v Larman
23rd May 1930
count then the
68 or Art 80

Rao v Larman
23rd May 1930
count then the
GS or Art 80

12 Maung San
within Art 68

—Art. 60 loci cit. not applicable

- (1909) 4 Ind Cas 956 (957) (Lah) *Rajput Ras v Mt Wali* (Installment bonds falling within Art 74 and Art 75—This Article does not apply)
(1932) A I R 1913 Oudh 186 (187) 197 Ind Cas 223 *Yageshar Prasad Dubey v Fakir*

A suit on a registered bond is governed by Article 116 and not by this Article, even if this Article will apply if the bond had not been registered.⁹ The reason is that Article 116 must be regarded as a specific Article applicable to all registered documents.

The Article is applicable only to suits claiming a *personal decree* against the defendant. Where the relief claimed is the enforcement of lien against any property, the Article is inapplicable.¹⁰

2. Starting point. — The starting point of limitation under this Article is the time when the bill, note or bond "becomes payable." A promissory note or bill of exchange payable at a specified place must, in order to charge the maker or drawer thereof, be presented for payment at that place (Section 69 of the Negotiable Instruments Act, 1881). The note or bill in such a case will become payable, within the meaning of this Article, when it is so presented.¹

Suppose now that A executes a bond in favour of B stipulating that he will pay the principal in five years, and pay the interest thereon regularly every month but that on default of payment in any one month, B may recover the whole of the principal and interest immediately. A commits default in the payment of the fourth month's interest. As has been seen in the Notes to Articles 74 and 75, such a bond is not an 'instalment bond' within the meaning of those Articles, inasmuch as the *principal sum* is not payable in instalments. The Article applicable to a suit on such a bond is therefore this Article. What then is the starting point of limitation in such a case? It has been held by the High Courts of Allahabad² and Lahore³ that the

- 9 (1923) A I R 1923 All 1 (7) 69 Ind Cas 981 45 All 27 (F B) *Shib Dayal v Maheban*
 (1924) A I R 1924 Rang 68 (70) 1 Rang 468 76 Ind Cas 602 *Maung San U v Maung Kyaw Mye*
 (1920) A I R 1920 All 124 (124) 58 Ind Cas 278, *Shyam Lal v Tehariya Lakhmi Chand*
 10 (1918) A I R 1918 All 344 (344) 46 Ind Cas 373 40 All 512, *Deoki Nandan v Gapua*

Note 2

- 1 (1933) A I R 1933 Mad 376 (378, 380) 142 Ind Cas 286 *Secy of State v Kuntla Krishna*
 2 (1933) A I R 1933 All 235 (241) 55 All 263 149 Ind Cas 181 *Lalta Prasad v Gajadhar Shukul*
 (1934) A I R 1934 All 397 (400 401) 148 Ind Cas 951 56 All 954 (F B) *Md Hussain v Sanwal Das* (Mortgage amount to be paid in 8 years

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Article 80
Note 2

covenant in the bond entitling the creditor to sue for the amount due on the bond before the expiry of the stipulated period is for the benefit of the creditor, that the latter has the option of taking advantage of it or not, as he pleases, and that, in the absence of any exercise of the option to enforce the covenant for immediate payment, the bond becomes payable only on the expiry of the period stipulated and that time runs, therefore, only from that date. This view rests upon the decision of their Lordships of the Privy Council in *Lasa Din v Gulab Kunwar*⁴ which was a case under Article 132 of the Limitation Act. Their Lordships held there that a similar covenant in a mortgage bond was only for the benefit of the creditor and, in the absence of exercise of the option on the part of the mortgagee, the bond 'became due' on the expiry of the period fixed, and that time ran only from that date. The Oudh Chief Court has, on the other hand, held that the decision of the Privy Council cannot be applied to bonds other than mortgage bonds, and that the bond will 'become payable' on default of payment of interest, and that time will run from the date of the first default⁶.

As to the starting point of limitation under Article 75, see Notes to that Article

Article 81

<p>81. By a surety against the principal debtor.</p>	<p>Three years.</p>	<p>When the surety pays the creditor.</p>
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Synopsis

1. Scope of the Article.
2. Suit must be by a surety against the principal debtor.
3. Article applies only when surety has paid the creditor.
4. Creditor's right against principal debtor barred—Rights of surety.
5. Starting point.
6. Sureties in respect of mortgage debts.

☆ Act of 1877, Article 81 and Act of 1871, Article 82
Same as above
Act of 1859
No corresponding provision

(1833) 1883 Pun Re No 10 *Prem Singh v Mula Mal*

[See also (1890) 1890 Pun Re No 139 (page 444) *Sundar Singh v Dur Singh*]

[But see (1933) A I R 1933 Lah 548 (549) 142 Ind Cas 851, *Sham Sundar Lal v Babu Lal* (Decision of a Single Judge)]

4 (1932) A I R 1932 P O 207 (210 211) 7 Luck 442 59 Ind App 376 133 Ind Cas 779 (P C)

5 (1936) A I R 1936 Oudh 279 (280) 162 Ind Cas 459 12 Luck 211, *Shita Narain v Dadal*

(1925) A I R 1925 Oudh 502 (503) 27 Oudh Cas 318 85 Ind Cas 280, *Pherai v Fudas Nam*

[But see (1923) A I R 1923 Oudh 19 (20) 70 Ind Cas 85 26 Oudh Cas 121 *Hars Lal v Thamman Lal*

(1913) 19 Ind Cas 733 (739) 16 Oudh Cas 45, *Durga v Tola Fam*]

1. Scope of the Article. — Article 61 *ante* is a *general* Article applicable to suits for the recovery of money paid by the plaintiff for the defendant. This Article is one of a series of *particular* Articles specifying various situations in which money is paid by the plaintiff for the defendant,¹ and governs suits by a *surety* against the *principal debtor* to recover money paid by the former to the creditor.

The Article is not, however, applicable to *every* kind of suit between the surety and the principal debtor. The first and third columns of the Article read with Article 83 *infra* indicate that a suit contemplated by this Article is one based on the right of *indemnity* which a surety has against the principal debtor, by virtue of the contract of suretyship. Under Section 145 of the Contract Act there is an implied promise by the principal debtor to indemnify the surety. Under Section 140 of that Act a surety who has paid the creditor is also invested with all the rights which the creditor has against the principal debtor. A suit to enforce the latter rights is not to enforce any right of indemnity, but merely to enforce the *original obligation* in favour of the creditor, and is consequently not governed by this Article, though the suit is one by a surety against the principal debtor.²

2. Suit must be by a surety against the principal debtor. — As has been seen in Note 1 above, the suit contemplated by this Article is one by a *surety* against the *principal debtor*.³ The word "surety" is not defined in the Act, but must, it is conceived, have the same meaning as is given to it under the Contract Act. S. 126 of that Act provides as follows: —

"A 'contract of guarantee' is a contract to perform the promise, or discharge the liability, of a third person in case of his default. The person who gives the guarantee is called the 'surety', the person in respect of whose default the guarantee is given is called the 'principal debtor', and the person to whom the guarantee is given is called the 'creditor'. A guarantee may be either oral or written."

Article 81—Note 1

- 1 (1921) A I R 1921 Lah 335 (336) 67 Ind Cas 365 *Kunj Lal v Gulab Ram*
2 (1917) A I R 1917 Mad 83 (87) 33 Ind Cas 509 39 Mad 905 *Muthu Raman v Chinnai Vellayan* (This decision has been dissented from in A I R 1926 Mad 544 on another point, namely the observation of

Note 2

- 1 (1914) A I R 1914 Mad 572 (572) 37 Mad 381 14 Ind Cas 254 *Santhamma Menon v Gopanda Menon* (Money received by junior member of tarwad — Suit by karnavan — karnavan is not surety — Art. 61 does not apply.)

1 *Kunj Lal v Gulab Ram*
arrest — Suit by
81 applies)
93 *Gharita v*
Suit in respect of principal and surety — Suit by surety

Article 81 Note 2

Although the Section does not state that the principal debtor is a concurring party to the contract, it has been held that this is a necessary ingredient in all contracts of guarantee.² In *Periamanna Marakkayar and Sons v Banians and Co*,³ Kumaraswamy Sastri, J. observed as follows "I think that the Contract Act draws a distinction between contracts of indemnity and contracts of suretyship, and that contracts of suretyship, unlike contracts of indemnity, require the concurrence of three persons, namely the principal debtor, the creditor and the surety. The surety undertakes his obligation at the request, express or implied, of the principal debtor. Reading Sections 126 and 145 together, it seems to me that there can be no contract of guarantee as distinguished from a contract of indemnity unless there is a privity between the principal debtor and the surety, as it is difficult to speak of an implied promise between persons between whom there is no privity of contract." And Krishnan, J. observed "Such a contract (i.e. a contract of suretyship) results only when, at the instance of the debtor, the surety guarantees payment to the creditor. Section 126 of the Act which defines a contract of guarantee, though it does not say expressly that the debtor should be a party to the contract, clearly implies, in my opinion, that there should be three parties to it, namely the surety, the principal debtor and the creditor, otherwise it will only be a contract of indemnity." The words "surety" and "principal debtor" will thus apply only where there is a contract of guarantee as explained above. A relationship of principal and surety may however be created by law. Thus, under Section 37 of the Negotiable Instruments Act, 1881, a relationship of principal and surety is created between the parties to a negotiable instrument.

Where A and B execute a joint promissory note in favour of C and receive in moieties the money advanced thereunder, each of them must, according to the unmentioned case,⁴ be regarded as a principal debtor in respect of a moiety of the debt and surety for the other in respect of the other moiety, and the right of contribution between them dealt with on the principle laid down in Section 145 of the Contract Act. In *Abraham Servai v Raphael Muthuriyan*⁵ Tyabji, J. dissented from this view and observed as follows —

"It seems to me that though the joint promisor's right is analogous to the surety's right of indemnity under Section 145, there

against principal after 1911 & off decree — Art 81 was held to apply.)

2 (1926) A I R 1926 Mad 514 (519 553) 49 Mad 156 95 Ind Cas 151, *Periamanna Marakkayar & Sons v Banians & Co*

(1867) 7 Suth W R 386 (387) Eng L R Sup Vol 611 (FB), *Shaboo Majeed v Noorai Mollah*

3 (1926) A I R 1926 Mad 511 (519 553) 49 Mad 156 95 Ind Cas 151 can be a

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4 (1903) 26 Mad 322 (326), *Putty Narayana Murthy Iyer v Marimuthu Pillai*

5 (1915) A I R 1915 Mad 675 (679) 27 Ind Cas 337 39 Mad 293

are distinctions between the two .. In order to make Section 145 applicable to joint promisors, the contractual liability of each joint promisor as principal debtor must be assumed to have reference only to a *proportionate part* of the debt, an assumption that is opposed to Section 42 " And he held that the right of contribution between them is a mere right of indemnity, not arising out of any contract of suretyship It is submitted that the latter view appears to be correct on principle A suit for contribution in such a case will be accordingly governed by Article 83 and not by this Article

The obligation of a surety is only a *collateral* obligation and postulates the principal liability of another namely the principal debtor A person is therefore not a surety for another unless that other is also liable⁶ Where *A* executed a bond in favour of *B* but the money was really for the benefit of *C* who undertook to indemnify *A* against loss, it was held that *A* was not a surety for *C* inasmuch as *C* himself was not liable to *B*⁷ Similarly, when *A* contracted with *B* to discharge the liability of *C* to *B* in case of his default, but on the date of such contract the rights of *B* against *C* had been barred by limitation, it was held by the Bombay High Court that the foundation of the alleged contract of suretyship, namely, an existing enforceable liability of the principal debtor being absent *A* was not a 'surety' at all⁸

Where *A* merely enters into an obligation in *substitution* of the obligation of *B* *A* is not a surety for *B*⁹ Thus where *D* owed money under a decree to *A* and *G* took over the liability by executing a bond in favour of *A* who thereupon absolved *D* from all liability under the decree it was held that *G* was not a surety and that a suit by him against *D* for reimbursement was not governed by this Article¹⁰

3 Article applies only when surety has paid the creditor.—The implied promise to indemnify the surety referred to in Section 145 of the Contract Act will arise even where the surety does not himself pay the creditor but is compelled to make contribution to a co surety who has paid the creditor But a suit by such a surety on the implied contract of indemnity is not governed by this Article, as the plaintiff has not made the payment *to the creditor* as required by the third column of the Article Article 83 will apply to such a case¹

6 Rowlett—Principal and Surety 2nd Edition Page 1

7 (1907) 29 All 627 (G34) 1907 All W N 214 4 All L Jour 561 *Girraj Singh v Mulchand*

8 (1918) A I R 1918 Bom 197 (193) 42 Bom 441 46 Ind Cas 122 *Manju Mahadev v Shirappa Manju*

9 Rowlett—Principal and Surety 2nd Edition Page 1

10 (1909) 4 Ind Cas 1041 (1042) (Lah) *Mansur Khan v Gawan Khan*

Note 3

1 (1881) 1881 Pun Re No 9 *Madar Balsh v Ahmed Ali*

Article 81
Note 3

4. Creditor's right against principal debtor barred—Rights of surety. — According to the High Court of Allahabad¹ and the undermentioned case^{1a} of the Judicial Commissioner's Court of Upper Burma, where the remedy against the principal debtor is allowed to be barred by limitation, the surety is discharged even though there may be no question of limitation as against him. In *Salig Ram v Lachman*,² Sulaiman, J observed "If the surety were still liable to pay the amount, he would in his turn be entitled to proceed against the debtor and recover the amount from him even after the limitation has set in." The other High Courts have taken a contrary view, namely that a surety is not discharged merely because the creditor has allowed the remedy to be barred against the principal debtor.³ In *Raghavendra v Mohapat*,⁴ Shah, Ag C J. observed as follows:—"The liability of the principal debtor to indemnify the surety is provided for by S 145 and is in no way dependent upon the existence of his original liability to the creditor. It may be said that this view may lead to an indefinite extension of the period of the liability of the principal debtor which cannot be enforced directly against him on account of the bar of limitation. It is possible that in some cases, as in the present case, it may so happen, but I am unable to think that there is any particular hardship or injustice to the principal debtor involved in his being called upon to indemnify the surety. The cause of action in respect of his liability to indemnify the surety arises when the surety in fact pays the amount under S 145 of the Indian Contract Act. Even if it involves some hardship I do not think it can afford any reasonable basis for holding that the payment made by the surety under circumstances such as we have in this case is wrongful."

Note 4

1 (1928) A I R 1928 All 46 (49) 50 All 211 107 Ind Cas 42, *Salig Ram v Lachman Das*

(1902) 24 All 504 (510) 1902 All W N 166, *Ranjit Singh v Naubal*

(1887) 9 All 205 (210) 1886 All W N 279 *Bhupsingh v Zainul Abidin* (Surety for mortgagor guaranteeing payment of mortgage amount by the mortgagor—Suit on mortgage after personal remedy against mortgagor is barred—Held surety not liable as the cause of action against surety arises on the personal covenant alone.)

1a (1892) 96 2 Upp Bur Rul 308 (310) *Ah Puan v See Shong Foo*

2 (1928) A I R 1928 All 46 (49) 50 All 211 107 Ind Cas 42

3 (1915) A I R 1915 Mad 675 (679) 27 Ind Cas 337 30 Mad 288 *Abraham Serrai v Raphael Muthurian* (Case of joint promisors)

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This was

(1925) A I R 1925 Bom 244 (246) 49 Bom 202 86 Ind Cas 883 *Pagha tandra Guru Rao v Mahipal Krishna*

(1881) 5 Bom 647 (652) 6 Ind Jur 139 *Hazarimal v Krishna Rao*

(1886) 12 Cil 370 (333) *Krishna Kishore v Radha Koman Munshi*

(1932) A I R 1932 Lah 419 (420) 133 Ind Cas 305 13 Lah 817 *Nur Din v. Allah Ditta*

(1932) 1802 Pun Re No 136 *Wahid Samai v Indar Kishore Singh* (But see (1878) 1878 Lun Re No 30 *Suja v Phaiuan*)

4 (1925) A I R 1925 Bom 244 (246) 49 Bom 202 86 Ind Cas 883

5. Starting point. — As seen already, the Article contemplates suits by sureties to *recover indemnity* from the principal debtors. The cause of action for such suits arises only when the plaintiff has suffered actual loss. In other words, it is the loss which the surety has sustained by the default of the principal debtor which entitles the surety to sue the principal debtor for *reimbursement*.¹ Time is accordingly made to run under this Article from the date when the surety *pays* the creditor.²

A surety has, even before making payment to the creditor, certain remedies against the principal debtor, other than the recovery of the indemnity. (See Notes to Article 83 *infra*) Suits to enforce such remedies are not governed by this Article.

The word "pays" in the third column of this Article has the same meaning as it has under Section 145 of the Contract Act.³ Under that Section "payment" means a payment in money or a transfer of property and not the mere incurring of a pecuniary obligation in the shape of a bond or a promissory note or an acknowledgment of liability,⁴ or in the shape of suffering a decree to be passed.⁵ It has been held in the undermentioned cases⁶ that the execution of a *mortgage* may be a payment inasmuch as it is a transfer of property.

Where money is *deposited* by the surety into Court to the credit of the creditor, the date of payment for the purpose of this Article is the date of the deposit, and not the date when the creditor

Note 5

1 (1903) 26 Mad 322 (327) *Putty Narayanamurthy Iyer v Marimuthu Pillai*
(1925) A I R 1925 Bom 244 (246) 49 Bom 202 86 Ind Cas 383, *Raghavendra Gururao v Mahipat Krishna*
[See (1918) A I R 1918 Low Bur 115 (115) 39 Ind Cas 432 *Shue Zan U v Shue Pru*]

2 (1920) A I R 1920 Upp Bur 21 (24) 60 Ind Cas 23 3 Upp Bur Rul 261, *Yinle Supaya v Maung Kan*
(1864) 1864 Suth W R 57 (58) *Iloy Hurree Kishen v Ranees Ashmedh Aonwar*

3 (1919) A I R 1919 Nag 126 (127) 50 Ind Cas 611 15 Nag L R 78 *Anwar Khan v Gulam Kasim*

(1926) A I R 1926 Nag 429 (431) 97 Ind Cas 185 *Vinayakrao v Shripat Rao*

4 (1930) A I R 1930 Lah 812 (813) 127 Ind Cas 714 *Jawala Singh v Mt Raj Kaur*

(1924) A I R 1924 Lah 637 (639) 76 Ind Cas 759 *Nur Samand Khan v Fajja*

See also the cases cited in Foot Notes (2) and (3)

(But see (1866) 1866 Pun Re No 72 *Kunhya v Molla* (Where
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5 (1919) A I R 1919 Nag 126 (127) 15 Nag L R 78 50 Ind Cas 611 *Anwar Khan v Gulam Kasim*

6 (1926) A I R 1926 Nag 429 (431) 97 Ind Cas 185 *Vinayakrao v Shripat Rao* (Suit on contract of indemnity)

(1919) A I R 1919 All 279 (280) 41 All 395 51 Ind Cas 155, *Chiranj Lal v Naraini* (Do)

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actually withdraws the money from Court⁷ But where at the time of the deposit the creditor is not entitled to draw the amount out of Court, the date of payment for the purpose of this Article would not be the date of deposit but the date when the creditor *becomes entitled* to withdraw it⁸

Where the surety has had to make payments at *several times*, his right to reimbursement arises as often as he is so compelled to make the payment and time runs as to each such payment from the time when it is made⁹

6. Sureties in respect of mortgage debts.—A borrows money from B and executes a mortgage of his properties in his favour C stands surety for the payment of such debt by A A fails to pay and B thereupon recovers the amount from C Now C has two remedies against A 1 A right to enforce the promise to indemnify implied by virtue of Section 145 of the Contract Act A suit to enforce this right is governed by this Article and must be brought within three years from the date when the surety paid the creditor¹ 2 A right to stand in the shoes of the creditor under S 140 of the Contract Act and enforce the mortgage itself against A But, as has been seen in Note 1 *ante*, this right is not governed by this Article at all The suit to enforce the mortgage should be brought within twelve years of the *cause of action under the mortgage* under Article 132 of the Limitation Act and not 12 years from the date of payment²

Article 82

82.* By a surety against a co-surety	Three years.	When the surety pays anything in excess of his own share.
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Act of 1877, Article 82

Same as above

Act of 1871, Article 83

Same as above except that for the word 'surety' in the present Article, there was the word 'plaintiff' in the third column

Act of 1859

No corresponding provision

7 (1920) A I R 1920 Upp Bur 21 (24) 60 Ind Cas 23 3 Upp Bur Rul 261,
Inde Supaya v Maung Aun

8 (1925) A I R 1925 All 161 (164) 82 Ind Cas 1011 *Mohamed Nazki v Hargu Lal*

9 (1910) 9 L J (N S) Ex 263 (269) 6 M & W 153 55 R R 547 4 Jur 250
151 E R 261, *Davies v Humphreys*

(1920) A I R 1920 Upp Bur 21 (24) 60 Ind Cas 23 3 Upp Bur Rul 261,
Inde Supaya v Maung Aun

Note 6

1 (1920) A I R 1920 Upp Bur 21 (23) 60 Ind Cas 23 3 Upp Bur Rul 261,
Inde Supaya v Maung Aun

2 (1919) A I R 1919 All 56 (59) 42 All 70 52 Ind Cas 681 *Barakatumissa Begam v Mahboob Ali Khan*

(1903) 26 Mad 680 (715) 13 Mad L Jour 83 (F D) *Rajah of Vizianagram v. Rajah Setrucherla Somasekharas*

Synopsis

Article 82
Note 1

1. Right of contribution between co-sureties.

2. Rights of surety against co-surety before payment.

1. Right of contribution between co-sureties. — Section 146 of the Contract Act provides that co sureties for the same debt or duty are liable, as between themselves to contribute equally towards the debt, and Section 147 provides that co sureties who are bound in different sums are liable to pay equally as far as the limits of their respective obligations permit

This right of contribution amongst sureties is not founded on contract, but is the result of a general equity on the ground of equality of burden and benefit¹. The true explanation of this right between co sureties seems to be that it is founded upon the consideration that, in equity, the remedies of the creditor against the several sureties should have been so applied as to apportion the burden rateably, and if they have been applied otherwise, the Court will, by laying hold of the remedies of the creditor or otherwise, interfere directly between the co sureties to correct the inequity².

It follows that a surety has no right of contribution until he has paid a larger sum than his proportion of the debt then actually due to the creditor³. A surety who has paid the creditor a sum which is less than his share of the debt due cannot recover any contribution from his co sureties. The reason is that otherwise a multiplicity of suits and great inconveniences may follow, if each surety is allowed to sue the others for a rateable proportion of what he has paid the instant he has paid any part of the debt⁴. Where, however the payment by one surety of what would have been no more than his own share is accepted in satisfaction of the whole debt, the result will be as if the surety has paid the whole debt himself and consequently in excess of his own share. He will consequently be entitled to claim contribution from his co sureties⁵.

The payment referred to may be either voluntary or made for the purpose of avoiding coercive process against the property of the surety. It will amount to a payment even if he suffered his property to be seized under process of law for the purpose of the amount

Article 82 — Note 1

1 (1787) 1 R R 41 (43 44 45) 1 Cox 318 *Dering v Earl of Manchester*
[See also (1915) A I R 1915 Cal 334 (336) 27 Ind Cas 22 *Matungins Debts v Brojeswar*

(1926) A I R 1926 Cal 657 (658 659) 94 Ind Cas 159 *Pegus cred Jessor Loan Co Ltd v Gopal Hari Ghose Choudhury*]

2 Rowlett—Principal and Surety 2nd Edition Page 222

3 See Rowlett—Principal and Surety 2nd Edition Pages 237 238

(1869) 1 N W P H C R 100 (101) *M Constantine v H Drew*

4 (1840) 55 R R 547 (559 560) 6 N & W 153 9 L J (N S) Ex 203 4 Jur 250
151 F R 361 *Daries v Humphreys*

5 Rowlett—Principal and Surety, 2nd Edition Page 235

Article 82
Notes
1—2

being realized from its income or sale⁶ But, as has been seen in Note 5 to Article 81 *ante*, the payment must be actual payment in money or transfer of property and not the mere undertaking of a pecuniary obligation such as the execution of a promissory note or bond in discharge of the surety's liability⁷

Since the cause of action arises only on payment of more than his share, a surety's suit for contribution will not be affected by the fact that his right to obtain reimbursement from the principal debtor himself has become barred

When a surety makes payments in excess of his share, he has, in respect of *each* such payment, a right of suit for contribution⁸ A surety must, in his suit for contribution, include the whole of the claim for contribution in respect of all the payments made prior to the date of suit⁹

2. Rights of surety against co-surety before payment. — Where a surety does not make any payment to the creditor, he has, as has been seen already, no right to claim that he should be paid any contribution¹ But where a judgment has been passed against him or he is threatened by the creditor with an action for more than his share of the debt due, he has a right in equity to bring an action against the co sureties *and the creditor*, and obtain an order upon the co sureties to pay their proportions *to the creditor* Where the creditor is not a party to the action, he may obtain a prospective order directing the co surety, upon payment by the surety of his own share, to indemnify the latter against further liability² A suit of the class above referred to is not one contemplated by this Article

See also Notes to Article 83

6 (1921) A I R 1921 Cal 814 (815) 57 Ind Cas 884, *Gopendath v Chandra Nath*

(1903) 26 Mad 686 (693) 19 Mad L Jour 83 (F B) *Rajah of Vizianagram v Rajah Setrucherla Somasekhararaz*

7 (1903) 26 Mad 322 (328) *Putti Narayanamurthy Iyer v Marimuthu Pillai*

(1916) A I R 1916 Oudh 177 (179) 35 Ind Cas 459 19 Oudh Cas 44, *Jagannath Kuar v Sheo Singh*

(1924) A I R 1921 P O 192 (191) 4 Rang 48 86 Ind Cas 259 (P C), *Veerappa Chetty v Arunachallam Chetty*

8 (1903) 26 Mad 686 (717) 13 Mad L Jour 83 (F B) *Rajah of Vizianagram v Rajah Setrucherla Somasekhararaz*

9 (1903) 26 Mad 686 (717) 13 Mad L Jour 83 (F B) *Rajah of Vizianagram v Rajah Setrucherla Somasekhararaz*

(1910) 5 Ind Cas 410 (442) 13 Oudh Cas 23, *Debi Sahai v Goura Shankar Saha*

(1910) 151 F R 361 (367) 6 M C W 153 3 L J (N S) Fr 263 4 Jur 250 55 R R 517 *Dunies v Humphreys* (Quoted in 26 Mad 686 at page 716)

Note 2

1 See also (1872) 11 Beng L R 76 (81) 19 Sath W R 24 *Ram Pershad Singh v Neerbhoj Singh*

2 (1893) L R 2 Ch 514 (529) 41 W R (Fug) Digest 193 (191) 3 R 610 68 L T 753 *Wolmershausen v Gullick*

<p>83. Upon any other contract to indemnify.</p>	<p>Three years.</p>	<p>When the plaintiff is actually damaged.</p>
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Article 83

Synopsis

1. Scope of the Article.
2. Section does not apply to suits for indemnity not based on contract.
3. Suit to enforce obligation under Sections 69 and 70 of the Contract Act.
4. Suit by agent against principal to enforce obligation under Section 222 of the Contract Act.
5. Suit on registered contracts of indemnity.
6. Suit to enforce indemnity charged on immovable property.
7. Suit by vendor against vendee.
8. Suit by assignor against assignee of lease.
9. Suit by surety against principal debtor for money paid to co-debtor.
10. Suit by creditor against surety.
11. Suit between joint promisors for contribution.
12. Starting point.
13. Remedy of plaintiff before payment.
14. Claim to indemnity, when can be set off.
15. Covenant in an award.

Other Topics

Article 116 and this Article . . . See Note 5 Note 7, Pts 5, 7 and Foot Note (5)
 Contract of indemnity may be express or implied See Note 2, Pt 2
 Contract of indemnity—When plaintiff damaged by breach—Instances See Note 12 Pts 5 to 10
 Indemnifier can be sued even before actual damage is caused See Note 13
 Where covenant for title is for quiet possession—Not contract of indemnity See Note 7, Pt 6
 Suit by public agent against principal See Note 4

1. Scope of the Article. — It has been seen in Note 1 to Article 81 *ante*, that Article 61 is a *general* Article applicable to suits for the recovery of money paid by the plaintiff for the defendant and that Article 81 is one of a series of *particular* Articles specifying various situations in which money is paid by the plaintiff for the defendant This Article is another of such particular Articles and applies to suits upon *contracts of indemnity*, other than those dealt

* Act of 1877, Article 83 and Act of 1871, Article 84.

Same as above.

Act of 1859.

No-corresponding provision.

with in prior Articles Where this special Article applies, the general Article will not apply.¹

The word "contract" in this Article must, it is conceived, be understood in the same sense in which it is used in the Contract Act. A contract of indemnity within this Article may ha therefore express or implied,² in the sense in which it is used in the Contract Act. A promise which is implied only as a matter of law or as a *legal fiction* is not a 'contract' within the Contract Act and is not a contract within this Article also. A suit for indemnity which is based not on any promise *actually* made but on a "promise" implied in law, is not one on a 'contract' of indemnity and is not governed by this Article.³

Thus, where *A* purchased goods wrongfully in the name of *B* without *B*'s knowledge and *B* was forced to pay the price to the seller, a

1 (1927) 4 I.R. 1927 Lah 231 (232) 104 Ind Cas 418, Abdul Kadir v. Inayat
Din

[See also (1938) A I R 1939 Lah 196 (1938) *Firm Haji Mahbub Baksh Rafiuddin v Abdul Gaffar* (Suit on undertaking to indemnify—Art 83 applies)]

1 (1967) 7 Suth W R 356 (3S7) Beng L R Sup Vol 691 (F B), *Shaboo v. Noorai Ullah*

Nath v Har Goring
Money not paid and

v Mohendra Prasad

¹ See also (1875) 23 Suth W R 305 (305) 2 Ind App 131 15 Beng L R 209 3 Suther 136 3 Sar 477 (P C), *Lam Tuhul Singh v Bishesar Lal Sahoo*]

3 (1933) A I R 1933 Lah 404 (405) 147 Ind Cas 57, *Des Raj Hukam Chand v. Lachhi Pami*

(1935) A I R 1935 M-1 591 (595) 157 Ind Cas 746, *Veetil Karnavan v Naravina Appur*
[See also (1911) 9 Ind Cas 9-8 (930) (Cal) *Deo Varain v Ram Sadhan*]

suit by *B* to recover from *A* the amount which he was compelled to pay was held to be governed not by this Article but by Article 61, inasmuch as there was no contract between *A* and *B*.⁴ Similarly, where a receiver appointed by the Court to administer the estate of a deceased person incurred costs in filing a suit on behalf of the estate, and filed a suit against the heirs to the estate for reimbursement, it was held that Article 61 and not this Article applied to the case.⁵

3. Suit to enforce obligation under Sections 69 and 70 of the Contract Act. — Under the English Common Law, where one person pays money to another under circumstances and upon occasions which make it just and equitable that it should be repaid, a debt or contract of payment is implied *in law without any actual agreement* to that effect.¹ the basis of the legal fiction lying in the fact that unless the obligation was stated as a fictitious contract, there was no place for it within the rules of Common Law pleading. Under the Contract Act, such an obligation is directly enforceable under Sections 69 and 70 of that Act without resort to any fiction of law such as that which prevails under the English Common Law. The obligation is not a 'contract' at all but is only 'a relation resembling that created by a contract'.² Consequently, a suit to enforce such an obligation is not a suit to enforce any contract and is not governed by this Article.

4. Suit by agent against principal to enforce obligation under Section 222 of the Contract Act. — Section 222, Contract Act, provides that the employer of an agent is bound to indemnify him against the consequences of all lawful acts done by such agent in the exercise of the authority conferred upon him. There is a conflict of opinion as to whether such liability to indemnify is a liability on a "contract to indemnify" within the meaning of this Article. According to the High Court of Madras this liability is not one under any contract of indemnity and a suit to enforce the same is not within this Article.¹ A contrary view has been taken by the High Courts of Bombay and Lahore.² According to these Courts the contract

4 (1933) A I R 1933 Lah 404 (405) 147 I C 57 *Des Paj v Lachs Ram*

5 (1935) A I R 1935 Mad 594 (595) 157 Ind Cas 746, *Cheerath Veetil Karnaran v Narayana Ayyar*

Note 3

1 (1849) 79 R R 623 (626) 8 C B 541 19 L J C P 130 14 Jur 396 *Leavis v Campbell*

(1907) 29 All 627 (631) 1907 All W N 214 4 All L Jour 501, *Girraj Singh v Mulchand*

2 See the heading to Chapter V of the Contract Act

Note 4

1 (1910) 7 Ind Cas 393 (399 400) 34 Mad 167 *Kondasamy Pillai v Arayambal*

2 (1932) A I R 1932 Bom 25 (30) 136 Ind Cas 461 *Haralchand v Sumathial*

(1914) A I R 1914 Lah 407 (40) 1915 Pun Re No 23 26 Ind Cas 415, *Mangal Ram v Firm of Ramsaran Das Manan Chand*

(1917) A I R 1917 Lah 22 (23) 42 Ind Cas 72 *Uttam Singh v Firm Ram Anwar Ganesh Das*

Article 83
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4—5

may be one which is implied or inferred in virtue of the jural relations of the parties. Thus, where a *pukka adatia* agent entered into a contract with a third person, in exercise of the authority conferred upon him by the principal, and became liable for the performance of such contract, it was held by the High Court of Bombay following the view of the Lahore High Court that a suit by the agent against the principal for indemnity against the consequences of the acts done under the authority of the principal, was one based on a contract of indemnity within the meaning of this Article. It is submitted that the view of the Lahore and Bombay High Courts is not correct. As has been seen in Notes 2 and 3 above, the word 'contract' implies a *real* or *actual* promise whether made in words or inferred from the conduct of parties. An obligation imposed by law without reference to any actual agreement between the parties is not a contract at all, though it may arise as a consequence of the agency contract.

5. Suit on registered contracts of indemnity. — When the contract of indemnity is *registered* the Article applicable is Article 116 read with this Article and the period of limitation will be six years from the time when the plaintiff is actually damaged.¹

- (1931) A I R 1931 Lah 392 (393) 128 Ind Cas 316 12 Lah 190 *Bhagwan Das v Mutsaddi Lal*
 (1929) 115 Ind Cas 767 (767) (Lah) *Ganesh Das v Narsingh Das*
 (1923) A I R 1923 Lah 473 (474) 73 Ind Cas 143 *Devi Sahai Ramji Das v Thirath Ram*
 (1921) A I R 1921 Lah 167 (167) 66 Ind Cas 900 *Kadars Pershad v Har Bhagwan*
 (1926) A I R 1926 Lah 152 (153) 92 Ind Cas 595 *Munshi Ram v Bhagwan Das*
 (1927) A I R 1927 Lah 826 (828) 106 Ind Cas 40 *Firm Asrpa Ram Lachman Das v Firm Sawan Mal*
 (1928) A I R 1928 Lah 424 (425) 112 Ind Cas 719, *Bhagat Ram v Harjas Mal*
 (1932) A I R 1932 Bom 593 (594) 140 Ind Cas 624 *Babasa v Hombanna* (Commission agent purchasing goods for principal—Refusal of principal to accept some goods — Re sale by agent — Damages suit for — Article 85 applied)
 (1918) A I R 1918 Lah 365 (365) 46 Ind Cas 541, *Sarab Dial Ishardass v Devi Dilla Mal Gordhandas*

Note 5

- I (1921) A I R 1921 Lah 260 (261) 2 Lah 316 61 Ind Cas 431, *Abdul Ans Khan v Muhammad Baksh*
 (1926) A I R 1926 Nag 429 (430) 97 Ind Cas 185 *Venayak Rao v Shripatrao*
 (1919) A I R 1919 Mad 767 (757) 50 Ind Cas 673 *Venkatachallam v Krishnaswamy*
 (1909) 4 Ind Cas 1121 (1121) 31 Mad 452 *Srinivasa Raghava v Ranga swamy Iyengar*
 (1912) 16 Ind Cas 73 (75) (Cal) *Ram Barai Singh v Mohendra Prosad Singh*
 (1936) A I R 1936 Mad 655 (656) 167 Ind Cas 157, *Valiyakath Periyattal v Corinda Menon*
 [See also (1933) A I R 1933 Lah 109 (111) 141 Ind Cas 435 14 Lah 350 *Culzari Mal v Vaghi Mal (Quare)*]
 [But see (1918) A I R 1918 Mad 1135 (1135) 89 Ind Cas 188 *Kah yammal v Aalandatela Goundar* {Submitted not correct}]

6. Suit to enforce indemnity charged on immovable property.—The Article applies only to suits on *personal* contracts of indemnity and not to cases where the indemnity is charged on immovable property and such charge is sought to be enforced¹ Article 132 *infra* will govern such cases

7. Suit by vendor against vendee.—Where a part or whole of the consideration amount for a sale deed is left in the hands of the vendee for the purpose of paying off the debts of the vendor and the vendee fails to pay the same as undertaken the vendor has two remedies open to him

1 He can sue for damages for breach of the contract committed by the vendee in not paying the debts as undertaken, the measure of damages being the sum undertaken to be paid It is not necessary that the plaintiff should have suffered any actual loss before he can maintain the suit¹ Such a suit is not a suit based on any contract of indemnity, and this Article does not apply.

2 He can sue on the implied contract of indemnity that arises in such cases² This Article will apply to such suits and time will run only from the date when the plaintiff is actually damaged See Note 12 *infra*

Where A sells property to B subject to incumbrances there is an implied contract of indemnity by B in favour of A against such

Note 6

- 1 (1934) A I R 1934 Mad 1 (7) 57 Mad 218 149 Ind Cas 379 *Rama Raya nungar v Venkatalingam Nayanam Bahadur*
- (1921) A I R 1921 Mad 514 (516) 66 Ind Cas 551 *Ramaswamy Iyengar v Kuppusamy Iyer*
- (1933) A I R 1933 Lah 109 (110) 141 Ind Cas 435 14 Lah 380 *Gulzari Mal v Maghs Mal*

Note 7

- 1 (1900) 23 Mad 441 (444) *Dorasinga Tetar v Arunachalam Chetti*
- (1912) 14 Ind Cas 244 (245) 34 All 429 *Raghubar Pat v Jay Pat*
- (1911) 12 Ind Cas 353 (355) 36 Mad 548 *Raghunathachariar v Sadagopa chariar* (In this case the vendor had before suit paid the debts and the suit was for the return of the purchase money)
- (1933) A I R 1933 All 386 (388) 55 All 490 143 Ind Cas 621 *Unkar Singh v Kashi Prasad*
- (1936) A I R 1936 All 870 (872) 166 Ind Cas 908 *Ramchander v Ram chander*
- 2 (1933) A I R 1933 All 386 (388) 55 All 490 113 Ind Cas 621 *Unkar Singh v Kashi Prasad*
- (1911) 12 Ind Cas 353 (354) 36 Mad 548 *Raghunathachariar v Sadagopa chariar*
- (1935) A I R 1935 All 463 (464) 154 Ind Cas 205 *Abdul Wahid Khan v Sher Mohamed Khan*
- (1931) A I R 1931 Pat 271 (273) 182 Ind Cas 101 10 Pat 451, *Mt Raj bansi Kuer v Bishundeo*

Article 83 Note 7

incumbrances³ In *Izzat-un-nisa Begam v. Kunwar Pertab Singh*,⁴ their Lordships of the Privy Council observed as follows

"On the sale of property subject to incumbrances the vendor gets the price of his interest, whatever it may be, whether the price be settled by private bargain or determined by public competition together with an indemnity against the incumbrances affecting the land. The contract of indemnity may be express or implied. If the purchaser covenants with the vendor to pay the incumbrances, it is still nothing more than a contract of indemnity.

Where money is left in the hands of the vendee to pay off the vendor's debts and there is also an express contract of indemnity against loss caused by the failure to pay, the Article applicable to enforce such a covenant is clearly this Article, and if the contract is registered, Article 116 read with this Article⁵

A mere covenant for title or for quiet possession, whether express or implied, is not a contract of indemnity and Article 83 does not apply to suits for breaches of such covenants⁶. Where, however, there is an express covenant for such indemnity against loss of title or possession, a suit on such covenant will be governed by this Article and if the contract is registered, by Article 116 read with this Article⁷

(1918) A I R 1918 Mad 1135 (1136) 38 Ind Cas 188 *Kaliyammal v. Kolan davela Gounder*

(1923) A I R 1923 Mad 492 (494) 74 Ind Cas 209, *Venkatanarayanaiah v. Subramanyya Iyer*

(1936) A I R 1936 All 870 (878) 166 I C 908, *Ramchander v. Ramchander Singh* (Vendee
o — Vendor losing
vendee runs from

date of such loss and not from date of sale)

3 (1909) 36 Ind App 203 (208) 31 All 583 3 Ind Cas 793 (P C) *Izzat un nisa Begam v. Kunwar Pertab Singh*

(1934) A I R 1934 Mad 1 (4) 57 Mad 218 149 Ind Cas 379 *Rama Raya nimgar v. Venkataalingam*

See also the cases cited in Foot Note(2) above

[See also (1936) A I R 1936 All 870 (878) 166 Ind Cas 908 *Ram chander v. Ramchander*]

4 (1909) 36 Ind App 203 (208) 31 All 583 3 Ind Cas 793 (P C)

5 (1933) A I R 1933 Lah 109 (111) 141 I C 435 14 Lah 380 *Gulzar v. Vaghi*

(1933) A I R 1933 Lah 793 (795) 141 Ind Cas 362 14 Lah 646 *Idul Qadir v. Mt. Dilas Kaur*

(1926) A I R 1926 Nag 429 (430) 97 I C 185, *Vinayak Rao v. Shripatrao*

(1912) 16 Ind Cas 73 (74) (Cal), *Ram Baras Singh v. Mohendra Prasad Singh*

In the following cases Article 83 was applied no reference being made to Article 116 —

(1926) A I R 1926 All 605 (607) 95 Ind Cas 913, *Kedar Nath v. Har Govind*

(1935) A I R 1935 All 463 (464) 151 Ind Cas 305 *Abdul Wahid Khan v. Sher Muhammad Khan*

(1933) A I R 1933 All 396 (398) 143 Ind Cas 621 55 All 490 *Unkar Singh v. Kashi Prasad*

In the following case Article 116 was held not to apply but only Article 83

(1918) A I R 1918 Mad 1135 (1136) 38 I C 188, *Kaliyammal v. Kolandavela*

C (1909) 26 Bom 750 (754) 4 Bom L R 371, *Tulsiram v. Vurlidhar*

7 (1919) A I R 1919 Mad 849 (850) 47 Ind Cas 924 *Venkataramayya v. Ram brahman*

8. Suit by assignor against assignee of lease—Where *A*, a lessee, assigns his lease to *B*, there is an implied promise on the part of *B* to indemnify *A* in respect of the covenants in the lease. This Article will, therefore, apply to the suit by *A* based on such obligation, and limitation commences to run not from the date of breach of covenant by the assignee, but only when the assignor was damaged.¹

Article 83
Notes
8—12

9. Suit by surety against principal debtor for money paid to co-surety. — See Note 3 to Article 81 *ante*

10. Suit by creditor against surety.—Article 81 *ante* deals with suits by a *surety against the principal debtor*. Article 82 deals with suits by a *surety against co sureties*. There is no specific Article for a suit by the *creditor against a surety*. Such a suit is one based on a contract of *guarantee* and not of *indemnity* and is not within this Article. Article 65 may, however, apply to such a case see Notes to Article 65 *ante*.

11. Suits between joint promisors for contribution. — Where A and B execute a joint promissory note in favour of C and receive, in moieties, the money advanced thereunder, each of them must, according to the undermentioned case,¹ be regarded as the principal debtor in respect of a moiety of the debt and surety for the other in respect of the other moiety, and the right of contribution between them dealt with on the principle laid down in Section 145 of the Contract Act. This view was relied on by Oldfield J, in *Abraham Servat v Raphael Muthirayan*² but was dissented from by Tyahji, J in the same case. According to the latter Judge it is not a case of suretyship at all, but merely one of an implied contract of indemnity within the meaning of Section 124 of the Contract Act. It is submitted that this view is correct and a suit to enforce such indemnity would be governed by this Article. See also Note 2 to Article 81.

12. Starting point.—In all contracts of indemnity, it is the damage sustained which entitles the indemnified person to sue the indemnifier for reimbursement.¹ Time is accordingly made to run

[See also (1919) A I R 1919 Mad 757 (757) 50 Ind Cas 673 Venkata
chalam v Krishnaswami]

(1909) 4 Ind Cas 1121 (1121) = 31 Mad 452, *Srinivasa Raghava v Ranganaswami Iyengar*]

Note 8

1 (1880) 5 Cal 811 (817) 6 Cal L R 167, *Pepin v Chunder Seekur Mookerjee*

Note 11

1 (1903) 26 Mad 392 (326) *Narayana-murthy Iyer v Marimuthu Pillai*

2 (1915) A I R 1915 Mad 675 (677 679) 27 Ind Cas 337 39 Mad 289

Note 12

hu Pallas

became actually out of pocket by payment)

Article 83
Note 12

under this Article from the date when the plaintiff is *actually damaged*. A person cannot be said to be 'damaged' before he has been deprived of anything. A remote chance of being deprived of some thing will not entitle him to realise damages from his indemnifier.^{1a}

The question, whether the plaintiff is damaged by reason of the breach of the contract of indemnity, depends also upon the nature of the indemnity given in each particular case.

- 1 Where the contract is to indemnify the plaintiff against any payments which he may be compelled to make, the plaintiff must have actually made a payment before he can claim reimbursement. A "payment" means a payment in money or a transfer of a property and not the incurring of a pecuniary obligation in the shape of a bond or promissory note or acknowledgment of liability,² or in the shape of suffering a judgment to be passed.³ The execution of a mortgage is a transfer of property and is a "payment" for this purpose.⁴ The payment must, however, not be a *gratuitous* one.⁵
- 2 Where the contract is to indemnify the plaintiff against loss of title of the plaintiff in respect of property sold to him by the defendant, the plaintiff will be damaged when a decree is passed against him negating his title.⁶
- 3 Where the contract is to indemnify the plaintiff against loss of possession of properties sold to him, the plaintiff will be "actually damaged" only when he is actually dispossessed of such property.⁷

(1935) A I R 1935 Lah 974 (975) 159 Ind Cas 853 *Shyam Sundar v Chandu Lal*

(1924) A I R 1924 P C 192 (194) 4 Rang 48 86 Ind Cas 259 (P C) *Veerappa Chetty v Arunachallam Chetty*

(1920) A I R 1920 Mad 615 (618) 57 Ind Cas 982 *Sectamma v Narayana murthy*

See also Note 5 to Article 81 ante

1a (1935) A I R 1935 Lah 974 (975) 159 I C 853 *Shyam Sundar v Chandu Lal*

2 See the cases cited in Foot Note (4) of Note 5 to Article 81 ante

[See also (1933) A I R 1933 Lah 401 (406) 147 Ind Cas 57, *Des Raj Hulari Chand v Lachi Ram* (There was no contract in this case for indemnity)]

[See however (1912) 13 Ind Cas 979 (981) 15 Oudh Cas 25 *Tajari mul Husain v Rannak Ali* (Where time was held to run from the date of the decree payment had been made in this case but when it was so made does not appear)]

4 See the cases cited in Foot Note (6) of Note 5 to Article 81 ante

5 (1933) A I R 1933 All 386 (388) 143 Ind Cas 821 55 All 490 *Unkar Singh v Kashi Prasad*

6 (1919) A I R 1919 Mad 757 (757) 50 Ind Cas 673, *Venkatachallam Pillai v Krishnaswamy Pathan*

(1919) A I R 1919 Mad 849 (850) 47 Ind Cas 924 *Venkataramaya v Ram brahman*

7 (1932) A I R 1932 Bom 36 (39) 55 Bom 565 194 Ind Cas 1157, *Ratanbas v Ghashiram Gangabishen*

4 Where the contract was to indemnify the plaintiff against "any act done by defendants with respect to certain mortgage documents on the property sold to plaintiff" and the defendants left the said documents with third persons thereby lessening the value of the property purchased by the plaintiffs, who had therefore to spend money and recover the documents, it was held that the plaintiffs suffered damage when they so spent the money.⁸

5 It has been seen in Note 3 *ante* that the obligation of the principal to indemnify the agent under Sec 222 of the Contract Act is, according to the High Courts of Bombay⁹ and Lahore,^{9a} one based on an implied *contract of indemnity*, a suit to enforce which is governed by this Article. According to these Courts, therefore, time will run under this Article when the *agent actually makes a payment* on the principal's behalf. Thus, where A, a commission agent, purchases property on behalf of B, and pays the purchase money from his own pocket, but on finding subsequently that B does not pay the amount, re sells the property at a loss, and then sues B for the loss caused to him by the transaction, time will run from the date on which he made the *payment* and not from the date on which he re sold the property at a loss.¹⁰

13. Remedy of plaintiff before payment. — The person indemnified in a contract to indemnify has, even before he is actually damaged, another remedy open to him, namely to sue the indemnifier to have his right of indemnity declared and enforced by an order on the indemnifier to pay off the debt if the rights were disputed or the obligation neglected,¹ or to place him in a position to meet the

(1927) A I R 1927 Lah 570 (571) 106 Ind Cas 804 9 Lah 191, *Mt Gopal Das v Dhanna Mal*

(1911) 10 Ind Cas 486 (487) (Cal), *Sukmoy Sarkar v Shashi Bhushan*

(1923) A I R 1923 Mad 492 (494) 74 Ind Cas 209, *Venkatanaryanavah v Subramania Iyer*

(1917) A I R 1917 Mad 874 (876) 35 Ind Cas 769, *Bhawani v Anantha*

8 (1922) A I R 1922 P C 187 (192) 49 Cal 203 48 Ind App 335 74 Ind Cas 660 (P C) *Sachindra Nath Roy v Maharaj Bahadur Singh*

9 (1932) A I R 1932 Bom 25 (30) 136 Ind Cas 481, *Harakchand Tarachand v Sumati Lal Chunilal*

9a (1928) A I R 1928 Lah 424 (425) 112 Ind Cas 719, *Bhagat Ram v Harjas Mal Mehr Chand*

(1929) 115 Ind Cas 767 (767) (Lah) *Ganesh Das v Narayn Singh Das*

(1926) A I R 1926 Lah 152 (153) 92 Ind Cas 595 *Munshi Ram v Bhagwan das*

10 (1921) A I R 1921 Lah 167 (168) 66 Ind Cas 900 *Kadari Pershad v Har Bhagwan*

(1923) A I R 1923 Lah 473 (475) 73 Ind Cas 143 *Dera Sahai Ramji Das v Thirath Ram*

(1927) A I R 1927 Lah 826 (827) 106 Ind Cas 40 *Kirpa Ram Lachman Das v Sawan Mal Gopi Chand*

Note 13

1 (1924) A I R 1924 P C 192 (194) 4 Rang 49 86 Ind Cas 259 (P C), *Veerappa Chetty v Arunachalam Chetty*

Article 83
Notes
13—18

liability that may hereafter be cast upon him² In *Richardson In re*,³ Buckley, L J, observed "Indemnity is not necessarily given by repayment after payment Indemnity requires that the party to be indemnified shall never be called upon to pay . . ." The kind of "anticipatory" form of action referred to above will not be premature on the ground that the plaintiff had not suffered actual damage⁴ Thus, where A purchases property subject to a charge existing against that and other properties of B, A is under an obligation to indemnify B against the incumbrance and this can be enforced even before payment by B, by selling the properties purchased by A and paying off the incumbrance from out of the proceeds thereof⁵ But the cause of action in such cases is different from a right to be indemnified after the plaintiff has suffered actual loss⁶

14. Claim to indemnity, when can be set off. — A plea of a set off in respect of a claim for indemnity is a plea of *equitable set-off* Such can be made only when on the date of the suit it is not barred by limitation (See Note 6 to Order 8 Rule 6 in the Authors' Civil Procedure Code) Thus, in a suit for recovery of price of goods supplied to the defendant under a contract for the supply of the same at stated times, such contract contained a clause whereby the plaintiff undertook to indemnify the defendant against losses caused by his failure to supply at the stated times, and the defendant pleaded a claim for indemnity as a set-off and it was found that the claim was not barred on the date of the suit, though three years had elapsed on the date of *written statement* from date of his actual loss, it was held that the claim to set off could be validly set up¹

15. Covenant in an award. — A covenant for indemnity in favour of a party to an award enures for the benefit of all persons claiming under him¹

(1926) A I R 1926 Mad 597 (599) 92 Ind Cas 715 *Mayappa Chettiar v Kolandavelu Chettiar*

(1912) 14 Ind Cas 244 (246) 34 All 429, *Raghubar Das v Jaij Rai*

2 (1899) 26 Cal 241 (245) *Kumar Nath Bhattacharjee v N K Bhattacharjee* (11 Cal 221, Followed)

3 (1911) 80 L J K B 1232 (1239) LR 2 K B 705 105 L T 226 18 Manson 827.

4 (1934) A I R 1934 Mad 1 (5) 57 Mad 216 149 Ind Cas 379, *Rama Raya nimgar v Venkatalingam*

5 (1934) A I R 1934 Mad 1 (5) 57 Mad 218 149 Ind Cas 379, *Rama Raya nimgar v Venkatalingam*

6 (1899) 26 Cal 241 (245), *Kumar Nath Bhattacharjee v N K Bhattacharjee*

Note 14

1 (1885) 7 All 284 (287) 1885 All W N 40, *Prag, Lal v Maxwell*

Note 15

1 (1920) A I R 1920 Mad 615 (617) 57 Ind Cas 982, *Seetanna v Narayana-murthy*

84. ^a By an attorney or vakil for his costs of a suit or a particular business, there being no express agreement as to the time when such costs are to be paid.	Three years.	The date of the termination of the suit or business, or (where the attorney or vakil properly discontinues the suit or business) the date of such discontinuance.	Article 84
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Synopsis

1. Legislative changes.
2. Suit by attorney or vakil.
3. "Suit or a particular business."
4. Application for costs by attorney or vakil.
5. Costs.
6. Lien for costs can be pleaded in defence.
7. Starting point.

Other Topics

Article not applicable to legal practitioners other than attorneys and vakils ..	See Note 2, Pt 1
Article not applicable to suits by attorney or vakil against opposite party ...	See Note 2, Pt 2
"Business" must be a continuous one	See Note 3, Pt 2
Revocation of authority before completion of suit — Starting point ...	See Note 7, Pt 5
Suit—When terminates	See Note 7, Pts 1, 2

1. **Legislative changes.** — Under the Act 14 of 1859, suits of the nature specified in this Article were treated as suits for price of work done, for which the cause of action accrued only on the completion of the work, or the termination of the suit in which the vakil or attorney was engaged. In the absence of an engagement or contract in writing that the costs or fees were to be paid before the completion of the work, limitation commenced to run under Section 1 clause 10 of the Act of 1859 from the date of the decision of the suit in respect of which costs were claimed¹

✱ Act of 1877, Article 84

Same as above

Act of 1871, Article 85

Same as above, except that the words "the date of" before the words "the termination" in the third column of the present Article are new

Act of 1859.

No corresponding provision see also Note 1, Legislative changes

Article 84 — Note 1

1. (1864) 1864 Suth W R 98 (C9), *Rajah Perladu Sen Bahadur v Panjait Roy* (1871) 6 Mad H C R 265 (266), *Buckiputaram Thalla Karu v Rajaratnam*.

Article 84
Notes
1—3

Act 9 of 1871 first introduced this Article, and it also provided a general Article (now Article 56) for suits for "price of work done by the plaintiff."

Act 15 of 1877 prefixed the words the "*date of*" before the words "the termination of suit" &c in the third column of Article 85 of the Act of 1871, and thus made the starting point clearer and more definite, the present Article is a mere re-enactment of Article 84 of the Act of 1877.

2. Suit by attorney or vakil.—This Article applies only to suits by *attorneys* and *vakils* for their costs. Suits by other classes of legal practitioners¹ such as advocates, pleaders, mukhtears and revenue agents are not governed by this Article. They would seem to be governed by Article 56 *ante* or Article 115 *infra*.

The Article will, however, apply only to a suit by an attorney or vakil against *his client* and not against the opposite party. Thus, where a consent decree provides that the costs of the one party should be paid to his attorney by the other party, and the attorney sues such other party for the costs, the suit is not governed by this Article². The Article will not also apply where there is an express agreement as to the time when such costs are to be paid.

A suit by a vakil for fees and costs, against the President of a Taluk Board who had engaged him for a suit is within time, if it is brought within three years of the termination of the suit, Section 225 of the Madras Local Boards Act (1920) prescribing a period of six months for a suit against the Taluk Board applies only to cases of alleged neglect or default of some officer in the execution of an act authorized by law, and not to suits by a vakil against the Board for his fees³.

3. "Suit or a particular business."—As to the meaning of the word 'suit,' see Notes to Section 2 clause 10 *ante*, according to which the word "suit" does not include an appeal or an application. The "particular business" must, it is conceived, be such business as is usually done by attorneys in the course of business, and will not include every business entrusted to a person who also happens to be an attorney. The drawing up of a conveyance or negotiating a sale

(1866) 5 Suth W R 297 (297) *Kashmath Roy Choudry v Ishur Chunder Mukherjee*

(1866) 5 Suth W R S C C Ref 1 (1) *Dwarkanath Maitro v T. J. Kenny*

(1868) 9 Suth W R 113 (114) *Rash Mohun Goswamy v Issur Chunder Mukherjee*

Note 2

1 See definition in S. 3 of the Legal Practitioners' Act, 1879

[See also (1903) 25 All 509 (521, 522) 1903 All W N 104 (F B), *C. Ross Alston v Pitambar Das* (An English or Irish Barrister enrolled as an Advocate in a High Court in India can neither sue for the recovery of, nor be sued for the return of fees for professional services as such fees are mere honoraria)]

2 (1932) A I R 1932 Bom 378 (384) 138 Ind Cas 832, *Rustomy v Fazal Rahim*

3 (1928) A I R 1928 Mad 981 (982) 111 Ind Cas 740, *Venkatasubba Rao v President Taluk Board, Repalli*

or purchase of immovable property will fall under the category of "business" It has also been held in the undermentioned case¹ that the filing and conduct of an application under Section 24 of Act 15 of 1859 is a "particular business" within the meaning of this Article

The "business" must, however, be a continuous business and if there are breaks in it, it will not be "a particular business"²

4. Application for costs by attorney or vakil.— It is only to suits by attorneys or vakils for costs that this Article applies An application for costs by an attorney, where such application is allowed under the Rules of the High Court, is not governed by this Article¹ Such applications are not governed by any Article of the Limitation Act, Article 181 being applicable only to applications under the *Civil Procedure Code*, and not under the Rules of the High Court In such cases it is in the discretion of the Court to allow or not an application for costs preferred after a length of time In exercising the discretion, the Court is not limited by any analogy of this Article, and is not bound to dismiss an application made three years after the termination of the suit or business²

Where the question arising in such an application is a complicated one and cannot be easily decided in a summary manner in the application, the Court can refer the parties to a separate suit³

5. Costs.— The expression "costs" in this Article is not limited to the out of pocket expenses incurred by the vakil or attorney but includes also the remuneration or fees payable to him¹

The fees stipulated between the client and the vakil can be recovered, without any reference to the Legal Practitioners Act, Section 27 of which only refers to the fee which is to be paid to the adversary's pleader² Where no fee had been settled, the Court will

Article 84
Notes
3-5

Note 3

- 1 (1895) 22 Cal 945 (949), *Watkins v Fox*.
- 2 (1846) 72 R R 433 (439) L R 9 Q B 741 16 L J Q B 72 11 Jur 264, *Phillips v Broadley*

Note 4

- 1 177
- (1919) A I R 1919 Cal 345 (346) 46 Cal 249 51 Ind Cas 911, *Lakhimons Dassi v Durgendra Nath*
- (1921) A I R 1921 Cal 67 (70) 48 Cal 817 66 Ind Cas 209, *Narendra Lal v Tarubala Dassi*
[See also (1931) A I R 1931 Mad 163 (163) 1931 Cr Cas 257 131 Ind Cas 158, *Ghulam Mohideen v Omer Sahib*]

Note 5

- 1 (1916) A I R 1916 Mad 836 (837) 29 Ind Cas 763, *Maharaja of Varanagram v Narasinga Rao*
- 2 (1916) A I R 1916 Mad 836 (837) 29 Ind Cas 763, *Maharaja of Varanagram v Narasinga Rao*

allow a fair and reasonable remuneration for the work done.³ Section 4 of the Legal Practitioners' Fees Act, 21 of 1926, now provides that "if no fee has been settled, a fee computed in accordance with the law for the time being in force in regard to the computation of the costs to be awarded to a party in respect of the fee of his legal practitioner," will be allowed to the vakil.

6. Lien for costs can be pleaded in defence.—In a suit by a client against his attorney for recovery of the documents and papers relating to his case, the attorney who has a lien on such papers for his costs can set up his lien as a defence to the suit notwithstanding that his claim for costs would have been barred by limitation.¹

7. Starting point.—Where the suit relates to the costs of a suit, the *terminus a quo* is the termination of the suit. Where it relates to the costs of a particular business, the *terminus a quo* is the termination of such business. Where the attorney or vakil has properly discontinued the suit or business before its termination, the *terminus a quo* will be the date of such discontinuance.

Termination of the suit

There is a difference of opinion as to whether a suit terminates with the judgment pronounced in the case. It was held in the under-mentioned cases that a suit can ordinarily be said to terminate when there is nothing more to be done in it except execution.¹ A contrary view has been held in some cases,² namely that where a decree directs that the client shall pay certain costs to be taxed, time runs only from the time when the *allocatur* is issued.

Termination of the business

Where the "business" was the prosecution of an application under Section 24 of the Act 15 of 1859, it was held that the business terminated when the judgment was delivered in the application.³ Where a petition for which the attorney was engaged resulted in an order in favour of the client in 1924, and nothing was done further till 1930 when the client instructed his attorney to have his bill of

3 (1888) 12 Bom 557 (558), *Keshav Govind v Jamsel's Cursetys*.

Note 6

1 (1889) 38 W R (Eng) 49 (51) 42 Ch D 424 62 L T 278, *Curwen v Milburn*
[See also (1910) 7 Ind Cas 399 (400) 34 Mad 167, *Kandasamy Pillai v Avayambal*]

Note 7

1 (1895) 22 Cal 952n (953), *Administrator General of Bengal v Chunder Kant Mukherjee*

(1889) 7 Bom 518 (520) 8 Ind Jnr 144, *Balakrishna Pandurung v Govind Shivas*

2 (1909) 2 Ind Cas 830 (831), 36 Cal 609, *Atul Chandra Ghosh v Lakshman Chandra Sen*

(1930) A I R 1930 Cal 651 (652) 129 Ind Cas 797 (F B), *Mt Attormani Das v. Ramesh Chunder Bose* (Per Panckridge, J. This judgment was reversed on another point)

(1884) 7 Mad 1 (2), *Narayana v Champion*.

(1876) 1 Bom 505 (506), *Hearn v Bapu Saju*

3 (1895) 22 Cal 943 (950), *Watkins v Foz*

costs taxed, it was held that the business continued till the costs were taxed ⁴

Proper discontinuance

The starting point will be the date of the termination of suit or business only if the attorney is employed *up to such termination*. Where, however, his authority is revoked even before completion of suit, the cause of action will arise on the date of such revocation, but this will be so only if the revocation is made in the proper manner provided by law. Under Order 3 Rule 4 of the Civil Procedure Code, the appointment of a pleader can only be determined with the leave of the Court by a writing signed by the client or the pleader and filed in Court, or until the client or the pleader dies, or until all proceedings in the suit are ended so far as regards the client. The mere repudiation of all liability for future costs will not furnish a starting point and the attorney's suit within three years of the termination of suit though after three years from the date of the client's notice, will be in time ⁵

Where an attorney is superseded properly by another and the Court orders on such supersession that "the costs due to the (outgoing) solicitor be taxed by the taxing officer, as between attorney and client," the solicitor is not entitled to wait till the taxation is made, and limitation commences to run from the date of his supersession and not from the date of the taxation ⁶

Article 84
Note 7

85.* For the balance due on a mutual, open and current account, where there have been reciprocal demands between the parties	Three years	The close of the year in which the last item admitted or proved is entered in the account; such year to be computed as in the account.
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Article 85

* Act of 1877, Article 85
Same as above

Act of 1871, Article 87.

Columns one and two same as above. Column three — The time of the last item admitted or proved in the account

Act of 1859, Section 8

In suits for balances of accounts current between merchants and traders who have had mutual dealings the cause of action shall be deemed to have arisen at, and the period of limitation shall be computed from the close of the year in the accounts of which there is the last item admitted or proved indicating the continuance of mutual dealings; such year to be reckoned as the same is reckoned in the accounts

4 (1931) A I R 1931 Mad 183 (184) 131 Ind Cas 159 1931 Cri Cas 237,
Ghulam Mohideen Sahib v Omar Sahib
5 (1909) 2 Ind Cas 830 (831) 36 Cal 609 Atal Chunder Ghose v Lalshman
Chunder Sen
6 (1908) 35 Cal 171 (175) (F B), Malham Lal Mulherjee v Nalin Chandra
Gupta

Article 85
Note 1

Synopsis

1. Legislativa changes.
2. Scope of the Article.
3. Mutual account and reciprocal demands.
4. Advances of loan and re-payments.
5. Advances of loan and agency.
6. Sale of goods and payments of price.
7. Each party selling goods to the other.
8. Advance of loan and sale of goods.
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12. Rent received from minor's estate and money spent for minor.
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Other Topics

Mere striking of balance is not closing accounts

See Note 14, Pt 6

Reciprocal demands—Test

See Note 3, Pts 8 to 11

Shifting balance—Test of

See Note 8, Pts 18 to 22, Note 13

Year—To be computed as in the account

See Note 17, Pts 1, 2

1. Legislativa changes.

- 1 Section 8 of Act 14 of 1859 which corresponded to this Article was confined to mutual and current accounts between merchants and traders only¹ The expression "merchants and traders" however was given a liberal interpretation²

Article 85 — Note 1

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[There is no corresponding provision in the English Law. The exception to the Statute of James on which S 8 of Act 14 of 1859 was based was abolished in England by the Mercantile Law Amendment Act, 1857]
[See (1874) 22 Buth W R 263 (264), *Chumun Lall v Soorjmun Jha*
(1864) 3 Bom H O R A C 82 (88), *Cost Fernandes v Vasudev Shanbog*]

- 2 (1931) A I R 1931 Cal 359 (372) 58 Cal 649 133 Ind Cas 801, *Tea Financ ing Syndicate Ltd v Chandra Kamal Des Barua*

2 Article 87 was the corresponding provision in Act 9 of 1871

The first and second columns were the same as the first and second columns of the present Article, but the starting point was the time of the *last item* admitted or proved in the account

3 In Article 85 of the Acts of 1877 and 1908, the words 'the time of the last item admitted or proved' which occurred in Act 9 of 1871 were substituted by the words in the third column of the present Article See Note 8 *infra*

2. Scope of the Article.—In England the Limitation Act of 1623 (21 Jac I, c 16) barred certain actions at *Common Law* after the period prescribed for such actions had expired Actions on accounts relating to trade between merchant and merchant were however excluded from the operation of the Act and there was no limitation for such suits Actions on accounts between persons other than merchants were governed by the Act But in such cases, every new item and credit in the account given by one party to the other was regarded as an *implied acknowledgment* of the prior existing debt, sufficient to take the case out of the statute¹ Thus, in *Callling v Skoulding*,² decided in 1795 Lord Kenyon observed as follows

"Here are mutual items of account, and I take it to have been clearly settled as long as I have any memory of the practice of the Courts that every new item and credit in the account given by one party to the other is an admission of there being an unsettled account between them, the amount of which is afterwards to be ascertained and any act which the jury may consider as an acknowledgment of its being an open account is sufficient to take the case out of the statute

The doctrine of implied acknowledgments in cases of accounts between non merchants was abolished in England by Lord Tenterden's Act, 1828 and the exception in this Statute of James as regards actions on accounts between merchants was also abolished by the Mercantile Law Amendment Act, 1857³

In 1859 the Indian Legislature however, enacted in S 8 of the Limitation Act the principle of *Callling v Skoulding*⁴ as between merchants and traders and provided that 'in suits for balances of accounts current between merchants and traders'^{5a} who have had

(1867) 2 Ind Jur (N S) 241 *Ghasseram v Manohur Doss* (Per Sir Barnes Peacock)

Note 2

1 (1931) 4 I R 1931 Cal 359 (366) 58 Cal 649 133 Ind Cas 601, *Tea Financing Syndicate Ltd v Chandra Kamal Des Barua*

2 (1795) 101 F R 504 (506) 6 T R 189

3 (1931) 4 I R 1931 Cal 359 (366 367) 58 Cal 649 133 Ind Cas 601 *Tea Financing Syndicate Ltd v Chandra Kamal Des Barua*

4 (1795) 101 F R 504 (506) 6 T R 189

5a See (1867) 7 Suth W R 67 (71 '2) *Mt Phool Koomaree Fibee v Woonkar Pershad Pustobu*

(1868) 10 Suth W R 56 (57), *Peary Mohun Bose v Gobind Chunder Idly*

(1875) 24 Suth W R 410 (410) *Bussessur Car v Sree Eswen Shaha Choudhry*

Article 85

Notes

2—3

mutual dealings, the cause of action should be deemed to have arisen at, and the period of limitation to be computed from, the close of year in the accounts of which there is the last item admitted or proved *indicating the continuance of mutual dealings*”

Article 87 of the Act of 1871 corresponding to this Article extended the above principle to suits on mutual accounts between *all* persons

The object of this Article is, thus, in effect, to apply the old English Common Law of acknowledgment (which is different from the acknowledgments and payments referred to in Sections 19 and 20 of this Act) to a certain type of cases for the purpose of exempting the plaintiff from the principle that limitation runs against each item from its date, and to provide that if the last item is within time it will draw the previous items after it, however old they may be, although there has been no acknowledgment or payment sufficient to comply with the conditions imposed by Sections 19 and 20 of the Act⁵

3. Mutual account and reciprocal demands. — It has always been recognised that the exemption of suits on accounts from the normal rule that limitation runs against each item from its date, applies only where there are transactions on either side *creating independent obligations* on the other. Thus, in *Raja Syud Ahmed Reza v Syud Enayat Hussain*,¹ a case which arose under the old Limitation Regulation of 1793,² Mr Justice Trevor observed that the rule that limitation will run from the date of the last item in the case of an action on a mutual account, was strictly confined to accounts between parties which show a *reciprocity of dealings*, or in other words, to transactions in which there was a *mutual credit* founded on a *subsisting debt on the other side*, or an express or implied agreement for a set off of mutual debts

Section 8 of the Act of 1859 provided, as has been seen in Note 2 above the period of limitation for suits for the balances of accounts on *mutual dealings*. In *Hirada Basappa v Gadigi Muddappa*,³ Holloway, Ag C J, observed that in order to constitute “mutual dealings”

“there must be transactions on each side, creating independent obligations on the other, and not merely transactions which create obligations on the one side those on the other being merely complete or partial discharges of such obligations”

This Article also has been so framed as to bring out more clearly the ideas expressed⁴. It requires that —

5 (1931) A I R 1931 Cal 359 (367) 58 Cal 649 133 Ind Cas 601, *Tea Financing Syndicate Ltd v Chandra Kamal Bes Barua*

Note 3

1 (1864) 1864 Suth W R 235 (236)

2 Regulation III of 1793

3 (1871) 6 Mad H O R 142 (144)

4 (1928) A I R 1923 Bom 82 (84) 47 Bom 128 76 Ind Cas 115, *Satappa Jakappa v Annappa Basappa* (“Mutual dealings” in Section 8 of Act of 1859 would ordinarily indicate a mutual, open and current account where there have been reciprocal demands)

- 1 there must be a mutual account, and
- 2 there must have been reciprocal demands between the parties⁵

Article 85
Note 3

The expression "mutual account" may be taken to mean an account in which the parties to a course of business have agreed to bring their items of debits and credits together with a view to set them off against each other and arrive at a balance⁶

A "demand," in relation to a matter of account, means a *claim for money* arising out of a *contractual business relationship* between the parties. Where the dealings between the parties disclose a *single* contractual relationship, there will be demands only in favour of one of the parties. Thus, where the relationship between A and B is that of lender and borrower respectively, A will have a "demand" against B in respect of every item of loan advanced. But B can have no demand against A. If he makes payments in discharge of the loan, the payments cannot constitute "demands" against A. (See Note 4 *infra*). Even if B makes over-payments by mistake, the right to recover it from A does not make it a demand against A within the meaning of this Article, because it does not arise out of the contractual relationship of lender and borrower⁷.

Where the dealings between the parties disclose *two* contractual relationships between the parties, there may arise demands in favour of each side against the other. Thus, where A advances money to B

- 5 (1923) A I R 1923 Bom 82 (84) 47 Bom 128 76 Ind Cas 115 *Satappa Jakappa v Annappa Dasappa* (Dissenting from A I R 1921 Bom 451)
(1921) A I R 1921 Lah 256 (256) 67 Ind Cas 933 *Hardial v Pohhar Das*
(1922) A I R 1922 Lah 338 (341) 71 Ind Cas 259 *Abdul Haq v Firm Shitaji Ram Khem Chand*
(1915) A I R 1915 Low Bur 148 (150) 27 Ind Cas 879 8 Low Bur Rul 149, *Ebrahim Ahmed v Abdul Haq*
(1936) A I R 1936 Rang 495 (495) 1937 R L R 240 166 Ind Cas 131, *Ramasamy Chettiar v M S M Chettiar Firm*
[But see (1921) A I R 1921 Bom 451 (452) 63 Ind Cas 950 *Vadhav Motiram v Jairam Sakhamam* (Test is whether the dealings are mutual and not whether there are reciprocal demands — This view has not been accepted in any other case and has been dissented from in A I R 1923 Bom 62)]
(1925) A I R 1925 Nag 295 (296) 87 Ind Cas 632 *Motiram v Gambhir Prasad*
- 6 (1931) A I R 1931 Cal 359 (367) 58 Cal 643 133 Ind Cas 801 *Tea Financing Syndicate Ltd v Chandra Kamal Bez Darwa*
(1907) 6 Cal L Jour 159 (162) *Ram Pershad v Harbans Singh*
(1938) A I R 1938 Lah 264 (266), *Basheshwar Nath v Baij Nath*
- 7 (1923) A I R 1923 Pat 242 (242) 72 Ind Cas 135 *Ram Sunder v Amrit*
(1922) A I R 1922 Pat 304 (307) 66 Ind Cas 30 *Copel Das v Firm Harchand Ram Anant Ram*
(1933) A I R 1933 Nag 50 (51) 29 Nag L R 20 142 Ind Cas 123 *Gobuldas v Radhakishen* (Casual overpayment)
(1928) A I R 1928 All 236 (238) 105 Ind Cas 634 50 All 645 *Dau Dayal v Peary Lal*
(1904) 7 Bom L R 151 (153) *Haji Abdul v Hajee Fakce* (Where distinguishing 5 Cal 757, it was observed that there might be settling balance in the case, but no reciprocity of account (i.e. demand))
(1880) 5 Cal 759 (763) 6 Cal L R 112 *Hajee Syed Muhammad v M Ashraf-unnissa*

Article 85

Note 3

from time to time as loans, and *B* engages *A* as his agent for the sale of goods sent by *B*, there are two contractual relationships between the parties—one that of lender and borrower and the other, that of principal and agent. *A* as creditor may have several demands against *B* and *B* as principal may have, independently, several demands against *A*. *A* and *B* would have reciprocal demands against each other. (See Note 5)

The real test therefore to see whether there have been reciprocal demands in any particular case is to see whether there is a *dual contractual relationship* between the parties.⁸ And this idea has been expressed in various ways—

- 1 that there should be two sets of independent transactions between the parties, in one of which one of the parties should hold the position of debtor and the other a creditor, and in the other, the reverse position.⁹
- 2 that the dealings should disclose *independent obligations* on both sides and not merely obligations on one side, the acts done by the other being merely discharges of such obligations.¹⁰ and

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- 8 (1928) A I R 1928 All 236 (237-238) 108 Ind Cas 694 50 All 645 *Dau Dayal v Peary Lal*
[See also (1913) 21 Ind Cas 773 (774) (Mad) *Naribherunall Chetty v Kottayya*]
- 9 (1928) A I R 1928 All 236 (237-238) 108 Ind Cas 694 50 All 645 *Dau Dayal v Peary Lal*
[But see (1937) A I R 1937 Rang 340 (343) 172 Ind Cas 837 1937 R L R 251 *Bengal Burma Trading Co v Burma Loan Bank Ltd* (To constitute a mutual account there need not be two independent sets of transactions.—It is sufficient if there be only one set of transactions but that set creates alternately debits and credits which are to be set off against one another.)]
- 10 (1904) 7 Bom L R 151 (153) *Haji Abdul v Haji Dabee*
(1933) A I R 1933 Bom 450 (455) 145 Ind Cas 630 59 Bom 200 *Karsondas v Surajbhan*
(1931) A I R 1931 Cal 359 (368) 58 Cal 649 183 Ind Cas 801 *Tea Financing Syndicate Ltd v Chandra Kausal Bez Darua*
(1936) A I R 1936 Cal 382 (385) 166 Ind Cas 900 *Bejoy Kumar Bhatla charjee v Firm Satish Chandra Nandi*
(1928) 111 Ind Cas 791 (792) (Lah) *Canda Singh v Bhana Ram Salig Rai*
(1920) A I R 1920 Lah 25 (26) 54 Ind Cas 453 *Dogarmal v Mula*
(1921) A I R 1921 Lah 369 (369) 59 Ind Cas 669 *Ratan Chandra Jwala Das v Asa Singh Bhoga Singh*
(1923) A I R 1923 Lah 347 (349) 73 Ind Cas 916 *Firm Rup Chand Jwan Singh v Firm Poho Mal Nathu Val*
(1923) A I R 1923 Lah 636 (638) 79 Ind Cas 998 *Thakur Das v Firm Bishan Das Mewa Rai*
(1973) A I R 1923 Mad 278 (279) 71 Ind Cas 466 *Kunhi Kuthals v Kunhammad*
(1926) A I R 1926 Mad 224 (224) 92 Ind Cas 106 *Govinda Nandan v Ramasamy Chettiar*
(1927) A I R 1927 Mad 819 (819) 103 Ind Cas 48 *Subramanyam Chettiar v N P L A R Firm*
(1936) A I R 1936 Rang 495 (495-496) 1937 R L R 240 166 Ind Cas 134 *Pamasamy Chettiar v M S M Chettiyar Firm*
(1894) 17 Mad 293 (295) 4 Mad L Jour 140, *Velu Pillai v Ghose Mahomed*

3 that each party must be able to say to the other "I have an account against you" ¹¹

Article 85
Note 3

The parties may, however, agree to their accounts in respect of the two transactions to be kept *separate*. In such case, although there may be reciprocal demands there cannot be any *mutual account* ¹²

An examination of the decided cases under this Article shows that the actual decisions themselves in most of the cases can all be supported on the basis of the views expressed above. But the reasoning in some of the decisions is open to question.

Thus, in one class of decisions it has been stated that the expression 'mutual accounts' involves in itself reciprocity of demands ¹³. In other words, it has been assumed that the two expressions are redundant, or that one merely explains the other ¹⁴. It is clear from the discussion that the above two expressions do not involve each other and can be construed as having different ideas. It is a general principle of the construction of statutes that no expression should be construed as being merely a surplusage if it can be avoided ¹⁵.

In the undermentioned cases ¹⁶ the view was expressed that the words "where there have been reciprocal demands" meant that there must have been *actual* demands made by each party on the other.

- (1923) A I R 1923 Rang 18 (20) 11 Low Bur Rul 369 68 Ind Cas 928
Arunachallari Chetty v Somasundaram Chetty
- (1909) 4 Ind Cas 261 (262) 32 All 11, *Chittar Mal v Behari Lal* (22 Bom 606 Followed)
- 11 (1880) 5 Cal 759 (763) 6 Cal L R 112 *Hajee Syud Mahomed v Mt Ashrufoonnissa*
- (1904) 7 Bom L R 151 (153) *Haji Abdul v Haji Bibee*
- (1917) A I R 1917 All 465 (466) 35 Ind Cas 199 39 All 33 *Bank of Multan Ltd v Kamla Prasad*
- (1931) A I R 1931 Cal 859 (872) 58 Cal 649 133 Ind Cas 801 *Tea Financing Syndicate Ltd v Chandra Kamal Bez Barua*
- (1934) A I R 1934 Lah 358 (360) 15 Lah 652 152 Ind Cas 620 *Punjab United Bank Ltd Lahore v Mohammad Hussain*
- (1924) A I R 1924 Pat 107 (109) 74 Ind Cas 631 *Eyzabad Bank Ltd v Ramdayal*
- (1928) A I R 1928 Pat 221 (222) 7 Pat 238 107 Ind Cas 533 *Joharmal Mathuradas v Hira Lal Shewchand*
- (1936) A I R 1936 Rang 495 (496) 1937 Rang L R 210 166 Ind Cas 131 *Namaswamy Chettiar v M S Chettiar & Co*
- (1898) 22 Bom 606 (609 610) *Ganesh v Gyanu*
- 12 (1931) A I R 1931 Cal 359 (372) 58 Cal 649 133 Ind Cas 801 *Tea Financing Syndicate Ltd v Chandra Kamal Bez Barua*
- 13 (1907) 6 Cal L Jour 158 (160) *Ram Iershad v Harbans Singh*
- (1935) A I R 1935 All 53 (51) 155 Ind Cas 44 *Puttulal v Jagannath*
- (1925) A I R 1925 Pat 221 (222) 7 Pat 238 107 Ind Cas 533 *Joharmal Mathuradas v Hira Lal Shewchand*
- (1923) A I R 1923 Rang 18 (20) 11 Low Bur Rul 369 68 Ind Cas 928,

Mishin Lal

- 14 (1921) 1
Jayram Sakharam

Motiram v

15. See cases in Preamble Note 7 Foot Note 15

- 16 (1880) 5 Cal 759 (763) 6 Cal L R 112 *Hajee Syud Mahomed v Mt Ashrufoonnissa*

(1893) 1893 All W N 31 (35), *Fallah Star-Iar v Jam Kunar*.

Article 85 Note 3

This view proceeds on the assumption that a "demand" means a "request." This view is not correct and has not been followed in the majority of cases¹⁷

In a third class of cases¹⁸ it has been held that the test for the applicability of the Article is to see whether there *has been a shifting balance* in favour of each side in the account. This view has been qualified in some cases by the statement that the dealings between the parties must be such that sometimes the balance *may* be in favour of one party and sometimes in favour of the other¹⁹. In some cases it has been stated that the test of shifting balance, though valuable as an index of the nature of dealings, is not by itself decisive, and that the absence of a shifting balance is not conclusive on the question²⁰.

17 (1931) A I R 1931 Cal 359 (367) 58 Cal 649 133 Ind Cas 801, *Tea Financing Syndicate Ltd v Chandra Kamal Bez Barua*

(1921) A I R 1921 Lah 256 (256) 67 Ind Cas 933, *Hardial Ramchand Shop v Pokhar Das*

(1936) A I R 1936 Rang 495 (495) 166 Ind Cas 134 1937 Rang L R 240, *Ramasamy Chettiar v V S M Chettiar Firm*

(1923) A I R 1923 Bom 82 (85) 47 Bom 128 76 Ind Cas 115, *Satappa Jakappa v Annappa Basappa*

(1914) A I R 1914 Mad 717 (719) 24 Ind Cas 128, *Saiecar Bapu Saib Yussuf Saib & Co v Isocet Ismail & Co*

18 (1934) A I R 1934 All 386 (387) 149 Ind Cas 651, *Radha Mohan v Anand Chand* (The relationship between the parties in this case seems to have been merely that of lender and borrower)

Lal (There

v Harchand

Ram Anant Ram

19 (1882) 8 Bom 134 (138), *Narrandas Hemraj v Vissandas Hemraj*

(1928) A I R 1928 Nag 127 (128) 106 Ind Cas 53, *Sitaramsa v Amrmbuz*

(1933) A I R 1933 Bom 450 (455) 145 Ind Cas 630 58 Bom 200, *Karsondas v Surajbhan*

(1907) 6 Cal L Jour 158 (160 161) *Ram Pershad v Harbans Singh* (The decision that the account was not within the Article, proceeded however on the ground that the balance did not shift except in one instance. What exactly was the nature of the dealings is not clear)

(1925) A I R 1925 Nag 2 (4) 20 Nag L R 106 79 Ind Cas 1002, *Chitnatis v Nathu Sao*

(1890) 1890 Bom P J 295 *Mangalore Krishnappa v Bakminsda*

(1896) 1896 All W N 186 (186, 187), *Bhawan Singh v Tyka Ram*

(1910) 7 Ind Cas 715 (716) 1910 Pun Re No 75, *Imrat Lal v Lal Chand*

(1923) A I R 1923 Mad 278 (279) 71 Ind Cas 466, *Kunhikutthali v. Kunhammad*

(1923) A I R 1923 Bom 82 (85) 47 Bom 128 76 Ind Cas 115, *Satappa Jakappa v Annappa Basappa*

(1927) A I R 1927 Bom 225 (226) 102 Ind Cas 225, *Premji Viraji v. Edward Elias Sassoon*

(1922) A I R 1922 Oudh 124 (126), *Banke Lal v Kanhya Lal*

20 (1898) 22 Bom 606 (609) *Ganesh v Gyanu*,

(1915) A I R 1915 Lah 279 (280) 30 Ind Cas 491 1916 Pun Re No 16, *Jas Ram v Altar Chand*

(1894) 17 Mad 293 (295) 4 Mad L Jour 140, *Velu Pillai v Ghose Muhammad*

(1933) A I R 1933 Nag 50 (51) 29 Nag L R 20 142 Ind Cas 123, *Gokuldas v Radhakisan*

(1924) A I R 1924 Pat 107 (109) 74 Ind Cas 831, *Fyzabad Bank v. Ramdayal*

In the undermentioned cases²¹ it has been held that even the existence of a shifting balance is not conclusive on the question. It is submitted that the test of shifting balance is not a correct test.²²

A fourth class of cases have purported to follow the English case of *Phillips v Phillips*,²³ where Vice Chancellor Turner observed as follows

"I understand a mutual account to mean not merely where one of two parties has received money and paid it on account of the other, but where each of two parties has received and paid in the other's account."

It has been accordingly held in the said cases²⁴ that where one party has received and paid money on account of the other but the other has not received and paid money on account of the former, the account is not a mutual one within the meaning of this Article. It is submitted that this view also is incorrect. Where each party does receive and pay on behalf of the other, it may no doubt be a case of reciprocal demands. But, as has been observed by Rankin, C J, in *Tea Financing Syndicate v Chandra Kamal Bez Barua*²⁵ distinguishing *Phillips v Phillips*,²⁶ that is not the only type of cases coming within Article 85. In the case of *Phillips v Phillips*,²⁷ one party had received and paid money on the other's behalf and it was argued that this was sufficient to constitute the account a mutual one so as to enable the party to come to a Court of Equity with his suit on the account. It was held that this was not sufficient but that each party should have received and paid money on the other's behalf.

See also the undermentioned cases²⁸

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- (1928) A I R 1928 Pat 221 (222-223) 7 Pat 238 107 Ind Cas 533, *Johar mal Mathuradas v Hira Lal Shewchand*
 (1923) A I R 1923 Rang 18 (20) 68 Ind Cas 928 11 Low Bur Rul 369
Arunachallam Chetty v Somasundaram Chetty
 (1911) 12 Ind Cas 673 (676) (Mad) *Subba Naidu v Ethirajammal*

 (1933) A I R 1933 Nag 50 (51) 29 Nag L R 20 142 Ind Cas 123 *Gokuldas v Radhakrishnan*
 22 (1912) 17 Ind Cas 48 (48) (Mad) *Thuppathi Veeras Chetty v Renganayakulu Aiyar*
 (1923) A I R 1923 Nag 103 (103) 65 Ind Cas 681 *Pandurang v Kaludas*
 23 (1852) 68 E R 596 (597) 9 Hare 471
 24 (1931) A I R 1931 Lah 241 (242) 12 Lah 420 134 Ind Cas 513, *Ram Dhan v Md Dost Khan*
 (1907) 6 Cal L Jour 158 (162) *Ram Pershad v Harbans Singh*
 (1927) A I R 1927 Mad 819 (819) 103 Ind Cas 48 *Subramaniam Chettiar v N P L & F Firm*
 (1915) A I R 1915 Low Bur 148 (151) 27 Ind Cas 679 6 Low Bur Rul 149
Fbrahim Ahmed v Abdul Huq
 25 (1931) A I R 1931 Cal 359 (367) 58 Cal 649 133 Ind Cas 601
 26 (1852) 68 E R 596 (597) 9 Hare 471
 27 (1852) 68 E R 596 (597) 9 Hare 471
 28 (1932) A I R 1932 Bom 593 (594) 140 Ind Cas 624 *Lakshmi v Hombanna*

Article 85 Notes 4

4. Advances of loan and repayments. — It has been seen in Note 3 above that where *A* lends money to *B* on various occasions and *B* makes several payments to *A* at different times in discharge of the said loans, there cannot be demands on both sides. See the undermentioned cases¹. There being no reciprocal demands, a suit for the balance on an account of such a transaction is not within this Article². There is no difference in principle where the payment in discharge is in money or by way of sending goods³.

Where *A* was employed by *B* and was in the habit of drawing advances against his salary, it was held in the undermentioned cases⁴ that the account was merely a debtor and creditor account and that Article 85 did not apply. On similar facts it was held in the cases cited below⁵ that it was a case of reciprocal demands and that the Article applied.

(1930) A I R 1930 Bom 5 (11) 53 Bom 652 121 Ind Cas 581, *Appa Dada v Ramkrishna Vasudeo* (There were cross dealings & separate dealings between both parties)

(1938) A I R 1938 Lah 264 (266) *Bakeshar Nath v Baij Nath* (In order to apply Article 85 mutual obligations and intentions to set off must be established—Express contract need not be proved)

Notes 4

- 1 (1875) 24 Suth W R 390 (390-391) *Thakur Pershad Singh v Mohesh Lall*
- (1921) A I R 1921 Lah 256 (256) 67 Ind Cas 933 *Hardial Ram Chand Shop v Pokhar Das*
- (1917) A I R 1917 Lah 166 (167) 37 Ind Cas 800 *Budh Ram v Ralli Ram*
- (1931) A I R 1931 Lah 241 (242, 243) 12 Lah 420 184 Ind Cas 513 *Ram Dhan v Md Dost Khan*
- 2 (1917) A I R 1917 All 465 (466) 35 Ind Cas 199 39 All 83 *Bank of Multan Ltd v Kamla Prasad*
- (1927) A I R 1927 Bom 225 (226) 102 Ind Cas 225 *Premji Virji v Eduard Elias Sassoon*
- (1882) 1882 Pun Re No 58 *Sadulla Khan v Bhana Mal*
- (1933) A I R 1933 Lah 12 (13) 140 Ind Cas 187 14 Lah 14 *Dasaundhi Rani v Mool Chand*
- (1894) 17 Mad 293 (296) 4 Mad L Jour 140 *Velu Pillai v Ghose Muhammad*
- (1911) 12 Ind Cas 673 (674) (Mad) *Subba Naidu v Ethirajammal*
- (1912) 17 Ind Cas 48 (48) (Mad) *Thuppati Veeri Chetti v Renganayakulu*
- (1936) A I R 1936 Rang 495 (496) 1937 Rang L R 240 166 Ind Cas 134 *Firm*
- ul 369 68 Ind 923 *Arund*
- 142 Ind Cas 123 *Gokuldas v Radhakrishnan*
- (1922) A I R 1922 Oudh 124 (127) *Banke Lal v Kanhasya Lal*
- 3 (1923) A I R 1923 Lah 636 (638) 79 Ind Cas 993 *Thakur Das v Bishan Das* (Grains sent in discharge of loans—Account held not mutual)
- (1910) 8 Ind Cas 141 (142) 34 Mad 513 *Shiv Gowda v C S Fernandes*
- ea Financ
- Ralli Rani
- Chettiar v
- 79 Ind Cas
- as not even
- contemplated—Therefore Article does not apply]]
- 5 (1925) A I R 1925 Nag 296 (296) 57 I C 832, *Motiram v. Gambhir Prasad*
- (1923) A I R 1923 Nag 103 (103) 65 Ind Cas 881, *Pandurang v Kalludas*

5. **Advances of loan and agency.** — Where *A* lends money to *B* in one capacity and acts as his agent in another capacity, and the two accounts are put together, it is clear that the account will be a mutual account as explained in Note 3. It is also clear, as explained in that Note, that *A* will have demands against *B* in respect of the loans and *B* will have demands against *A* in respect of the agency. *A* and *B* will thus have "reciprocal demands" between them and a suit on the account would be governed by this Article.¹ In *A. Watson v.*

Note 5

- 1 (1904) 7 Bom L R 151 (152), *Haji Abdul v Haji Dabee*
(1928) A I R 1928 All 236 (238) 108 Ind Cas 694 50 All 645, *Dan Dayal v Pearey Lal*
(1926) A I R 1926 Lah 283 (283) 92 Ind Cas 674 *Firm Bihari Lal Jay Narain v Har Narain Das* (Advances by discounting hundies—
(1928) 112 Ind Cas 715 (716) (All) *Firm Baldeo Prasad Babu Ram v Firm Haji Ali Muhammad Usman*
(1931) A I R 1931 Cal 859 (368) 58 Cal 649 133 Ind Cas 801 *Ten Financing Syndicate Ltd v Chandra Kamal Bez Barua*
(1921) A I R 1921 Lah 369 (369) 59 Ind Cas 669, *Ratanchand Jwala Das v Asa Singh Bhogha Singh*
(1922) A I R 1922 Lah 838 (341) 71 Ind Cas 250 *Abdul Haq v Firm Shivji Ram Khem Chand*
(1915) A I R 1915 Mad 1001 (1002) 29 Ind Cas 462 (F B) *Bapu Sahib Yousuff Sahib & Co v Isaac Ismail & Co* (Confirming A I R 1914 Mad 717)
(1922) A I R 1922 Lah 189 (188) 62 Ind Cas 693 *Ratanchand Jwala Das v Asa Singh Bhogha Singh*
[See also (1923) A I R 1923 Mad 278 (279) 71 Ind Cas 466 *Kunhi Authial v Kunhammad* (Plaintiff was agent of the defendants
to be accounted for)
(1927) A I R 1927 Bom 225 (226) 102 Ind Cas 225, *Premji Varji v Edward Elias Sassoon*
[But see (1915) A I R 1915 Low Bur 148 (151) 27 Ind Cas 879 8 Low Bur Rul 149 *Ebrahim Ahmed v Abdul Haq* (In this case also A was agent of B and had also advanced moneys to B But it was held not to be mutual account following *J Phillips v Phillips* (1852) 9 Hare 471, since B had not paid on behalf of A—Submitted wrong)
(1931) A I R 1931 Lah 233 (234) 131 Ind Cas 292 *Mulla's Firm Herra Raj v Pup Chand Lachman Das* (There A was creditor as well as agent of B—Query whether Article applies)

Article 85
Notes
5—6

Aga Mahedee,² a case which arose under the Act of 1859, *A* advanced money to *B* as loans, and *B* appointed *A* as his agent for selling the timber which *B* undertook to send to *A* from time to time. They also agreed that *A* should deduct the expenses of the sale and commission and credit the balance of the proceeds of the sale to the loan transaction. They also agreed that on the adjustment of the account, *B* would be bound to pay *A* such balance as might be found due from him. It was held by their Lordships of the Privy Council that the account was one continuous account between principal and agent with debits and credits on each side of it, and that the contract was to pay the balances of that account where it should be struck, and that the case therefore fell within Section 8 of the Act of 1859. The case would now clearly fall within this Article.

B engaged *A* as his agent for working his boats and authorized him to receive the money payable by people using the boats, and to pay on his account money for expenses incurred in and for working the boats, *A* did so and kept account of the receipts and payments. It was held that the money received by *A* was to that extent *B*'s demand and the payment made by *A* at *B*'s request to third persons and the payments made to him and the payments for the expenses of working the boats and commission was to that extent *A*'s demand that there were reciprocal demands, and that Article 85 applied to the case.³

6. Sale of goods and payments of price.—Where *A* sells goods to *B* from time to time and *B* makes payments towards the price from time to time there is only a *single* contractual relationship namely that of buyer and seller between the parties. *A* has demands against *B* for each item sold, but *B* can have no demands against *A*. The case is not one of reciprocal demands and this Article will not apply to suits on such accounts. The decisions¹ which have held that such cases are not within this Article can all be supported on the above principle though, as has been seen in Note 3 *ante* the reasons adopted by some of them are open to question.

(1930) A I R 1930 Lah 711 (712) 126 Ind Cas 65 *Salamat Rai Basanta Mal v Munial Brijlal* (There were advances of loan and also agency in this case. The decision cannot be accepted as correct.)

(1910) 8 Ind Cas 141 (142 144) 34 Mad 513 *Shiva Gouda v Fernandez* (*A* made advances to *B*. *B* sent coffee to *A* to be sold by *A* and the proceeds credited to *B*.—Held no two relationships and no independent obligations but merely

Note 6

- 1 (1935) A I R 1935 All 53 (54) 155 Ind Cas 44 *Patlu Lal v Jagannath*
- (1936) A I R 1936 Cal 382 (325) 166 Ind Cas 900 *Dejoy Kurian v Satish Chandra*
- (1925) A I R 1925 Pat 806 (807) 88 Ind Cas 747, *W K Dansford v B D Shaw & Co* (Goods supplied on credit—Payment made on presentation of bills.—Smt to recover price is governed by Art 52 and not by Art 85.)

7. Each party selling goods to the other. — Where each party sells goods to the other to be paid for by the other, there are two independent transactions or relationships between the parties creating independent and reciprocal demands. A suit on an account of such transactions will be governed by this Article¹

8. Advance of loan and sale of goods. — Where *A* advances money to *B* as loan, and *B* sells goods to *C* as an independent transaction, there are two contractual relationships between the parties giving rise to reciprocal demands. A suit for an account in which the two transactions have been brought together would be governed by this Article¹

9. Deposits and withdrawals of money. — Where *A* deposits various amounts at different times with *B* and draws money at various times from *B* whenever wanted, such amounts being on several occasions over-drafts, it must be regarded that the parties have a dual relationship of lender and borrower, unless such over drafts are accidental over-payments. The Article will apply to accounts of such transactions¹. A contrary view was held in the undermentioned case². It is submitted that having regard to the facts, the decision does not seem to be correct.

10. Loans by each party to the other. — Where *A* draws *Jundis* upon *B*, and *B* similarly draws *hundis* upon *A*, without the parties intending that the *hundis* drawn upon *A* should be merely in discharge of the *hundis* drawn upon *B*, it has been held that the account would be within this Article¹. In such cases there would be a dual relationship between *A* and *B*, first, that of *A* being the lender and *B* the borrower and secondly, of *B* being the lender and *A* the borrower. There would, consequently, be reciprocal demands between

(1923) A I R 1923 Pat 242 (212) 72 Ind Cas 135 *Ram Sunder v Anirudh Pajiyar*

(1930) A I R 1930 Oudh 297 (283) 128 Ind Cas 276 6 Luck 7 *Lalji v Ghass Ram* (In the nature of the dealings, purchaser cannot have a demand against the seller)

(1935) A I R 1935 Mad 932 (933) 159 Ind Cas 429 *Anithra Rice Mill v Narasimha Rao*

Note 7

1 (1887) 10 Mad 259 (264) *Sitayya v Rangareddi*

Note 8

1 (1910) 7 Ind Cas 715 (716) 1910 Pun Re No 75 *Imrat Lal v Lalchand*

(1924) A I R 1924 Pat 107 (110) 74 Ind Cas 831 *Eyrybad Bank v Ramdaval*

Note 9

1 (1880) 1886 Pun Re No 44 *Sacca Ram v Mohan Singh*

(1924) A I R 1924 Pat 107 (109) 74 Ind Cas 831 *Eyrybad Bank Ltd v Ramdaval Marwari*

(1891) 3 All 523 (526) 1891 All W N 19 *Khushalo v Belary Lal*

(1934) A I R 1934 Lah 358 (360) 15 Lah 652 152 Ind Cas 626 *Punjab United Bank Ltd v Muhammad Hussain*

2 (1906) A I R 1926 Mad 221 (224) 92 Ind Cas 107 *Gorindri Nadin v Ramasamy Chettiar*

Note 10

1 (1841) 6 R m 191 (184) *Narayan Lal Hemraj v Ferozuddin Hemraj*

Article 85
Notes
6—6

Aga Mahedee,² a case which arose under the Act of 1859, *A* advanced money to *B* as loans, and *B* appointed *A* as his agent for selling the timber which *B* undertook to send to *A* from time to time. They also agreed that *A* should deduct the expenses of the sale and commission and credit the balance of the proceeds of the sale to the loan transaction. They also agreed that on the adjustment of the account, *B* would be bound to pay *A* such balance as might be found due from him. It was held by their Lordships of the Privy Council that the account was one continuous account between principal and agent with debits and credits on each side of it, and that the contract was to pay the balances of that account where it should be struck, and that the case therefore fell within Section 8 of the Act of 1859. The case would now clearly fall within this Article.

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(1930) A I R 1930 Lah 711 (712) 126 Ind Cas 65 *Salamat Bai Basanta Mal v Muntal Brijlal* (There were advances of loan and also agency in this case. The decision cannot be accepted as correct.)

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Note 6

- 1 (1935) A I R 1935 All 53 (54) 155 Ind Cas 44 *Pattu Lal v Jagannath*
 (1936) A I R 1936 Cal 382 (385) 166 Ind Cas 900 *Bejoy Kumar v Salish Chandra*
 (1925) A I R 1925 Pat 806 (807) 88 Ind Cas 747 *W. K. Dansford v B. D. Shaw & Co* (Goods supplied on credit—Payment made on presentation of bills.—Suit to recover price is governed by Art 52 and not by Art 85.)

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10. Loans by each party to the other. — Where *A* draws *kundis* upon *B*, and *B* similarly draws *kundis* upon *A*, without the parties intending that the *kundis* drawn upon *A* should be merely in discharge of the *kundis* drawn upon *B*, it has been held that the account would be within this Article¹. In such cases there would be a dual relationship between *A* and *B*, first, that of *A* being the lender and *B* the borrower and secondly, of *B* being the lender and *A* the borrower. There would consequently, be reciprocal demands between

(1923) A I R 1923 Pat 242 (242) 72 Ind Cas 135 *Ram Sunder v Amrit Pajiyar*

(1930) A I R 1930 Oudh 287 (283) 128 Ind Cas 276 *G Luck 7, Lalji v Ghani Ram* (In the nature of the dealings, purchaser cannot have a demand against the seller)

(1935) A I R 1935 Mad 982 (983) 153 Ind Cas 429 *Andhra Rice Mill v Narasimha Rao*

Note 7

1 (1935) 10 Mad 250 (264) *Sitayya v Rangareddi*

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1 (1886) 18 G Pun Re No 44 *Sewa Ram v Mohan Singh*

(1924) A I R 1924 Pat 107 (109) 74 Ind Cas 831 *Fyzabad Bank Ltd v Ramdayal Marwari*

(1891) 8 All 523 (526) 1891 All W N 19 *Khushal v Behary Lal*

(1934) A I R 1934 Lah 359 (360) 15 Lah 652 152 Ind Cas 626 *Punjab United Bank Ltd v Muhammad Hussain*

2 (1926) A I R 1926 Mad 224 (224) 92 Ind Cas 107 *Gowind Nadin v Parasamy Chettiar*

Note 10

1 (1851) 6 R m 194 (185) *Narrar Lal Hemraj v Fuzardas Hemraj*

Article 85
Notes
10—13

them Where each party charges interest for the amounts advanced by him to the other party, it would be an indication that each party has lent moneys to the other and not merely that one advance is merely by way of repayment of the other advance.²

11. Casual or mistaken entries. — It has been seen in Note 3 that a casual over payment, where there is a single relationship of debtor and creditor between the parties does not create a demand within the meaning of this Article, inasmuch as the right to claim back the over payment does not arise on the relationship of lender and borrower. The same principle was held in the undermentioned case¹ to apply where the transaction between the parties was for *A* to sell goods to *B* and for *B* to pay the price thereof, but *B* had sold goods to *A* once or twice. The case purported to follow *Velu Pillai v Ghose Muhammad*². In that case however, it was held that the casual sales were merely a mode of payment of the price of the goods bought from the other side and not as part of a business giving rise to reciprocal demands. See also the undermentioned case.³

12. Rent received from minor's estate and money spent for minor. — Where *A* was receiving rents from the property belonging to a minor and independently spent also moneys from his own pocket for the expenses of the minor, each party would have demands against the other. The case is one where there have been reciprocal demands and consequently a suit on an account of such transactions is within this Article.¹

13 Shifting balance need not exist throughout the dealings. — Where the balance shifted in the account up to a particular stage and then was all one way, it was held in some cases¹ that it ceased to be a mutual account within this Article from the last item of defendant's payment. It is submitted that this view is not correct.²

² (1897) 22 Bom 606 (609) *Ganesh v Gyann*

(1923) A I R 1923 Rung 18 (20) 11 Low Bur Rul 369 68 Ind Cas 923, *Arunachalam Chetty v Somasundaram Chetty*

Note 11

¹ (1935) A I R 1935 Mad 982 (983) 158 Ind Cas 490 *Andhra Rice Mill v Narasimha Rao*

² (1898) 17 Mad 293 (296) 4 Mad L Jour 140

³ (1929) 115 Ind Cas 767 (767) (Lab) *Ganesh Das v Narsingh Das*

Note 12

¹ (1911) 12 Ind Cas 673 (676) (Mad) *Subba Naidu v Ethirajammal*

Note 13

¹ (1880) 5 Cal 759 (763) 6 Cal L R 112, *Hajee Syud Mahomed v Ml Ishrufunnisa*

(1907) 6 Cal L Jour 158 (161) *Ram Pershad v Harbans Singh*

(1922) A I R 1922 Pat 364 (369) 66 Ind Cas 30, *Gopal Ras v Harchand Ram Anant Ram*

(1923) A I R 1923 Lah 347 (349) 73 Ind Cas 916 *Rupchand v Poho Mal Nathu Mal* (Simply following 6 Cal L Jour 158 and purports to follow 5 Cal 759)

² (1920) A I R 1920 Lah 25 (26) 54 Ind Cas 453, *Dagar Mal v Mula*

The reason is that it is the *nature of the dealings* between the parties that must be considered in order to see whether the Article applies and not whether the balance has shifted *throughout* the dealings. See Note 3

14. "Open and current account."—An open account means an account which has not been closed by settlement or otherwise, that is, where the balance is not ascertained, or though ascertained has not been admitted or acknowledged by the parties.¹ Thus, even if the dealings between the parties may have stopped, an account may be open so long as there has been no adjustment or settlement between them. But a current account means an unclosed account where the parties contemplate the continuance in future of the dealings between them. An open and current account means, therefore, a running, unsettled or unclosed account.²

For the application of this Article, the plaintiff has to show that the account between the parties is open and current and that it was so at the time of the institution of the suit.³ Where, therefore, the balance due from the defendant *has been ascertained*, and the account is acknowledged by the defendant, the account becomes closed: i. e.

Note 14

- I (1931) A I R 1931 Cal 350 (372) 58 Cal 649 193 Ind Cas 501, *Tea Financing Syndicate Ltd v Chandra Kamal Des Barua*
(1907) 6 Cal L Jour 158 (160), *Ram Pershad v Harbans Singh*
(1935) A I R 1935 All 53 (54) 155 Ind Cas 44, *Puttu Lal v Jagannath*
See the cases under Foot Note (2)
- 2 (1931) A I R 1931 Cal 850 (372) 58 Cal 649 193 Ind Cas 501 *Tea Financing Syndicate Ltd v Chandra Kamal Des Barua*
(1909) 4 Ind Cas 261 (262) 32 All 11, *Chittar Mal v Behari Lal*
(1907) 6 Cal L Jour 158 (160) *Ram Pershad v Harbans Singh*
(1935) A I R 1935 All 53 (53 54) 155 Ind Cas 44 *Puttu Lal v Jagannath*,
(1927) A I R 1927 Bom 225 (226) 102 Ind Cas 225 *Premji Virji v Eduard Elias Sassoon*
(1921) A I R 1921 Lah 256 (256) 67 Ind Cas 933 *Hardial Ram Chand Shop v Pokhar Das*
(1923) A I R 1923 Lah 347 (349) 73 Ind Cas 916 *Firm Rupchand Jivan Singh v Firm Poho Mal Nathu Mal*
(1927) A I R 1927 Lah 848 (849) 100 Ind Cas 815 *Firm Bhagwandas Kanhayalal v Firm Nand Singh Hari Singh*
(1860) 6 Cal 447 (450) *Laljee Shahoo v Raghoonundun Lal Sahoo*
(1877) 1 Cal L R 525 (526) *Roy Dhunput Singh Bahadur v Baboo Lekraj Roy*
- 3 (1933) A I R 1933 Bom 450 (452 456 457) 145 Ind Cas 630 58 Bom 200, *Karsondas v Surajbhan*
(1922) A I R 1922 Lah 182 (183) 68 Ind Cas 815, *Firm Gurudas Ramkotu Ram v Bhagwan Das*
[See however (1879) 5 Cal L R 211 (212), *Gonesh Lal v Sheo Golam Singh*
(1918) A I R 1918 Mad 1305 (1306) 88 Ind Cas 227, *Murugappa Chetty v Vyapuri Chetty*]

Article 85
Notes
10—13

them Where each party charges interest for the amounts advanced by him to the other party, it would be an indication that each party has *lent* moneys to the other and not merely that one advance is merely by way of *repayment* of the other advance.²

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2 (1897) 22 Bom 606 (609) *Ganesh v Gyann*

(1923) A I R 1923 Rang 18 (20) 11 Low Bur Rul 369 68 Ind Cas 928, *Arunachalam Chetty v Somasundaram Chetty*

Note 11

1 (1935) A I R 1935 Mad 982 (983) 158 Ind Cas 429, *Andhra Rice Mill v. Narasimha Rao*

2 (1898) 17 Mad 293 (296) 4 Mad L Jour 140

3 (1929) 115 Ind Cas 767 (767) (Lab) *Ganesh Das v Narsingh Das*

Note 12

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1 (1880) 5 Cal 759 (763) 6 Cal L R 112, *Hajee Syud Mahomed v Mt Ashrufunnisa*

(1907) 6 Cal L Jour 158 (161), *Ram Pershad v Harbans Singh*

(1922) A I R 1922 Pat 364 (368) 66 Ind Cas 30, *Gopal Rai v Harchand Ram Anant Ram*

(1923) A I R 1923 Lah 347 (349) 73 Ind Cas 916 *Rupchand v Poho Mal Nathu Mal* (Simply following 6 Cal L Jour 158 and purports to follow 5 Cal 759)

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The reason is that it is the *nature of the dealings* between the parties that must be considered in order to see whether the Article applies and not whether the balance has shifted *throughout* the dealings. See Note 3

14. "Open and current account." — An open account means an account which has not been closed by settlement or otherwise, that is where the balance is not ascertained, or though ascertained has not been admitted or acknowledged by the parties¹. Thus, even if the dealings between the parties may have stopped, an account may be open so long as there has been no adjustment or settlement between them. But a current account means an unclosed account where the parties contemplate the continuance in future of the dealings between them. An open and current account means, therefore, a running, unsettled or unclosed account².

For the application of this Article, the plaintiff has to show that the account between the parties is open and current and that it was so at the time of the institution of the suit³. Where, therefore, the balance due from the defendant *has been ascertained*, and the account is acknowledged by the defendant, the account becomes closed, i. e.

Note 14

- 1 (1931) A I R 1931 Cal 359 (372) 58 Cal 649 133 Ind Cas 801, *Tea Financing Syndicate Ltd v Chandra Kamal Des Darna*
- (1907) 6 Cal L Jour 158 (160), *Ram Pershad v Harbans Singh*
- (1935) A I R 1935 All 53 (54) 155 Ind Cas 44, *Puttu Lal v Jagannath*.
See the cases under Foot Note (2)
- 2 (1931) A I R 1931 Cal 359 (372) 58 Cal 649 133 Ind Cas 801, *Tea Financing Syndicate Ltd v Chandra Kamal Des Darna*
- (1909) 4 Ind Cas 261 (262) 32 All 11, *Chittar Mal v Behari Lal*
- (1907) 6 Cal L Jour 158 (160) *Ram Pershad v Harbans Singh*
- (1935) A I R 1935 All 53 (53, 54) 155 Ind Cas 44, *Puttu Lal v Jagannath*,
- (1927) A I R 1927 Bom 225 (226) 102 Ind Cas 225, *Premji Virji v Edward Elias Sassoon*
- (1921) A I R 1921 Lah 256 (256) 67 Ind Cas 933, *Hardial Ram Chand Shop v Pokhar Das*
- (1923) A I R 1923 Lah 347 (349) 73 Ind Cas 916, *Firm Rupchand Jwan Singh v Firm Poho Mal Nathu Mal*
- (1927) A I R 1927 Lah 848 (849) 100 Ind Cas 815, *Firm Bhagwandas Kanhaiyalal v Firm Nand Singh Hari Singh*
- (1880) 6 Cal 447 (450) *Laljee Shahoo v Raghoonundun Lall Sahoo*
- (1877) 1 Cal L R 525 (526), *Roy Dhunput Singh Bahadur v Baboo Lekraj Roy*
- (1916) A I R 1916 Lah 84 (84) 35 Ind Cas 577, *Ishar Das v Harikishan Das* (An open account is one that is not closed)
- (1933) A I R 1933 Bom 450 (455) 145 Ind Cas 630 58 Bom 200 *Karsondas v Surajbhan*
- 3 (1933) A I R 1933 Bom 450 (452, 456 457) 145 Ind Cas 630 58 Bom 200, *Karsondas v Surajbhan*
- (1922) A I R 1922 Lah 182 (183) 68 Ind Cas 815, *Firm Gurudas Ramkotu Ram v Bhagwan Das*
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- (1918) A I R 1918 Mad 1805 (1806) 88 Ind Cas 227, *Murugappa Chetty v Vyapuri Chetty*

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it becomes an account *stated* (Article 64 *ante*)⁴ It is not however necessary that the account should be stated in order to close an account between the parties⁵ Nor does a mere striking of the balance due from the defendant show by itself that the account has become closed⁶ As a matter of fact, the wording of the Article itself indicates that the Legislature has contemplated annual accounts and annual striking of the balances⁷ Also the mere fact that the plaintiff allowed a considerable time to elapse before suing does not by itself show that the account has become closed or has ceased to be current⁸ The question, whether in a particular case the account is open, is one of fact depending on the nature of the dealings and the intentions of the parties Thus, where the balance due from the defendant is ascertained in the plaintiff's books and his account is formally closed, it is not an open or current account In such a case the plaintiff cannot re-open the account and avoid the bar of limitation, by simply carrying on the old balance in a new account⁹ Similarly, where the balance due on account in respect of dealings between the parties is ascertained periodically and pro notes are executed for the amounts found due the account becomes closed every time such pro notes are executed The account cannot be re-opened again by entering the amount of the pro notes in the books of account⁹

15. Each party need not keep one account.—It is not necessary that each party should have kept accounts¹ The fact that only one of the parties kept accounts does not show that the account is not a mutual one if it is established otherwise that the dealings were mutual²

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- 4 (1928) A I R 1928 Lah 51 (52) 100 Ind Cas 874 *Karamchand Sant Ram v Dayanand Damodhar Das*
 (1931) A I R 1931 Lah 233 (235) 131 Ind Cas 292 *Mulki Ram Hem Raj v Rupchand Lachman Das*
 [See (1933) A I R 1933 Lah 12 (13) 140 Ind Cas 187 14 Lah 14, *Dasrundhi Ram v Moolchand*
 (1931) 130 Ind Cas 570 (570) (Lah) *Jesa Ram Dhan Chand v Lachman Das*]
 5 (1918) A I R 1918 Mad 1905 (1906) 38 Ind Cas 227 *Murugappa Chetty v Vyapuri Chetty*
 6 (1922) A I R 1922 Lah 316 (317) 66 I C 387 *Jawala Das v Hukum Chand*
 (1910) 7 Ind Cas 715 (716) 1910 Pun Re No 75 *Imrat Lal v Lal Chand*
 (1918) A I R 1918 Mad 1905 (1906) 38 Ind Cas 227 *Murugappa Chetty v Vyapuri Chetty*
 7 (1870) 14 Suth W R O C 41 (44) 5 Beng L R 550 *Sreenath Dass v Parka Pittar* (Per Sir Richard Couch C J)
 (1881) 6 Cal 447 (450) *Laljee Shahoo v Roghoonundum Lal Sahoo*
 7a (1922) A I R 1922 Lah 316 (317) 66 Ind Cas 337, *Juala Das v Hukum Chand*
 8 (1927) A I R 1927 Lah 848 (849) 100 Ind Cas 815 *Firm Bhagwan Das Kanhaya Lal v Furr Nand Singh Hari Singh*
 9 (1918) A I R 1918 Mad 1825 (1826) 37 Ind Cas 875 *Kuppusamy Iyer v Veerappa Chettiar*

Note 15

- 1 (1887) 10 Mad 199 (202) *Lalshamaya v Jagannatham*
 2 (1915) A I R 1915 Lah 279 (280) 30 Ind Cas 491 1916 Pun Re No 16, *Jas Rai v Attar Chand*
 (1887) 10 Mad 199 (202) *Lakshmayya v Jagannatham*

16. "Between the parties."—It is not necessary for the application of this Article that the account should be mutual, open and current *between the parties* in other words, the parties should be the same throughout the period of the account. Thus, where the defendant and his brother carried on dealings with the plaintiff and their joint account was closed with Rs 530 against them, and thereafter the defendant carried on separate dealings with the plaintiff on his own account the plaintiff is not entitled, in a suit against the defendant for an account, to tack on one half of the sum due in respect of their joint account of the defendant and his brother, to the new account against the defendant only, as there could not have been any reciprocal demands *between the parties* in respect of the joint account¹

17. Period of limitation.—The period of limitation for the balance due on a mutual open or current account is three years^{1a} and has to be computed from the end of the year in which "the last item admitted or proved" is entered in the account—and the year is to be computed as in the account¹. The provisions of Section 25 have no application to this Article as that Section applies only to instruments²

18. "Last item admitted or proved."—The words "last item admitted or proved" have been construed to mean the last item on the *defendant's* side of the account¹. The reason for this construction was held to be that the account could be said to be mutual, at the latest down to the date when the defendant made his last payment to the plaintiff but that from the date when the balance was for the last time in favour of the plaintiff and since which it continued to be against the defendant, it could not be said that there were reciprocal demands between the parties². As has been seen in Note 13

Note 16

- 1 (1877) 1 Cal L R 525 (526-527) *Roy Dhunput Singh Roy Bahadur v Babco Lekraj Roy*

Note 17

- 1a (1870) 14 Suth W R 184 (187-188-189) *Luchmee Narain v Choomun Meah* (Sec 8 of Act 14 of 1859 did not provide any particular period of limitation but provided cause of action should be deemed to arise from the close of the year in which the last item is entered in accounts. Hence if accounts were based on contracts the period was three years.)
 (1870) 14 Suth W R O C 7 (10) *Usher Chand Sahoo v Moroolyram (Do)*
 1 (1920) A I R 1920 Lah 406 (406) 55 Ind Cas 872 1 Lah 12 *Gobind Ram v Jawala Ram*
 2 (1895) 20 Bom 767 (776) *Rampatab Saipathras v Foolisba*

Note 18

- 1 (1880) 5 Cal 759 ("64) 6 Cal L R 112 *Hajee Sjud Mahomed v Mt Ashru Jannissa*
 (1907) 6 Cal L Jour 158 (161) *Ram Pershad v Harbans Singh*
 -2 (1907) 6 Cal L Jour 158 (161) *Ram Pershad v Harbans Singh*
 (1924) A I R 1924 Pat 107 (110) 74 Ind Cas 631 *Farrabad Bank Ltd v Ram Dayal*

Article 85
Note 18

ante, this view is not correct. If the dealings comprise independent obligations on each side and if in the course of the dealings an item is entered evidencing an obligation incurred, whether on the plaintiff's side or on the defendant's side, such an item will fall strictly within this Article if it is admitted by the defendant or is duly proved by the plaintiff.³ It cannot, however, be said that because mutual dealings exist between the parties, every liability between them, whatever its nature and whenever it arose—such as for example a case where the plaintiff has succeeded by the purchase of a later debt or otherwise in becoming a creditor of the defendant—can be included in the account by the plaintiff in order to secure the extended period of limitation.⁴ The word "proved" in the Article means not only proved as a fact, but also proved to have arisen *in the course of mutual dealings*.⁵

Article 86

86. ¹ On a policy of insurance, when the sum assured is payable immediately after proof of the death or loss has been given to or received by the insurers.	Three years	† [The date of the death of the deceased]
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Act of 1877, Article 86

Columns one and two same as above. Column three was: When proof of the death or loss is given or received to or by the insurers whether by or from the plaintiff or any other person.

Act of 1871, Article 88

Column one was: 88 — On a policy of insurance when the sum assured is payable after proof of the death or loss has been given to or received by the insurers. Columns two and three same as in the Act of 1877.

Act of 1859 — No corresponding provision

† These words were substituted for the words *when proof of the death or loss is given or received to or by the insurer whether by or from the plaintiff, or any other person* by Section 122 of the Insurance Act 4 of 1938.

3 See (1914) A I R 1914 Mad 717 (718 719) 24 Ind Cas 128 *Bapu Saib Yussuf Saib & Co v Iscoet Ismail & Co*

4 (1914) A I R 1914 Mad 717 (719) 24 Ind Cas 128 *Bapu Saib Yussuf Saib & Co v Iscoet Ismail & Co*

5 (1914) A I R 1914 Mad 717 (718 719) 24 Ind Cas 128 *Bapu Saib Yussuf Saib & Co v Iscoet Ismail & Co* (An item of debit against the defendant was considered as the last item in mutual dealings.)

Synopsis

Article 86
Notes
1—4

1. Legislative changes.
2. Scope of the Article.
3. Starting point.
4. Contract of insurance, limiting the time within which a suit should be filed — Validity.

1. Legislative changes.

- 1 There was no provision corresponding to this, in the Act of 1859, and cases such as that contemplated by this Article were treated as suits on breaches of contracts governed by clause 10 of Section 1 of the Act of 1859
- 2 Article 83 of the Act of 1871 introduced a provision corresponding to this Article but the word "immediately" was absent in the first column
- 3 Article 86 of the Act of 1877 introduced the word "immediately" after the word "payable"
4. The words and dots "The date of the death of the deceased" were substituted for the words "When proof of the death or loss is given or received to or by the insurer, whether by or from the plaintiff, or any other person" by Section 123 of the Insurance Act, 4 of 1938 But this amendment omits to mention as to when the time with respect to claims on policies other than life assurance policies commences to run

2. Scope of the Article. — This Article applies only to suits where the sum assured is payable *immediately* after proof of loss or death is given Cases where the sum is not payable immediately but after a certain time after the loss or death is proved, are not governed by this Article, but would fall under Article 115 *infra*

3. Starting point. — Under the Act of 1859, where cases, such as that contemplated by this Article, were held to fall under clause 10 of Section 1 providing for breaches of contract, it was held that in the absence of a custom of allowing a certain time of grace, time ran from the date when the insurer had notice of the loss and refused and neglected to pay¹

Under this Article as it stood before the amendment of 1938, time ran from the date when proof of death or loss was given or received to or by the insurer Under the present Article as amended, time runs from the date of the death of the deceased and not the date when proof of such death is given

4. Contract of insurance limiting the time within which a suit should be filed — Validity. — See Note 24 to Section 3 *ante*

Article 86 — Note 3

1. (1869) 6 Bom H C R A C 31 (37), *Narotamdas Bhagandas v Dayabhai*

Article 87

87. By the assured to recover premia paid under a policy voidable at the election of the insurers.	Three years.	When the insurers elect to avoid the policy.
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Article 88

88.† Against a factor for an account.	Three years.	When the account is, during the continuance of the agency, demanded and refused or, where no such demand is made, when the agency terminates.
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Synopsis

1. Factor.
2. Starting point.

1. Factor. — A factor is a mercantile agent who, in the ordinary course of business, is entrusted with the possession of goods for sale.¹ This Article prescribes the period of limitation for a suit for accounts against a *factor*. Where there are some elements outside the mere entrusting of goods for sale, and the sale by the agent, and the suit is brought on those elements, it would not be governed by this Article. Thus, where *A* was a factor in respect of some portion of his dealings with *B*, but not in respect of several advances made to him by *B* and a suit was brought by *B* against *A* on accounts, it was held that it was governed by Article 85.²

2. Starting point. — See Notes to Article 89, *infra*

* Act of 1877, Art. 87 and Act of 1871, Art. 89 — Same as above.
Act of 1859 — No corresponding provision

† Act of 1877, Article 88 — Same as above
Act of 1871, Article 64 — Columns one and two, same as above
Column three was — "When the account is demanded, or where no such demand is made, when the agency terminates"

Act of 1859 — No corresponding provision

Article 88 — Note 1

- 1 Halsbury's Laws of England, Vol I, Page 152
(1818) 2 B and Ald 187 (143) 20 R R 383 (388), *Baring v Corrie*
(1889) 13 Bom 314 (320), *In re Bombay Saw Mills Co Ltd* (Secretaries and treasurers of joint stock company who have made advances and incurred expenses on behalf of the company in the conduct of its business are not factors)
- (1893) 17 Bom 520 (544), *Jafferibhoy Ludhabhoy Chaitoo v Charlesworth*
2 (1915) A I R 1915 Mad 1001 (1003) 29 Ind Cas 462 (F B), *Bapu Sahib & Co. v Isaac Ismail & Co.*

89.* By a principal against his agent for moveable property received by the latter and not accounted for.	Three years.	When the account is, during the continuance of the agency, demanded and refused or, where no such demand is made, when the agency terminates.
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Synopsis

1. Legislative changee.
2. Scope of the Article.
3. Express agreement to account.
4. Registered agreement to account.
5. Suit for accounts.
6. Moveable property includes money.
7. Agent, who is.
8. Suit between members of a quondam joint Hindu family.
9. Suit against a del credere agent.
10. Suit against the representative of a deceased agent.
11. Suit by representative of deceased principal.
12. Starting point — General.
13. "Demanded and refused."
14. "When the agency terminates": general.
15. Termination by revocation of agent's authority.
16. Termination by the agent renouncing the business of the agency.
17. Termination by the business of the agency being completed.
18. Termination of the agency by the death of the principal.
19. Termination of the agency by the death of the agent.
20. Burden of proof.
21. Duty of an agent to render proper accounts.
22. Period for which the agent is liable to render account.

* Act of 1877, Article 89

Same as above

Act of 1871, Article 90

Columns one and two same as above Column three was "—When the account is demanded and refused"

Act of 1859

No corresponding provision.

Article 89
Notes
2—3

principal on his accounts, the case falls within Article 132⁷

3. Express agreement to account. — As has been seen in Note 2 *ante*, the liability of the agent to account to the principal for the moveable property received by him may arise by virtue of an *express* contract or by virtue of the provisions of law. This Article is generally worded and is comprehensive enough to include suits based on either of these liabilities¹. Article 115 would not apply to such cases. *Firstly*, it is a general Article which would apply only where

7 (1908) 35 Cal 298 (301) 7 Cal L Jour 279 12 Cal W N 820, *Hafesuddin Mandal v Jadu Nath Saha*

(1920) A I R 1920 Cal 848 (849) 59 Ind Cas 126 *Dasarath Chatterjee v Asst Mohan*

(1916) A I R 1916 Cal 680 (681) 30 Ind Cas 697 43 Cal 248, *Madhusudan Sen v Rakhal Chandra* (But on facts it was held that this lien could not be enforced for a particular period of agency 5 Ind Cas 69, Not followed)

(1915) A I R 1915 Cal 118 (119) 24 Ind Cas 18 *Troslakhyanath Mandal v Abanish Chandra* (5 Ind Cas 59 Dissented from)

(1915) A I R 1915 Cal 626 (627) 29 Ind Cas 748 *Behari Lal v Har Kumar Dutta* (But if by any means the agency is terminated and the same agent is re appointed a new agency is created — The charge created under the old agency on immovable property in favour of the principal will not be available under the new agency)

[But see (1910) 5 Ind Cas 59 (60) (Cal) *Jogesh Chandra v Benode Lal Roy Chowdhury* (That any moneys as to which the agent might default were to be recovered in a particular way, cannot alter the nature of the suit or extend the period of limitation)]

Note 3

1 Suits based on liability to account arising under law

(1901) 24 All 27 (43) 28 Ind App 227 3 Bom L R 576 8 Sar 142 (PC), *Asghar Ali Khan v Khurshed Ali Khan*

(1865) 4 Suth W R Sm C C 19 (20) *Radhanath Dutt v Gobind Chunder*

(1923) A I R 1923 Pat 464 (465) 2 Pat 585 75 Ind Cas 1022 *Jagdeep Prasad v Mt Rajo Kuer*

(1933) A I R 1933 All 642 (643 648) 147 Ind Cas 529 55 All 814 *Moti Lal v Radhe Lal* (Suit by the assignee of the principal)

(1905) 32 Cal 719 (723) 1 Cal L Jour 232 *Sib Chandra v Chandra Naram*

(1916) A I R 1916 Cal 800 (801) 29 Ind Cas 818 *Sures Kanta v Navab Ali*

(1915) A I R 1915 Cal 626 (627) 29 Ind Cas 748 *Behari Lal v Harakumar*

h Chatterjee
v Gian Chand
am v Mehanga

Suit to recover money paid for joint purchase of property — Held Art 89 applied and not Arts 60 and 106

(1891) 1891 Pun Re No 31 *Ganesh Das v Shanker Das* (Suit by one partner against manager of the firm — Suit for moveable property received by agent and not accounted for)

(1919) A I R 1919 Low Bur 71 (75) 51 Ind Cas 530 *Hormasji v Po Hmyin* (In a suit for money received by defendant as agent for plaintiff on account of plaintiff's winnings in a lottery the agency continues so long as the money is held by the defendant for the plaintiff, is demanded

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Suits based on express contract

(1916) A I R 1916 Mad 281 (283) 26 Ind Cas 740 39 Mad 376 *Venkata chalam Chetty v Narayanan Chetty*

the suit is not one otherwise specially provided for, where, therefore, the case is onn clearly falling within Article 89, Article 115 will not apply.² Secondly, a suit for recovery of moveable property (not being money) cannot possibly be called a suit for compensation within the meaning of Article 115 although under Order 20 Rule 10 of the Civil Procedure Code the decree for delivery of such property should also state the amount of money to be paid as an alternative if delivery cannot be had.³ Nor can a suit for accounts and for payment of the balance be regarded as a suit for compensation for a breach of the contract to account.⁴ In *Nobin Chandra Barua v Chandra Madhub Barua*,⁵ where the agent had expressly agreed to render accounts from time to time, it was held by their Lordships of the Privy Council that the suit was governed by this Article. A contrary view which had been held by the High Courts of Calcutta and Patna in the undermentioned cases⁶ can no longer be considered good law in view of the Privy Council decision in *Nobin Chandra's case*⁵ and also in view of the later decisions of the same High Courts.⁷

(1925) A I R 1925 Pat 494 (495) 4 Pat 269 89 Ind Cas 275 *Jogendra Narayan v Chinai Muhammad* (Lower Court held that relation between parties depended on contract—Held in appeal that suit was

(1910) 5 Ind Cas 58 (59) (Cal) *Debendra Nath Ghose v Sheikh Esha Haq Mirza*

(1909) 2 Ind Cas 597 (599) (Cal) *Mahomed Fias v Upendra Lal* (It cannot be argued that where an agent is bound to furnish periodical accounts, his failure to do so necessarily constitutes a breach of contract)

[See (1916) A I R 1916 Cal 800 (801) 29 Ind Cas 848, *Sures Kanta v Nawab Ali* (32 Cal 719 and 35 Cal 298, Followed 5 Ind Cas 59 Not followed)]

(1922) A I R 1922 Cal 355 (356) 49 Cal 250 68 Ind Cas 562, *Pran Ram v Jagadish Nath* (Obiter)]

2 (1916) A I R 1916 Mad 281 (283) 26 Ind Cas 740 39 Mad 376, *Venkata chalam Chetty v Narayanan Chetty*

(1912) 16 Ind Cas 414 (415 416) (Cal), *Jhapa jhanessa Bibee v Bama Sundari*

3 (1867) 7 Suth W R 499 (499) *Kazee Nuseentoolah v Roop Sona Bibi*

[See also (1916) 31 Mad L Jour 37 (Jour) Critical Note on (1916) 39 Mad 376 A I R 1916 Mad 281, *Venkatachalam v. Narayanan*]

4 (1908) 35 Cal 298 (301) 7 Cal L Jour 279 12 Cal W N 820 *Hafesuddin Vandal v Jadu Nath Saha*.

(1919) A I R 1919 Cal 458 (460) 53 Ind Cas 675 *Bhabatarani Devi v Sheikh Bahadur*

[See (1933) A I R 1933 Nag 127 (130) 141 Ind Cas 277 29 Nag L R 34 *Binjraj v Kisanlal*]

(1931) A I R 1931 Mad 185 (188) 131 Ind Cas 165 54 Mad 654, *Annu Avathanigal v Somasundara Avathanigal*]

5 (1916) A I R 1916 P C 148 (149) 44 Cal 1 36 Ind Cas 1 (P C)

¹,
Anantaram v Ganeshram [Agent agreeing to render yearly accounts—Art 89 or rather Art 115 applies]

⁷ See the cases cited in Foot Note (1) above

Article 89
Notes
2—3

principal on his accounts, the case falls within Article 132⁷

3. Express agreement to account. — As has been seen in Note 2 *ante* the liability of the agent to account to the principal for the moveable property received by him may arise by virtue of an *express* contract or by virtue of the provisions of law. This Article is generally worded and is comprehensive enough to include suits based on either of these liabilities¹. Article 115 would not apply to such cases. *Firstly* it is a general Article which would apply only where

- 7 (1908) 35 Cal 298 (301) 7 Cal L Jour 279 12 Cal W N 820 *Hafesuddin Mandal v Jadu Nath Saha*
(1920) A I R 1920 Cal 848 (849) 59 Ind Cas 126 *Dasarath Chatterjee v Asit Mohan*
(1916) A I R 1916 Cal 680 (681) 30 Ind Cas 697 43 Cal 248 *Vadhusudan Sen v Rakhal Chandra* (But on facts it was held that this lien could not be enforced for a particular period of agency 5 Ind Cas 59. Not followed)
(1915) A I R 1915 Cal 118 (119) 24 Ind Cas 18 *Troulakhyanath Mandal v Abanish Chandra* (5 Ind Cas 59 Dissented from)
(1915) A I R 1915 Cal 676 (627) 29 Ind Cas 748 *Behari Lal v Harhumar Dutta* (But if by any means the agency is terminated and the same

might default were to be recovered in a particular way cannot alter the nature of the suit or extend the period of limitation)]

Note 3

R 576 8 Bar 142 (P.O.).

v *Gobind Chunder*
Ind Cas 1022 *Jagdish*

Asit Mohan

- (1933) A I R 1933 All 642 (643 648) 147 Ind Cas 529 55 All 814 *Moh Lal v Radhe Lal* (Suit by the assignee of the principal)

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- (1916) A I R 1916 Lah 432 (432) 33 Ind Cas 438 *Jetha Ram v Mehanga Ram* (Suit to recover money paid for joint purchase of property — Held Art 89 applied and not Arts 60 and 106)
(1891) 1891 Pun Re No 31 *Ganesh Das v Shanker Das* (Suit by one partner against manager of the firm — Suit for moveable property received by agent and not accounted for)
(1919) A I R 1919 Low Bar 71 (75) 51 Ind Cas 530 *Hormasji v Po Hmyan* (In a suit —
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Debendra Nath]

as 740 39 Mad 376 *Venkata*

the suit is not one otherwise specially provided for, where, therefore, the case is one clearly falling within Article 89, Article 115 will not apply.² Secondly, a suit for recovery of moveable property (not being money) cannot possibly be called a suit for compensation within the meaning of Article 115 although under Order 20 Rule 10 of the Civil Procedure Code the decree for delivery of such property should also state the amount of money to be paid as an alternative if delivery cannot be had.³ Nor can a suit for accounts and for payment of the balance be regarded as a suit for compensation for a breach of the contract to account.⁴ In *Nobin Chandra Barua v Chandra Madhub Barua*,⁵ where the agent had expressly agreed to render accounts from time to time it was held by their Lordships of the Privy Council that the suit was governed by this Article. A contrary view which had been held by the High Courts of Calcutta and Patna in the undermentioned cases⁶ can no longer be considered good law in view of the Privy Council decision in *Nobin Chandra's case*⁵ and also in view of the later decisions of the same High Courts.⁷

- (1925) A I R 1925 Pat 494 (495) 4 Pat 289 89 Ind Cas 275 *Jogendra Varayan v Chinai Muhammad* (Lower Court held that relation between parties depended on contract—Held in appeal that suit was governed by Art 89 and not by Art 115)
- (1916) A I R 1916 Cal 660 (682) 80 Ind Cas 697 43 Cal 248 *Vadhusudan Sen v Rakhal Chandra* (1 Cal L Jour 211 5 Ind Cas 186 and 5 Ind Cas 59 Not followed)
- (1910) 5 Ind Cas 58 (59) (Cal) *Debendra Nath Ghose v Sheikh Esha Hag Mistri*
- (1909) 2 Ind Cas 597 (599) (Cal) *Mahomed Fias v Upendra Lal* (It cannot be argued that where an agent is bound to furnish periodical accounts his failure to do so necessarily constitutes a breach of contract)
[See (1918) A I R 1918 Cal 800 (801) 29 Ind Cas 848 *Sures Kantia v Vawab Ali* (32 Cal 719 and 85 Cal 298 Followed 5 Ind Cas 59 Not followed)]
- (1922) A I R 1922 Cal 355 (356) 49 Cal 250 68 Ind Cas 562 *Pran Ram v Jagadish Nath* (Obiter)
- 2 (1916) A I R 1918 Mad 261 (283) 26 Ind Cas 740 39 Mad 376 *Venkata challam Chetty v Narayanan Chetty*
- (1912) 16 Ind Cas 414 (415 416) (Cal) *Jhapaishanessa Bibee v Bama Sundari*
- 3 (1867) 7 Suth W R 499 (499) *Kasee Nuseenoolah v Roop Sona Bibi*
[See also (1916) 31 Mad L Jour 37 (Jour) Critical Note on (1916) 39 Mad 376 A I R 1916 Mad 291 *Venkatachallam v Narayanan*]
- 4 (1908) 35 Cal 298 (301) 7 Cal L Jour 279 12 Cal W N 820 *Haferuddin Vandal v Jadu Nath Saha*
- (1919) A I R 1919 Cal 458 (460) 53 Ind Cas 675 *Bhabatarani Debi v Sheikh Bahadur*
[See (1933) A I R 1933 Nag 127 (130) 141 Ind Cas 277 29 Nag L R 34 *Binjraj v Kisanlal*]
- (1931) A I R 1931 Mad 185 (188) 131 Ind Cas 165 54 Mad 654 *Annu Athanigal v Somasundara Athanigal*]
- 5 (1916) A I R 1916 P C 148 (149) 44 Cal 1 36 Ind Cas 1 (P C)

(1919) A I R 1919 Pat 895 (896) 51 Ind Cas 733 4 Pat L Jour 304 *Anantaram v Ganeshram* (Agent agreeing to render yearly accounts—Art 89 or rather Art 115 applies)

7 See the cases cited in Foot Note (1) above

Article 89
Note 4

4. Registered agreement to account. — It was held by the High Court of Calcutta in the undermentioned cases¹ that a suit for accounts against the agent based on an agreement which is registered would be governed by Article 116 and not by this Article. The High Court of Allahabad has also held in the case cited below² that a suit for accounts against the *heirs* of an agent is not governed by this Article but would be governed by Article 116 where the contract of agency is registered. The general trend of opinion is, however, to the effect that a suit for accounts is not a suit for *compensation for a breach of contract* and that consequently, Article 116 would not apply even where the contract to account is registered³. A suit for an account involves an undertaking by the plaintiff to pay to the defendant any amount that may be found to be due to him on taking accounts, and consequently a decree may be passed in favour of the defendant for such amount⁴. This cannot be done if the suit is merely one for *compensation*⁵. In *Annu Avathanigal v Somasundara*⁶ Reilly J of the Madras High Court observed as follows —

"As was pointed out by Trevelyan, J, in *Kunjo Behary Singh v Madhub Chandra Ghose*,⁷ a suit for an account is not a suit for a definite sum of money but for ordering the defendant to account to the plaintiff for money received by him and the

Note 4

- 1 (1885) 12 Cal 357 (363) *Harender Kishore Singh v The Administrator General of Bengal*

[See also (1912) 16 Ind Cas 852 (853, 855) 17 Cal L Jour 201 *Bhagrat v Prem Chand* (There seems to be some mistake as to dates in the judgment as reported)]

- 2 (1917) A I R 1917 All 14 (15) 39 Ind Cas 626 39 All 355, *Mathura Nath v Cheddu*

- 3 (1908) 35 Cal 298 (301) 7 Cal L Jour 279 12 Cal W N 620 *Hafezuddin Mandal v Jadu Nath*

- (1919) A I R 1919 Cal 458 (460) 53 Ind Cas 675 *Bhabatarani v Sheikh Bahadur*

- (1933) A I R 1933 Nag 127 (130) 141 Ind Cas 277 29 Nag L R 34 *Binjraj v Kishenlal*

- (1931) A I R 1931 Mad 185 (188) 131 Ind Cas 165 51 Mad 654 *Annu Avathanigal v Somasundara Avathanigal*

- 4 (1910) 6 Ind Cas 162 (162) 32 All 525 *Persmanand v Jagat Narain*
(1887) 14 Cal 147 (153) 13 Ind App 123 4 Sar 751 10 Ind Jur 475 (P C) *Hurriath v Krishna Kumar*

- (1924) A I R 1924 All 854 (854) 46 All 858 83 Ind Cas 880 *Ram Charan v Bulagi*

unatha Rau
54 Mad 654
(Dissenting)

- 5 (1931) A I R 1931 Mad 185 (188, 190) 131 Ind Cas 165 51 Mad 654 *Annu Avathanigal v Somasundara Avathanigal*

- 6 (1931) A I R 1931 Mad 185 (188) 131 Ind Cas 165 51 Mad 654

- 7 (1896) 23 Cal 834 (F B)

first result is that the plaintiff gets a decree for discovery it is recognised as the law and practice in England—and there is no reason to suppose that the practice in this country should be different — that defendant agent in a suit for an account can recover the balance if on the accounting a balance is found to be due to him I must accede to Mr Rajah Iyer's contention that a suit for an account is not a suit for compensation for breach of contract It appears to me to be a suit of an entirely different nature and may have results impossible in a suit for compensation for breach of contract

In *Pran Ram v Jagadish Nath* * it was held that Article 116 would not apply but the reason on which the decision proceeded was that that Article would apply only when as provided by Article 115 the suit is not otherwise specially provided for This reasoning is however not correct See Notes to Article 116 *infra*

5 Suit for accounts — There was some hesitation felt as to the applicability of this Article to a suit for accounts brought by the principal against his agent¹ However, doubts if any, have been removed since the Privy Council decision in *Ashgar Ali v Khurshed Ali* ² It was held in that decision that moveable property in this Article includes money Following this ruling it has been held by all the High Courts that a suit for accounts *and* to recover the balance due after taking such accounts would fall within the ambit of this Article³

For the form of relief to be claimed in a suit for accounts by the principal against his agent see the undermentioned decision⁴

8 (1922) A I R 1922 Cal 355 (356) 49 Cal 250 68 Ind Cas 562

Note 5

I (1901) I Cal L Jour 147 (150) *Madhub Chunder v Debendra Nath*

2 (1902) 24 All 27 (43) 28 Ind App 227 3 Bom L R 576 8 Sar 142 (P C)

3 (1905) 82 Cal 719 (725) 1 Cal L Jour 232 *Shub Chundra v Chandra Narain Mukerjee*

(1934) A I R 1934 Cal 238 (239) 60 Cal 1347 149 Ind Cas 996 *Id Amirul Islam v Md Abdul Hamid*

(1922) A I R 1922 Cal 355 (356) 49 Cal 250 68 Ind Cas 562 *Pran Ram Mukerjee v Jagadish Nath Ray*

(1919) A I R 1919 Cal 458 (459) 53 Ind Cas 675 *Bhabatarini Deb v Shesh Bahadur*

(1917) A I R 1917 Cal 156 (157) 40 Ind Cas 359 *Kesho Prasad Singh v Sarwan Lal*

(1931) A I R 1931 Mad 185 (188) 131 Ind Cas 165 54 Mad 654 *Annu Acharanigal v Somasundara Acharanigal*

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Ind Cas 254

(1917) A I R 1917 Pat 74 (75) 42 Ind Cas 860 2 Pat L Jour 642 *Janardhan Prasad v Mt Jankibai Thakurain* [Suit against an administrator]

Article 89
Notes
6—7

6. Moveable property includes money. — See Note 5 above

7 Agent, who is. — An agent is a person employed to do any act for another or to represent another in dealings with third persons¹ A contract of agency need not be created by a written document, it may be inferred from the circumstances and the conduct of the parties²

Illustrations

- 1 A is employed by B to invest money on his behalf and to represent him in his dealings with the debtors A is an agent of B³
- 2 Two Muhammadan brothers were joint in estate, both were in Government service, employed in different districts and one was at home at one time and another was at another It resulted from their mutual relations and similar engagements that the one acted for the other in the receipt of the profits of their estate It was held that they were agents, the one of the other in dealings with the joint estate⁴
- 3 A Hindu family becomes divided but a portion of the joint property is with the consent of all the members concerned left in the management of one member the member so left in management of the property must be considered the agent of the other members⁵

Note 7

- 1 Contract Act Section 182
(1908) 30 All 492 (427 428) 5 All L Jour 375 1908 All W N 175 4 Mad L Tim 49 (F B) *Ram Charan Das v Gaya Prasad*
- 2 (1910) 8 Ind Cas 687 (638) (Bom) *Nathubhai v Devidas* (Agency by conduct)
(1905) 32 Cal 719 (721 722) 1 Cal L Jour 232 *Shib Chandra Roy v Ulandra Narain Mukherjee*
(1930) A I R 1930 Sind 142 (143) 128 Ind Cas 228 *Ganesh Das v Ganga Ram* (A servant on fixed salary the nature of whose employment is that of an agent)
- 3 (1931) A I R 1931 All 812 (313 374) 132 Ind Cas 43 *Khub Chand v Chittar Mal*
- 4 (1902) 24 All 27 (43) 28 Ind App 227 8 Bom L R 576 8 Sar 142 (P C) *Asghar Ali Khan v Khurshed Ali Khan*
- 5 (1921) A I R 1921 Bom 384 (385) 45 Bom 313 59 Ind Cas 357 *Gabu v Zipru*
(1928) A I R 1928 Bom 365 (367) 113 Ind Cas 173 *Gowinddas v Gajpatdas*
(1925) A I R 1925 Bom 148 (150) 88 Ind Cas 975 *Gurjaba v Narayan Rao*
(1922) A I R 1922 Mad 150 (156 163) 71 Ind Cas 177 45 Mad 648 (F B) *Yerukola v Yerukola*
(See (1930) A I R 1930 P C 18 (21) 121 Ind Cas 205 (P C) *Yirayya v Adenna*
- (1928) A I R 1928 Lah 688 (688) 111 Ind Cas 635 *Mt Kishan Devi v Banwar Lal*
- (1909) A I R 1929 Lah 407 (408) 119 Ind Cas 327 *Burel and v Ganpat Rai*

4 A deposited certain amount with a banker and drew against it but not to the full extent the residue was employed on A's account by the banker according to an agreement between them. It was held that besides the ordinary relation of banker and customer, there subsisted also between them the relation of principal and agent.^{5a}

For other illustrations see the undermentioned cases.⁶

The following persons have been held not to be 'agents' within the meaning of this Article —

1 A *quondam* agent after termination of his authority, receiving money due to principal.⁷

2 The guardian of his ward.⁸

3 A co mortgagee of another co mortgagee.⁹

5a (1873) 10 Bom H C R 300 (304) *Nasir bin Abdul v Dnyabhai Itchad and Co* (1917) A I R 1917 All 466 (468) 36 Ind Cas 371 39 All 81 *Susil Chandra v Gauri Shankar* (The relation between a broker and the person

(1916) A I R 1916 Cal 548 (550) 31 Ind Cas 607 42 Cal 1050 *Patil Ram Banerjee v Kankinarra & Co* (Broker)

(1890) 12 All 541 (545) 1890 All W N 99 *Babu Ram v Ram Dayal* (Factor)

(1899) 26 Cal 715 (723) 3 Cal W N 524 *Fink v Duldeo Das* (Do)

General of Bengal (Muzart)

(1881) 7 Cal 627 (632) *Lawless v Calcutta Landing and Shipping Co*

(1880) 14 Cal 147 (152) 13 Ind App 123 4 Sar 751 10 Ind Jur 475 (P C) *Hurriath v Krishna Kumar* (Dewan of Estate)

(1924) A I R 1924 All 481 (489) 46 All 791 84 Ind Cas 158 (F B) *Sheo Ghulam v Salik Pam* (Lambardar)

1 Pat L Jour 304
(Do 10 C P L R

Madhab Barua v

(1916) A I R 1916 P C 148 (149) 44 Cal 1 36 Ind Cas 1 (P C) *Nobin Chandra Barua v Chandra Madhab Barua* (Lambardar. This view was not contested in the appeal to the Judicial Committee. On appeal from 18 Ind Cas 735.)

[But see (1916) A I R 1916 Nag 40 (41) 41 Ind Cas 848 13 Nag L R 127 *Baluani v Decrao* (Lambardar is not an agent.)]

7 (1915) A I R 1915 All 259 (260) 29 Ind Cas 986 *Hansraj v Ratni*
[See also (1919) A I R 1919 All 440 (444 445) 41 All 635 52 Ind Cas 373 *Puran Mal v Ford and MacDonald & Co*]

8 (1936) A I R 1936 All 706 (706) 165 Ind Cas 266 *Charan Singh v Diwan Singh*

(1896) 10 C P L R 98 (99) *Molammad Farrukh v Kadir Ali Khan*

(1891) 1891 Pun Re No 84 *Sher Ali v Khatija Molammad* (Art 120 applied)

9 (1921) A I R 1921 Lah 196 (197) 79 Ind Cas 294 *Molamed Ibrahim v Molamed Ismail*

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4. A chairman of a Municipal Council, of the Council ¹⁰

5. An administrator *de son tort* ¹¹

6 A receiver appointed by a Court of a disputed property, of the successful party. ¹²

As to whether a partner is an agent of another partner, see the undermentioned case ¹³

8. Suit between members of a quondam joint Hindu family.—It has been seen in Note 7 *ante* that where a Hindu family becomes divided, but a portion of the joint property is left in the management of one member, such member must be considered to be the agent of the other members in respect of such management. It follows that a suit for an account against such member is governed by Article 89 ¹. A contrary view, namely, that such a suit is governed by Article 62 and not by Article 89, has been held in the undermentioned cases ². In view of the Privy Council decision in *Mudanna Virayya v Mudanna Adenna*,³ the said contrary view is no longer law. In the said Privy Council case, a suit was brought by *A* in 1920 for division of property against his two brothers *B* and *C*, *A* alleged that there had been in 1908 a division of status between the three brothers, and made a claim (*inter alia*) against *B* as manager of the joint property in respect of certain family outstandings alleged to have been collected and misappropriated by *B*. Their Lordships, after observing that in the circumstances of the case the point about limitation was not open to *B*, remarked, "if, however, it was open, their Lordships are of opinion that the Article of the Limitation Act applicable is Article 89"

9 Suit against a del credere agent.—A *del credere* agent is one who, in consideration of extra remuneration, called a *del credere* commission, undertakes that persons with whom he enters into contracts on the principal's behalf will be in a position to perform

10 (1899) 22 Mad 842 (343), *Srinivasa Ayyangar v Municipal Council of Karur*

11 (1919) A I R 1919 Mad 172 (173) 51 Ind Cas 748, *Alla Pichai v Papathi ammal*

12 (1900) 3 Oudh Cas 171 (173), *Sarju Prasad v Mt Khem Kuar*

13 (1933) A I R 1933 Nag 127 (129, 130) 141 Ind Cas 277 29 Nag L R 34

[But see (1912) 14 Ind Cas 19 (21) (Lab), *Sham Lal v Damla Mal*]

Note 8

1 See cases cited in Foot Note (5) to Note 7

Article 89
Notes
7—9

- 4 A chairman of a Municipal Council, of the Council ¹⁰
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10 (1899) 22 Mad 342 (343) *Srinivasa Ayyangar v Municipal Council of Karur*

11 (1919) A I R 1919 Mad 172 (173) 51 Ind Cas 748 *Alla Pichas v Papathi ammal*

12 (1900) 3 Oudh Cas 171 (173) *Sarju Prasad v Mt Khem Kuar*

13 (1933) A I R 1933 Nag 127 (129 130) 141 Ind Cas 277 29 Nag L R 34
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Note 8

- 1 See cases cited in Foot Note (5) to Note 7

the claim of the other members to recover their shares in the realisations is governed by that Article)

8 (1930) A I R 1930 P C 16 (21) 121 Ind Cas 205 (P C)

their duties. A *del credere* agent incurs only a secondary liability towards the principal: he is in effect a surety for the persons with whom he deals.¹ Where such an agent had *not* received any moneys for goods sold by him and was sued upon his contract of guarantee for the price of goods sold, it was held by their Lordships of the Privy Council that the action was merely one on a breach of contract governed by clause 9 Section 1 of the Act of 1859.²

10 Suit against the representative of a deceased agent — Where an agent dies without rendering accounts to the principal in respect of moveable property received by him, his estate in the hands of his legal representatives does not thereby escape liability to the principal. The legal representatives would be liable to make good the losses of the principal to the extent of the assets which they might have received from the deceased agent, though they are not personally liable for such losses.¹ The question has arisen whether, in enforcement of this liability, a suit *for accounts* will lie against such representatives and whether such a suit if maintainable will be governed by Article 89.

On the first question, it has been held in the undermentioned cases² that a suit for accounts will not lie against the agent but only a suit for money payable to the principal for loss which he may have suffered by reason of the negligence or misconduct, the misfeasance or malfeasance of his agent. In this view it has been held in the said cases that Article 89 is not applicable to such suits. The general trend of opinion, however, is that a suit for accounts will lie against the representatives of the agent with this difference that the burden of proof will be upon the plaintiff to establish his case.³ The plaintiff must prove that each item was actually realised by the agent and

Note 9

- 1 (1816) 4 M & S 566 (574) 16 R R 514 (519) *Morris v Cleasby*
- 2 (1871) 16 Suth W R 35 (36) 14 Moo Ind App 131 10 Beng L R 15 2 Sar 703 (P C) *Okoor Persaud Bustooree v Mt Fool Koomaree Dabee*

Note 10

- 1 (1912) 16 Ind Cas 414 (416) (Cal) *Jhapajhannessa Bibi v Bama Sundari Chaudhrani*
See also cases cited in Foot Note [3]
- 2 (1912) 16 Ind Cas 742 (745) (Cal) *Kumeda Charan Bala v Asutosh Chattopadhyaya*
(1923) A I R 1923 Pat 259 (263) 71 Ind Cas 916 *Rameshwar Singh v Narendra Nath*
(1886) 1886 Pun Re No 96, *Sethehand Mal v Kahan Mal*

(1912) 16 Ind Cas 414 (416) (Cal) *Jhapajhannessa Bibi v Bama Sundari Chaudhrani*

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Article 89 Note 10

that it was not paid to the plaintiff by him. It would be open to the legal representatives to adduce evidence to show either that the money was never realised by the agent or that it was paid to the plaintiff after realization. The duty of the legal representatives would be to place before the Court for investigation all the accounts in their possession and power which the deceased agent might have prepared during his agency.^{3a}

On the second question, it has been held that Article 89 will govern such suits.⁴ The High Court of Allahabad⁵ and the under mentioned cases of the High Court of Calcutta⁶ and the Chief Court of the Punjab⁷ have, on the other hand, held that Article 89 will not apply to such cases, the reason given being that the representative of an agent is not an agent within the meaning of that Article and that the suit, therefore, though for accounts, is not against the agent.

- (1927) A I R 1927 Mad 157 (159) 99 Ind Cas 456 50 Mad 249 *Partha saradhi Apparao v Turiapati Subba Rao* (On appeal from A I R 1924 Mad 840)
- (1915) A I R 1915 Mad 596 (596) 27 Ind Cas 807 *Arunachallam Chetty v Raman Chetty*
- (1925) A I R 1925 Bom 148 (149 150) 88 Ind Cas 975 *Gurjabai v Narayana Rao*
- (1921) A I R 1921 Bom 384 (385) 45 Bom 318 59 Ind Cas 357, *Gabu v Zipru*
- (1928) A I R 1928 Nag 256 (256) 112 Ind Cas 128 *Lal Singh v Jivan Ram*
- (1917) A I R 1917 All 14 (15) 39 Ind Cas 626 39 All 855 *Mathura Nath v Chheddu*
- (1912) 13 Ind Cas 930 (935) 1912 Pun Re No 1 *Fatima v Imtiaz Jan*
- (1910) 5 Ind Cas 59 (60) (Cal) *Jogesh Chandra v Benode Lal Roy*
- (1885) 12 Cal 357 (363), *Harender Kishore v Administrator General of Bengal*
- 3a (1929) A I R 1929 Lah 362 (366) 117 Ind Cas 223 *Prem Das v Charan Das*
- (1918) A I R 1918 Cal 276 (277) 47 Ind Cas 371, *Satishekhareswar Roy v Hajirannessa Bibi*

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- Raman Chetty*
- (1921) A I R 1921 Bom 384 (385) 45 Bom 318 59 Ind Cas 357, *Gabu v Zipru*
- (1925) A I R 1925 Bom 148 (149) 88 Ind Cas 975 *Gurjabai v Narayana Rao*
- (1928) A I R 1928 Nag 256 (256) 112 Ind Cas 126 *Lalsingh v Jivanram*
- (1935) A I R 1935 Cal 817 (821) 160 Ind Cas 388 *Bhrami Kishore v Jadab Chandra*
- (1910) 5 Ind Cas 59 (60) (Cal) *Jogesh Chandra v Benode Lal Roy* (As the document was registered Article 116 was held to apply)
- (1885) 12 Cal 357 (363) *Harender Kishore v Administrator General of Bengal* (Do)
- 5 (1909) 2 Ind Cas 118 (121) 31 All 429 *Rao Gorrav v Rani Raghunath Kunuar*
- (1917) A I R 1917 All 14 (15) 39 Ind Cas 626 39 All 855 *Mathura Nath v Chheddu*
- (1902) 25 All 55 (56) 1902 All W N 191, *Bindraban Behari v Jamuna Kunuar*
- 6 (1912) 16 Ind Cas 414 (416) (Cal) *Jhajjannessa Bibi v Daria Sundari Choudhrani*
- 7 (1912) 13 Ind Cas 930 (935) 1912 Pun Re No 1 *Mt Fatima v Mt Imtiaz Jan*

In *Parthasaradhi Appa Rao v. Subba Rao* ⁸ Curgenven J., observed as follows —

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‘ It has only to be pointed out that the Limitation Act classifies suits according to their description and that a suit of the description referred to in Article 89 may be brought against the legal representative of an agent as well as against the agent himself just as, under Article 78 the drawer’s representatives may be sued upon a dishonoured bill of exchange ’

11. Suit by representative of deceased principal.— It has been seen in Note 10 *ante* that the omission of any mention of legal representatives in the first column of the Article does not mean that the Article is not intended to apply to a suit by the legal representatives of the principal or against the legal representatives of the agent. A suit by the legal representative of a deceased principal against the agent for accounts will, consequently, be governed by this Article ¹

12. Starting point—General.—An agent receives money subject to an obligation to account for the same. In all such cases the cause of action does not accrue to the principal immediately the money is received by the agent¹ but arises when an account is demanded and refused² or in the absence of such demand and refusal when the agency terminates³. Limitation has therefore been made to run under this Article from the date —

1 when the account is, during the continuance of the agency, demanded and refused, or

2 where no such demand is made, when the agency terminates

In the generality of cases, only one of these contingencies ordinarily happens. There may, however, be cases where both the contingencies may happen. There may first be a demand and refusal and at a subsequent date, a termination of the agency. In such cases time will run from the date of the refusal in respect of the accounts up to that date and from the date of the termination of the agency in respect of accounts subsequent to the date of refusal.

8 (1927) A I R 1927 Mad 157 (160) 99 Ind Cas 456 50 Mad 249 (This view has been expressly approved by A I R 1935 Cal 917 (592).)

Note 11

1 (1935) A I R 1935 Cal 817 (820) 160 Ind Cas 398 *Bikram Ashore v. Jadab Chandra*

deo Prasad v. Sooraj

Cal 1 (P C), Nobin
suit by representative

of deceased principal against *quondam* agent — Art. 89 was applied)

Note 12

1 (1869) 11 Suth W R 76 (77) 2 Beng L R A C 139 *Kali Krishna Pal Chowdhury v. Sm. Juggut Tura*

2 (1873) 10 Bom H C R 300 (305) *Nasir bin Abdul v. Dayabhai Itchachand* (Though it is stated in this case that a demand will furnish a cause of action it must in reference to the context be taken as a demand and refusal.)

3 See Note 14 *infra*

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Illustration

B, an agent, was employed by *A* to collect rent from December 1907 to October 1915. He was asked to submit accounts up to 12th April 1914, on or before the 13th May 1914. He failed to submit them. The agency terminated on 11th October 1916. A suit was filed by *A* against *B* on 27th August 1918 for accounts for the whole period from 1907 to 1915. It was held that there was refusal on 13th May 1914 and that the claim therefore, so far as it related to accounts up to 12th April 1914, was barred by limitation, but that the suit was in time in respect of the claim for accounts from 13th April 1914 to 11th October 1915.⁴

13 "Demanded and refused."—Where an account has been demanded and refused, time runs from the date of such refusal.¹

The question whether there has been a demand and refusal is a question of fact and has to be proved by definite evidence.² Hence, in the absence of evidence, no inference as to the demand and refusal can properly be drawn adversely to the claim of the principal.³

On the question whether the refusal should be an *express* refusal or an *implied* one to be inferred from the circumstances of the case, there is a difference of opinion. The Punjab Chief Court is of opinion that as the cause of action must accrue to the principal against his agent on a definite date and that date must be the date on which the account is demanded by the principal from the agent and is refused by him, the refusal by the agent to comply with the principal's demand for the account must be an *express* refusal on a definite

⁴ (1922) A I R 1922 Cal 855 (357) 49 Cal 250 68 Ind Cas 562, *Pran Ram v Jagadish Nath*

Note 13

1. (1916) A I R 1916 Cal 680 (663) 30 Ind Cas 697 43 Cal 248, *Madhusudan Sen v Rakhai Chandra*
(1939) A I R 1939 All 642 (648) 147 Ind Cas 529 55 All 814 *Motilal v Radhey Lal*
(1912) 13 Ind Cas 930 (934) 1912 Pun Re No 1 *Fatima v Imtiaz Jan*
[See also (1925) A I R 1925 Nag 115 (117) 81 Ind Cas 505 *Bhayaial v Rai Beharilal* (Held that the agent was not a trustee for the principal)]
- 2 (1925) A I R 1925 Pat 494 (495) 4 Pat 289 69 Ind Cas 275 *Jogindra Narayan v Chinai Mahomed*
(1918) A I R 1918 Pat 615 (618) 43 Ind Cas 570 *Nawab Chowdhry v Lok Nath Singh*
[See (1909) 2 Ind Cas 597 (599) (Cal) *Mahomed Fiaz v Upendra Lal* (It was held on facts that there was no refusal)]
[See also (1905) 1 Cal L Jour 147 (149) *Vadhub Chunder v Debendra Nath* (A mere agreement on the part of the agent that he will submit account papers at the end of each year is not enough to make the right to sue for each year's account accrue at the end of that year)]
(1931) A I R 1931 All 372 (374) 132 Ind Cas 43 *Ashub Chand v Chittar Mal*
- 3 (1916) A I R 1916 P O 146 (149) 41 Cal 1 86 Ind Cas 1 (P O) *Nobin Chandra Barua v Chandra Madhab Barua* (18 Ind Cas 735. Reversed)

date⁴ Dr Whitley Stokes (in Anglo Indian Codes) seems to be of the same opinion⁵ This view has not found favour with the High Courts of Bombay⁶ and Calcutta⁷ and with the Judicial Commissioner's Court of Sind⁸ These Courts have held that the question whether or not an account was demanded and refused must depend upon the circumstances of each case and that a refusal might be inferred or implied from the facts of the case

However the decisions in which it has been held that a demand and refusal might be inferred do not admit of any principle being formulated as to the extent or degree of evidence that is necessary before such an inference of refusal can be drawn Thus the case of *Hari Nairam v Administrator General of Bengal*⁹ is an authority for the proposition that the neglect to comply with the demand to render accounts is tantamount to a refusal This decision was followed in *Easin Sarkar v Barada Kishore*¹⁰ which was a case of negligence on the part of the agent to render accounts annually which he by an agreement had agreed to so render Coxe J however observed in the undermentioned case¹¹ I must confess speaking with the greatest respect that I feel some difficulty in holding that mere neglect to render accounts which the defendants have agreed to render can be deemed to be a refusal within the meaning of Article 89 And in *Madhusudan v Rakhal Chandra*¹² it was remarked There may be cases where omission to render accounts may not be a refusal within the meaning of Article 89

Illustrative Cases

1 A was the mukhtear of B B demanded of A an account of his receipts and disbursements and in reply thereto A wrote on

-
- 4 (1912) 13 Ind Cas 930 (934) 1912 Pun Re No 1 *Fatima v Imtiaz Jan*
(1912) 14 Ind Cas 19 (21) (Lah) *Sham Lal v Banka Mal* (Suit by a partner against other partners)
- 5 See Anglo Indian Codes Vol 1 page 987 referred in (1919) A I R 1919 Cal 458 (459) 53 Ind Cas 675 *Bhabatarini Debi v Sheikh Bahadur*
- 6 (1933) A I R 1933 Bom 450 (457) 145 Ind Cas 630 68 Bom 200 *Karsondas Dhunjabhai v Surajbhan Ramrupal*
- 7 (1933) A I R 1933 Cal 204 (208) 141 Ind Cas 225 *Abdul Latiff v Gopeswar Chaitoraj*
- (1922) A I R 1922 Cal 355 (357) 49 Cal 250 68 Ind Cas 562 *Pran Ram Mookerjee v Jagadish Nath*

*

- (1916) A I R 1916 Cal 680 (683 684) 30 Ind Cas 697 43 Cal 248 *Madhusudan Sen v Rakhal Chandra*
- 8 (1930) A I R 1930 Sind 142 (143) 123 Ind Cas 228 *Ganeshdas Lokuram v Gengaram Dhingra*
- 9 (1878) 3 Cal L R 446 (446)
- 10 (1910) 5 Ind Cas 186 (187) (Cal) (There is nothing to show in the judgment whether the demand and refusal were proved)
- 11 (1912) 16 Ind Cas 414 (417) (Cal) *Jhapojhannessa Bibi v Bama Sundari Goudhrani*
- 12 (1916) A I R 1916 Cal 680 (684) 30 Ind Cas 697 43 Cal 248

3rd August 1872 a letter in which he promised to render full accounts during the ensuing vacation. This he neglected to do. Held that *mukhtear* virtually refused to account at the end of the vacation.¹³

- 2 A letter was written by the plaintiff to the defendant on 24th April 1909 In this letter it was stated that the defendant had submitted account papers for 1311 and 1312 *fastis* but had not explained them He was accordingly called upon to appear and explain The defendant did not respond to this call Held that failure to respond amounted to refusal ¹⁴
- 3 An agent employed to collect rent was asked by his principal to submit accounts up to 12th April 1914 on or before 13th May 1914 The agent failed to submit the accounts Held that the conduct of the agent in not complying with the demand to submit the accounts amounted to a refusal ¹⁵
- 4 When a demand for accounts was made but the agent put the matter off, such *postponement* was held not to amount to a refusal ¹⁶

Where an agent is appointed *jointly* by more than one principal, the demand for an account must be made by *all* the principals together. A separate demand from an individual principal and refusal by the agent to such principal has no effect on the starting point of limitation under this Article.¹⁷

14. "When the agency terminates": general. — As has been seen in Note 13 above, the Article contemplates two distinct starting points of limitation of which the date of the termination of agency is one, the other being the date of demand and refusal of accounts.¹ This Article, thus, recognizes the termination of agency as giving a cause of action for a suit by the principal to recover moveable property received by the agent and not accounted for,² and in this

- 13 (1878) 9 Cal L R 446 (416), *Hari Narain v Administrator General of Bengal*
 14 (1916) A I R 1916 Cal 680 (683, 684) 30 Ind Cas 697 43 Cal 248, *Madhusudan Sen v Rakhai Chandra*
 15 (1922) A I R 1922 Cal 355 (357) 43 Cal 250 68 Ind Cas 562, *Pran Ram Vooherjee v Jagadeesh Nath Roy*
 16 (1924) A I R 1924 Pat 664 (665) 3 Pat 546 80 Ind Cas 956 *Syed Hasan Iman v Debi Prasad Singh*
 (1918) A I R 1918 Pat 615 (618) 43 Ind Cas 570 *Nauab Chowdhury v Loh Nath Singa*
 (1919) A I R 1919 Cal 458 (459) 53 Ind Cas 675 *Bhabatarini Debi v Sheikh Bahadur*
 17 (1923) A I R 1923 Pat 464 (467) 2 Pat 595 75 Ind Cas 1022, *Jagdeep Prasad Sahi v Mt Rajo Kuer*

1 (1922) A I R 1922 Cal 355 (357) 49 Cal 250 68 Ind Cas 562, *Pran Pam Vookerjee v Jagdish Nath Roy*
(1916) A I R 1916 Cal 680 (684) 30 Ind Cas 697 43 Cal 248, *Madhusudan Sen v Rakhai Chandra*

respect differs from the Act of 1871 (see Article 90 of that Act) The right to demand an account from the agent is vested in the principal and this right can be exercised by him *at any time* during the continuance of the agency, unless there is a contract to the contrary but where *no demand* for an account is, during the continuance of the agency, made by the principal, time will begin to run from the date of the termination of the agency. A suit, therefore, brought more than three years after the termination of the agency will be barred by limitation³

An agency, according to Section 201 of the Contract Act, is terminated —

- 1 by the principal revoking his authority (see Note 15) , or
- 2 by the agent renouncing the business of the agency (see Note 16) or
- 3 by the business of the agency being completed (see Note 17); or
- 4 by either the principal or the agent dying or becoming of unsound mind (see Notes 18 and 19), or
- 5 by the principal being adjudicated an insolvent under the provisions of any Act for the time being in force for the relief of insolvent debtors

The determination of the agency is a question of fact and depends upon the circumstances of each case⁴ The test to be applied is to see whether the agent has *ceased to represent the principal*, the fact that the liability of the agent in respect of acts done by him may

(1905) 32 Cal 719 (724) 1 Cal L Jour 232, *Shib Chandra Roy v Chandra Narain Mukherjee*

3 (1905) 1 Cal L Jour 147 (150) *Madhub Chunder v Debendra Nath*

(1905) 32 Cal 719 (724) 1 Cal L Jour 232 *Sib Chandra Roy Choudhury v Chundra Narain Mukherji*

(1915) A I R 1915 Mad 596 (596) 27 Ind Cas 807, *Arunachallam Chetty v Raman Chetty*

(1937) A I R 1937 All 363 (365) 169 Ind Cas 135 *Hangu Lal v Sarju*

continued)

amount due to his principal)

(1933) A I R 1933 All 642 (648) 147 Ind Cas 529 55 All 814 *Moti Lal v Radhey Lal*

(1866) 6 South W R Act X Rul 29 (30) *Bissessor Roy Choudhry v Ram Doolal Chund* (Where an agency has been created for a fixed period, the mere absconding of the agent would not amount to such a determination of the agency as to cause limitation to run from that date)

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continue has nothing to do with the termination of the agency ^{1a}

Where the duration of an agency was fixed for a certain term by an agreement between the principal and the agent and the latter was allowed to continue as agent even after the term was over it was held that the agency was not terminated on the expiry of the term nor was a fresh agency created but the original agency continued.⁵ An agency created for the management of an immovable property is terminated by the transfer of such property.⁶

Where once the Court takes charge of the property in suit by the appointment of a receiver or otherwise rights of management or service which other persons may possess by virtue of any contract with the original owners of the property will cease. But this is not an absolute rule of law it depends upon circumstances of each case. Thus where an agent is appointed as receiver and he works as an agent of his master notwithstanding his appointment as receiver his agency does not cease.⁷

There is no such thing as a general agency between a pleader and his client. In every suit the contract of agency is created when the *wakalat* is executed and it ends with the termination of the suit.⁸

15 Termination by revocation of agent's authority. — The authority of an agent may be revoked subject to the provisions contained in Section 202 to Section 206 of the Contract Act expressly such as by notice to¹ or by dismissal of² the agent. A

(1936) A I R 1936 Mad 38 (39) *Subramania Iyer v Kannappa Chetty*
 (See (1913) 18 Ind Cas 921 (922) (Mad) *Narayanasamy Thevar v Araswamy Iyengar* (Parties becoming enemies — Agency terminates))

4a (1916) A I R 1916 Mad 281 (282) 28 Ind Cas 740 39 Mad 376 *Venkatachallam Chetty v Narayanan Chetty* (Fixing in the contract of

relation

Chetty

Chetty v

5 (1917) A I R 1917 Mad 455 (456) 36 Ind Cas 804 *Ramanathan Chetty v Kas*

6 (1916) A I R 1916 Cal 800 (800 801) 29 Ind Cas 818 *Suresh Kanta Banerjee v Nawab Ali Sikdar* (So assumed)

7 (1936) A I R 1936 Mad 980 (982 993) 166 Ind Cas 360 *Hari Rao v Somasundara*

radha

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(But see (1923) A I R 1923 Pat 259 (264) 71 Ind Cas 916 *Rameshwar Singh v Narendra Nath*)

Note 15

1 (1916) A I R 1916 P C 148 (148) 44 Cal 1 36 Ind Cas 1 (P C) *Nobin Chandra Barua v Chandra Malhab Barua*

(1916) A I R 1916 Mad 281 (282) 26 Ind Cas 740 39 Mad 376 *Venkatachallam Chetty v Narayanan Chetty*

2 (1912) A I R 1912 Cal 355 (358) 49 Cal 250 68 Ind Cas 562 *Pran Ram v Jagadish Nath*

revocation may also be implied from the conduct of the principal or of the agent ³

16. Termination by the agent renouncing the business of the agency. — An agency may be terminated by the agent renouncing the business of the agency, as when he resigns from the employment ¹ or departs from his employer's service ² The renunciation of the agent may be gathered from the facts of the case. Thus, an agency terminates when the agent sets up a title in himself adverse to his principal ³

17. Termination by the business of the agency being completed. — Where an agency is created for the purpose of transacting a particular business, it terminates on the completion of that business, ¹ in the absence of any proof to the contrary ² Where an agent has been appointed for the sale of certain properties, is the business completed as soon as the sale is completed? There is a difference of opinion on the point. According to the undermentioned cases, ³ where an agent for the sale of property receives the price thereof, the agency does not terminate until he has paid the price to the principal. In *Babu Ram v. Ram Dayal*, ^{3a} their Lordships of the Allabad

(1865) 4 Suth W R S C O Ref 19 (19) *Radhanath Dutt v. Govind Chunder Chatterjee*

[See (1915) A I R 1915 Cal 626 (627) 29 Ind Cas 748 (748) *Behari Lal v. Hara Kumar*]

8 See Contract Act Section 207

Note 18

1 (1909) 4 Ind Cas 556 (557) (Cal) *Foz v. Bens Pershad*

[See (1928) A I R 1928 Mad 906 (907) 109 Ind Cas 332 *Madhatan Nair v. Zamorin Maharajah Aiergal of Calicut*]

2 (1886) 14 Cal 147 (154) 19 Ind App 123 4 Bar 751 10 Ind Jur 475 (P C) *Hurminath Rai v. Krishna Kumar*

30 Ind Cas 691 *Palaniappa Chetty v.*

505 8 Shome L R 81 *Kally Churn v.*

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[See (1910) 8 Ind Cas 637 (639) (Bom) *Nathu Bhas v. Devidas*

(1893) 16 Mad 456 (458) *Sankaran v. Krishna*]

Note 17

1 (1928) A I R 1928 Lah 833 (834) 110 Ind Cas 575 *Fuch, Ram Sukha Nand v. Charan Das*

(1929) A I R 1929 Lah 883 (884) 123 Ind Cas 878 *Ramji Mal Narain Das v. Gulzara Singh*

(1891) 1891 Pun Re No 31 *Ganesh Das v. Shankar Das*

2 (1926) A I R 1926 Lah 200 (201) 91 Ind Cas 487 *Lakshmi Chand v. Chajju Mal Ratan Mal* (Limitation for a suit for accounts between a principal and agent commences to run in cases where a date is fixed for settling accounts from the date so fixed)

3 (1890) 12 All 541 (545) 1890 All W N 99 *Babu Ram v. Ram Dayal*

(1899) 26 Cal 715 (725) 3 Cal W N 524 *Fink v. Buldeo Das*

[See also (1919) A I R 1919 Low Bur 71 (75) 51 Ind Cas 530 *Hor musji v. Po Hingyn*]

3a (1890) 12 All 541 (545) 1890 All W N 99

[But see (1937) A I R 1937 All 863 (365) 169 Ind Cas 135 *Hingu Lal v. Sargu Prasad* (Madras and Sind view referred to with approval)]

Article 89
Notes
17—18

High Court observed "Section 218 of the same statute (i.e. Contract Act) provides that an agent is bound to pay to his principal all sums received on his account. Clearly then the business does not terminate on receipt of the money by the agent, inasmuch as there is a subsequent obligation to account for the sums and to pay them." The Madras High Court⁴ and the Judicial Commissioner's Court of Sind⁵ are of the opinion that the agency terminates when the sale is completed, and that it does not continue until the payment of the price to the principal. The latter view, it is submitted, is correct. As has been seen in Note 14, an agency is determined when the agent ceases to *represent the principal*, though his liability to account may continue.

Where a general power of attorney executed in favour of a person empowers him to manage *all* the affairs of the principal, the agency cannot be restricted only to the collection of debts and outstandings due to the principal. Hence the agency does not terminate on such collections.⁶

18. Termination of the agency by the death of the principal.—The authority of an agent is terminated by the death of the principal.¹ His legal representative is entitled, as has been seen in Note 11 *ante*, to bring a suit for accounts against the *quondam* agent. Time for such a suit runs from the date of the death of the principal. Where an agent continues after the death of the principal as agent under the legal representative of the principal and the legal representative sues the agent for accounts for the whole period of agency, the two periods, namely the period before the death of the principal and the period thereafter, must be separately considered. The suit in respect of the former period would be barred after three years from the date of the death of the principal and the suit in respect of the latter period would be barred after three years after the date of the termination of the agency.²

4 (1916) A I R 1916 Mad 281 (282, 283) 26 Ind Cas 740 39 Mad 376 *Venka*

1 Cas 875, *Kuppusamy Iyer v*

(1934) A I R 1934 Mad 691 (691) 152 Ind Cas 266, *Nagayya v Yerra Kalappa*

5 (1926) A I R 1926 Sind 264 (269) 96 Ind Cas 79 21 Sind L R 836, *Gordhan das v Firm of Gokal Khataoo*

6 (1918) A I R 1918 Mad 1296 (1297) 37 Ind Cas 505 *Rokhsa Bi v Official Assignee Madras*

Note 18

1 (1916) A I R 1916 P O 148 (149) 44 Cal 1 36 Ind Cas 1 (P C), *Nobin Chandra v Chandra Madhab*

(1916) A I R 1916 Cal 680 (682) 30 Ind Cas 697 43 Cal 248, *Madhusudan Sen v Bakhal Chandra*

(1900) 23 All 233 (241) 5 Cal W N 177 28 Ind App 15 11 Mad L Jour 53 3 Bom L R 114 7 Sar 829 (P C), *Mujib un nissa v Abdur Rahim*

2 (1935) A I R 1935 Cal 817 (820, 821) 160 Ind Cas 388, *Dikram Ashore v Jadab Chandra*

(1916) A I R 1916 P O 148 (149) 44 Cal 1 36 Ind Cas 1 (P C), *Nobin Chandra v Chandra Madhab*

Where an agency is created for the management of a dedicated property by a document executed in favour of the Thakur represented by its *shebait*, the death of the *shebait* does not terminate the agency.³

What is the effect on the termination of the agency where two or more persons appoint an agent by the same act or instrument, and where only one of such principals dies? Will the death terminate the agency so far as the deceased principal is concerned, or will it also terminate the agency with respect to the surviving principals? It cannot be held "as an inflexible rule of law," says Mookerjee, J., "that whenever two principals appoint an agent to take charge of some matter in which they are jointly interested, the death of one of them terminates the authority of the agent, not merely as regards the deceased but as regards the surviving principal. We have in each case to determine the true intention of the parties to the contract from the terms thereof and from the surrounding circumstances."⁴ This view was modified in the undermentioned case⁵ where it was held that the agency will continue under the surviving principals in the absence of any evidence that all the principals were joint principals and not joint and several.

19. Termination of the agency by the death of the agent.—The death of an agent also operates as a termination of the agency.¹ As to whether the legal representative of the deceased agent can be sued for accounts, and if so, whether this Article will govern such a suit see Note 10 *supra*.

Where authority is conferred on two or more agents, it is understood under the English law to be a joint agency, and the power must be exercised by all of them. Where such is the case, the death

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suit

(1909) 3 Ind Cas 684 (685) (Cal), *Mohendra Nath Ghosh v Jadu Nath Mullaik*

(1923) A I R 1923 Pat 165 (173) 67 Ind Cas 451, *Rameshwar Narain v Bikhnaik Koeri*

(1909) 3 Ind Cas 684 (685) (Cal), *Mohendra Nath Ghosh v Jadu Nath Mullaik* (Art 120 does not apply to such a suit)

3 (1920) A I R 1920 Cal 848 (849, 850) 59 Ind Cas 126 *Dasarathi Chatterji v Asst Mohan Ghose*

4 (1917) A I R 1917 Cal 436 (441) 41 Ind Cas 288, *Badrinarain v Brynaranayan*

[See also (1916) A I R 1916 Mad 279 (280) 44 Ind Cas 849, *Ponnusamy Pillai v Chidambaram Chelthar*]

5 (1936) A I R 1936 Cal 650 (652, 653) 166 Ind Cas 608, *Monindralal v Haripada*

Note 19

1 (1869) 11 Suth W R 76 (77) 2 Beng L A R O 189, *Kalee Kishen v Mt Juggut Tara*

(1881) 7 Cal 627 (632) *Lawless v Calcutta Landing & Shipping Co Ltd* (Limitation will not commence to run until administration has been taken out)

Article 89
Notes
19—21

of one of them terminates the authority of the others. Where however, the agency is joint and several the death of one of the agents does not terminate the entire agency. In India, in view of the provisions of Section 43 of the Contract Act, the presumption is that the agency is joint and several. Hence, the death of one of two agents does not terminate agency as regards the surviving agent.²

20. Burden of proof.—Where the suit is against the agent himself, the burden lies on the agent to establish that the claim is beyond time.¹ In order to take the case partially out of the application of this Article, it must be shown that this Article protects the agent against a liability to render accounts for the whole period of agency and limits his liability to render accounts for a portion of such period. Thus the agent can show by proving either that there was a demand and refusal or that by any act of the principal he has been exempted from the duty of furnishing the accounts.²

Where the suit is against the legal representative of the agent, the burden lies on the plaintiff to establish his case. See Note 10 *ante*.

21. Duty of an agent to render proper accounts.—When any money is received by the agent in course of the business, there is an obligation on him to render an account to the principal of the money so received.¹ It is his duty to keep true and correct accounts of all his transactions; he has to be ready with his accounts.² He has to support the entries by vouchers in proper cases.² This duty of rendering an account is not discharged merely by submission of account papers, the agent is bound to explain those papers wherever necessary. And he must be ready to pay any balance which might be found due from him upon taking the accounts.³

- 2 (1912) 16 Ind Cas 852 (854-855) (Cal) *Bhagirath v Prem Chand*
 (See also (1910) 8 Ind Cas 637 (639) (Bom) *Nathubhai v Devdass*]

Note 20

- 1 (1930) A I R 1930 P C 18 (21) 121 Ind Cas 205 (P C) *Vratty v Adenna*
 (1931) A I R 1931 All 372 (374) 132 Ind Cas 43 *Khubchand v Chittar Mal*
 2 (1916) A I R 1916 P C 148 (149) 44 Cal 1 36 Ind Cas 1 (P C) *Nobin Chandra v Chandra Madhab*

Note 21

- 1 (1869) 11 Sath W R 76 (77) 2 Beng L R A C 189 *Kalee Kishen v Ml Juggut Tara*
 (1873) 10 Bom H C R 300 (305) *Nasir v Dayabhai Itchachand*
 (1929) A I R 1929 P C 119 (120) 115 Ind Cas 729 10 Lah 352 56 Ind App 170 (P C) *Bhauram Singh v Mirbahadur*
 1a (1819) 20 R R 258 (258) 1 Jack & Walk 135 *Pearse v Green*
 2 (1881) 6 Cal 751 (757) 8 Cal L R 321 *Annoda Prosad v Diarlanaith*
 (1931) A I R 1931 Mad 185 (190) 131 Ind Cas 165 54 Mad 654 *Annu Atathanigal v Somasundara Atathanigal*

43 Cal 248 *Vadhusudan*

3 189 *Kalee Kishen v Ml*

ibid *unlra Foy v Chundra*

Article 89
Notes
21—22

But, where there has been both a demand and refusal as well as a subsequent termination of agency, and a suit for the period before the

(1912) 13 Ind Cas 930 (935) 1912 Pun Re No 1, *Fatma v Imtiaz Jan*
[See (1931) A I R 1331 Mad 185 (190) 131 Ind Cas 165 54 Mad 654,
Annu Athanigal v Somasundara Athanigal]
[See also (1920) 15 Bom 155 (159) 18 Ind App 6 5 Sar 639 15 Ind

1 Cas 1022, *Jagdip*

Frasad v Mt Raja Kuer (In order to give a discharge to an agent, there must be a joint concurrence of all the principals and where such a joint concurrence is wanting, there is, in point of law, no discharge at all.)

Note 22

1 (1886) 14 Cal 147 (154) 18 Ind App 123 4 Sar 751 10 Ind Jur 475 (P C),

(1928) A I R 1928 Mad 1236 (1237) 114 Ind Cas 364, *Ayyaluttu Thevan v Sagarra Achi*

(1901) 1 Cal L Jour 147 (149) *Madhub Chunder v Debendranath Dey*]

2 (1910) 8 Ind Cas 637 (639) (Bom) *Nathubhai v Devidas*

Article 89
Note 22

date of the refusal is barred, it has been held that in a suit based on the cause of action furnished by the termination of the agency, the agent cannot be called upon to account for the period prior to the refusal. See Note 12 *ante*.

Article 90

<p>90. Other suits by principals against agents for neglect or misconduct.</p>	<p>Three years.</p>	<p>When the neglect or misconduct becomes known to the plaintiff.</p>
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Synopsis

1. Scope of the Article.
2. Neglect or misconduct.
3. Suit against agents.
4. Starting point of limitation — Knowledge of the plaintiff.
5. Liability of the legal representative of a deceased agent.

1. Scope of the Article. — Articles 88 and 89 prescribe the period of limitation for suits *for account* brought by the principal against his agent. This Article prescribes the period of limitation for "*other suits*" by the principal against his agent for neglect or misconduct, that is, suits which do not properly come under Article 88 or Article 89¹.

Thus, a suit for compensation based on the provisions of § 212 of the Contract Act for loss resulting from the neglect, want of skill or misconduct of the agent, will be governed by this Article.

2. Neglect or misconduct. — An agent is bound to conduct the business of the agency with as much skill as is generally possessed by persons engaged in similar business, unless the principal has notice of his want of skill. The agent is always bound to act with reasonable diligence and to use such skill as he possesses, and to make compensation to his principal in respect of the direct consequences of his own neglect, want of skill or misconduct, but not in respect of loss

* **Act of 1877, Article 90**
Same as above

Act of 1871, Article 91

Columns one and two same as above Column three was — When the neglect or misconduct occurs

Act of 1859

No corresponding provision

Article 90 — Note 1

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or damage which are indirectly or remotely caused by such neglect, want of skill or misconduct.¹ An agent is, thus, legally bound to take all the precautions which an ordinary prudent man of business would take in managing affairs of his own.² And where it can be shown that a loss sustained by the principal is directly traceable to a disregard on the part of the agent of directions issued to him regarding the conduct of the business, such misconduct is actionable.³ Thus, where *A* entrusted *B* with certain sums of money, with a direction to dispose them off in a particular manner and *B* wrongfully retained them in his hands it was held that *B* was an agent of *A* and was liable to *A* for neglect or misconduct.⁴ Similarly, where an agent did not inform his master about the arrears of rent getting barred by limitation, it was held that he failed in his duty and was liable for damages in respect of such arrears as could not be recovered.⁵

The expression "neglect or misconduct" has special reference to what is termed negligence or misconduct of the agent in the conduct of the agency. These words must be construed technically as referring to what the principal charges as misconduct on the part of the agent in the business of the agency. These words do not cover every failure of duty by the agent.⁶

As for the degree of negligence required before an action lies against a legal practitioner, see the undormentioned decisions.⁷

Note 2

1 Contract Act, Section 212

2 (1919) A I R 1919 Cal 423 (424) 52 Ind Cas 71, *Ramesh Chandra v Easin Sarkar*

(1927) A I R 1927 All 436 (437) 103 Ind Cas 221, *Kishore Lal Mahabadi Lal v Jauhari Mal* (An agent misconducts himself if he makes a secret profit and conceals that profit from his principal)

3 (1924) A I R 1924 All 467 (470, 471, 472) 46 All 175 80 Ind Cas 241, *A C Mukerji v Municipal Board Benares* (A suit by a Municipal Board against its Secretary and Executive Officer for the recovery of moneys embezzled by municipal servants owing to the negligence of the defendant—It was assumed that Executive Officer was an agent of the Municipal Board)

(1927) Cal 100, 101 (1927) D. I. 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000

(1924) A I R 1924 All 481 (489) 46 All 791 84 Ind Cas 158, *Sheo Ghulam v Sahk Ram* (An agent who neglects his duty, that is to say, who is guilty of a breach of contract is liable to pay compensation which directly flows from his breach)

(1931) A I R 1931 Cal 738 (741) 58 Cal 923 133 Ind Cas 177 *Sahitpra*

4 (1930) A I R 1930 All 397 (398) 124 Ind Cas 33, *Jaganji v Bandan*

5 (1919) A I R 1919 Cal 423 (424) 52 Ind Cas 71, *Ramesh Chandra Acharjee v Easin Sarkar*

6 (1928) A I R 1928 Mad 906 (907) 109 Ind Cas 332 *Madhavan Nair v. Manavikrama Zamorin Maharaja Atergal, Calicut*

7. (1907) 16 Oudh Cas 95 (191 102, 106) *Babu Manohar Lal v Kashmiri Bank Ltd* (This is a question of fact)

Article 90
Notes
3—4

3. Suit against agents. — A *lambardar* is the agent of the co sharers of the village. If he does not collect from solvent and willing tenants or squanders the cash and generally fritters away the profits which might be realized if he were ordinarily diligent, he is liable to be sued for compensation. And a suit brought against such a *lambardar* will be governed by this Article ¹

It is a question of fact in each case as to whether a director of a company whose acts are brought into question is in the position of a trustee, a partner or an agent to the company or the body of the share holders. If on the facts of a particular case it is held that the director was an agent to the company, a suit against him for loss incurred by his negligent conduct of the business will be governed by this Article ²

A bank clerk in charge of savings bank accounts, through whom alone money could be withdrawn and who alone could report to the official concerned what a particular depositor desirous of withdrawing money has to his credit was held to be an agent and this Article was held to be applicable to a suit to recover moneys paid out by his fraud ³

4. Starting point of limitation—Knowledge of the plaintiff. —Time runs from the date when the neglect or misconduct becomes known to the plaintiff ¹. It is necessary therefore, before the Article can be applied, to ascertain the date on which the plaintiff came to know of the neglect or misconduct of the agent ². The knowledge may

(1932) A I R 1932 Rang I (2) 9 Rang 575 135 Ind Cas 648 *Saw Hla Pru v S S Halkar*

Note 3

- 1 (1924) A I R 1924 All 481 (489) 46 All 791 84 Ind Cas 158, *Sheo Ghulam v Salik Ram*
- 2 (1924) A I R 1924 Lah 435 (437) 5 Lah 27 79 Ind Cas 740 *Daulat Ram v Bharat National Bank Ltd Delhi*
- (1935) A I R 1935 Lah 705 (706) 160 Ind Cas 759 *Peoples Bank of Northern India Ltd v Des Raj* (Art 36 was not applied)
- (1936) A I R 1936 Lah 268 (271) 162 Ind Cas 204 17 Lah 262 *Peoples Bank of Northern India Ltd v Har Gopal* (To such a suit, Art 36 does not apply)
- (1936) A I R 1936 Lah 271 (272) 167 Ind Cas 307 *Peoples Bank of Northern India Ltd v Har Gopal*
- 3 (1930) A I R 1930 All 573 (575) 124 Ind Cas 180, *Benares Bank Ltd v Ram Prasad*

Note 4

- 1 (1927) A I R 1927 All 496 (437) 103 Ind Cas 221 *Ashora Lal Mahundi Lal v Jauhari Mal* (Suit for money earned by agent as secret profits—Limitation begins to run from the date the principal comes to know that agent has made secret profits)
- (1930) A I R 1930 All 397 (398) 124 Ind Cas 33 *Jaganji v Dandan* (Money entrusted to a person with direction to dispose it off in a particular manner — Agent failing to do so — Suit for negligence of agent)
- (1911) 9 Ind Cas 51 (54) (Mad), *Pengaswamy Iyengar v Srinivasa Iyengar*. (1907) 10 Oudh Cas 95 (103), *Dabu Manohar Lal v Kashmiri Bank Ltd*
- 2 (1931) A I R 1931 Cal 738 (741) 59 Cal 923 133 Ind Cas 177, *Sakti prasanna Bhattacharya v Nalinranjan Bhattacharya*

be actual or constructive. In *Lala Anant Parshad v. Perbhu Narain*³ it was held by the Allahabad High Court that constructive notice of the negligence of the agent was sufficient in the circumstances of that case. Ordinarily, the knowledge of the negligence or misconduct of an agent can fairly be imputed to the principal from the date when he obtains the account book from the agent.⁴ However, it was held in the undermentioned decision⁵ that reasonable time for examination of account books should be allowed after delivery of such account books.

A suit for negligence in this Article means a suit in respect of some negligent act or omission and the words that limitation shall run from the time when the neglect becomes known to the plaintiff mean that time will run from the time when the negligent act or omission becomes known to the plaintiff and not from the time when he realizes or concludes that the act was negligent⁶ nor from the time when the principal comes to know that there is sufficient cause for a good case being run against the agent.⁷

5. Liability of the legal representative of a deceased agent.—The remedy for a wrongful act, which is not a mere tort but a breach of a quasi contract, committed by a deceased agent, can be pursued against his legal representative where property belonging to another person has been appropriated by the deceased and added to his estate.¹

Article 90
Notes
4—5

91. * To cancel or set aside an instrument not otherwise provided for.	Three years	When the facts entitling the plaintiff to have the instrument cancelled or set aside become known to him.
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Article 91

* Act of 1877, Article 91

Same as above

Act of 1871, Article 92

Columns one and two same as above Column three was — When the instrument is executed

Act of 1859

No corresponding provision

3 (1910) 6 Ind Cas 456 (457) (All)

4 (1914) A I R 1914 Low Bur 173 (175) 25 Ind Cas 136 *Palaniappa Chetty v P V R M Firm*

5 (1916) A I R 1916 Low Bur 40 (41) 36 Ind Cas 418, *Ardikappa Chetty v K A R Kadappa*

6 (1932) A I R 1932 Rang 1 (2) 9 Rang 575 135 Ind Cas 648, *Saw Hla Pru v S S Haikar*

7 (1914) A I R 1914 Cal 888 (890) 25 Ind Cas 706, *Janki Koer v Mahabir*

Note 5

1 (1936) A I R 1936 Lah 268 (271) 162 Ind Cas 204 17 Lah 262, *Peoples Bank of Northern India Ltd v Har Gopal*

(1935) A I R 1935 Lah 705 (707) 160 Ind Cas 759, *Peoples Bank of Northern India Ltd v Des Raj*

(1922) 66 Ind Cas 446 (447) (Lah), *Framjee Shapurjee v Karam Dev*

Article 91
Note 1*Synopsis*

1. Legislative changes.
2. Scope and applicability of the Article.
3. Cancellation or setting aside of instruments — General.
4. Alienation by Hindu widow.
5. Alienation by guardian.
6. Alienation by coparcener in joint Hindu family.
7. Alienation by Iambardar.
8. Alienation by karnayan of Malabar tarwad.
9. Alienation by member of Aliyasantana family.
10. Transfer by mobunt of mntt or trustee of temple.
11. Alienation by sonless proprietor in the Punjab.
12. Alienation by executor or administrator.
13. Alienation by Court of Wards on behalf of disqualified proprietor.
14. Alienation voidable under Section 53 of the Transfer of Property Act.
15. Alienation by minor as major — Suit for possession after majority.
16. "Instrument," meaning of.
17. "Plaintiff."
18. Disability of plaintiff — Extension of time.
19. Onne of Proof.
20. Starting point.

Other Topics

Article not restricted to suits between parties to instrument	...	See Note 2
"	...	See Note 20, Pt. 11
"	...	Is. 3, 3a; Note 3, Pt. 3
"	...	See Note 20
"	joint ...	See Note 20,
"		Pts. 7 to 10
Instrument not supported by consideration—Starting point:		See Note 20, Pt. 6
Sham or inoperative transaction	...	See Note 3, Pts. 1 to 4
Suit for possession	...	See Note 3 F-Ns (6), (9), (13), (16), (17), Note 15
Void or voidable instrument	...	See Note 3, Pts. 5 to 11

1. Legislative changes.

1. There was no provision corresponding to this Article in the Act of 1859.
2. Article 92 of the Act of 1871 corresponding to this Article provided that the starting point of limitation was the *date of the execution of the instrument*.

3 The words "when the facts entitling the plaintiff to have the instrument cancelled or set aside become known to him" were substituted in the Act of 1877 for the words "when the instrument is executed" which occurred in the Act of 1871

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2. Scope and applicability of the Article. — This is a general Article applicable to suits to cancel or set aside instruments not otherwise provided for. Articles 44, 114, 125 and 126 are instances of special Articles providing for special classes of such suits. Where a case falls under a special as well as under a general Article, the established rule of interpretation of statutes is that the case is governed by the special Article and not by the general one¹

A right to sue to set aside or cancel an instrument is provided for by S. 39 of the Specific Relief Act, 1877,² which runs as follows

'Any person against whom a written instrument is void or voidable, who has reasonable apprehension that such instrument, if left outstanding, may cause him serious injury, may sue to have it adjudged void or voidable and the Court may, in its discretion, so adjudge it and order it to be delivered up and cancelled

"If the instrument has been registered under the Indian Registration Act, the Court shall also send a copy of its decree to the officer in whose office the instrument has been so registered, and such officer shall note on the copy of the instrument contained in his books the fact of its cancellation'

Where an instrument is not void as between the parties thereto, or voidable at the option of the parties or of any other person, it cannot be set aside or cancelled, but may, in proper cases, be declared not to be binding on a particular person. A suit for such a declaration is governed by Section 42 of the Specific Relief Act. This Article does not apply to such suits³. As was observed by their Lordships of the Privy Council in *Motilal v. Karabuldin*,^{3a} "between setting aside a sale and holding that the plaintiff's rights are not affected by it, there is a wide difference."

It has been broadly stated in some cases⁴ that the Article is restricted to suits between parties to an instrument or their successors in-interest. This however does not seem to be correct. As will be shown in the Notes below, there are instruments which may be

Article 91 — Note 2

1 See Note 24 to the Preamble

2 (1919) A I R 1919 Mad 679 (679) 47 Ind Cas 505, *Balasundaram Pandiam Pillai v. Authumulam Chettiar*

3 (1863) 1863 Pun Re No. 19, *Mangal v. Buta*

See also Note 3 *infra*

3a (1897) 25 Cal 179 (186) 24 Ind App 170 1 Cal W N 639 7 Bar 222 (P C)

4 (1923) A I R 1923 Rang 82 (83) 74 Ind Cas 164, *M. San Ma Khawng v. Shwe Ba*

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2—3

voidable at the instance of third parties to the instrument and if such third party sues to avoid it, the suit will fall under this Article

A suit based on an instrument, i.e. a suit claiming a relief in accordance with an instrument is not a suit to set aside or cancel the same⁵ This will be so even if the plaintiff attacks a particular clause in the instrument as invalid and illegal⁶ Where the plaintiff sued for reliefs granted to him under an award but stated in the plaint that a particular clause inserted in the award by the arbitrator after it was made was *ultra vires* and invalid, their Lordships of the Privy Council held that it was not a suit to set aside or cancel the award within the meaning of this Article⁷ Their Lordships observed as follows

"As regards the defence that the suit is barred by limitation of time, their Lordships are of opinion that the suit is based on the award and is not a suit to set it aside. No doubt the plaintiff contends that the fifth clause prohibiting partition is invalid or at any rate is not binding upon him and that the arbitrator having made his award was then *functus officio* and had no jurisdiction to make the entry which he afterwards did make respecting the five hiswa share of Kukargoti. But these contentions do not bring the case within Article 91, Schedule II of the Indian Limitation Act, 1877. Under that Act, a suit to cancel or set aside an award must be brought within three years from the time when the facts entitling the plaintiff to have it cancelled or set aside became known to him. It is obvious that this limitation has no application to the controversy respecting the five hiswas of Kukargoti. A plaintiff who contends that an arbitrator has no power to make an unauthorised addition to an award already made and sought to be enforced by him is not in any sense seeking to cancel or set aside the award. Neither does the contention that the fifth clause is *ultra vires* and invalid bring the case within the Act. The plaintiff disputes the legal effect of that particular clause, but does not seek to cancel or set aside the award. On the contrary he seeks to enforce it so far as it is operative in point of law."

3. Cancellation or setting aside of instruments.—General.—Whether a person is entitled or bound to set aside or cancel an instrument depends largely on the question whether he is, or claims through a person who is, *on the face of it*, a party to the instrument

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- (1921) A I R 1921 Nag 74 (76) 17 Nag L R 169 64 Ind Cas 775 *Kunjilal v Chandar Singh*
 (1931) A I R 1931 Oudh 333 (339) 132 Ind Cas 51 7 Luck 131, *Parkash Narain v Birendra Bikram Singh*
 5 (1925) A I R 1925 Oudh 678 (680) 90 Ind Cas 184 *Amis Fizza Bibi v Datta Din*
 6 (1901) 23 All 383 (391) 23 Ind App 111 5 Cal W N 555 11 Mad L Tim 149 3 Bom L R 311 8 Sar 27 (P C), *Jafri Begam v Syed Ali Raza*
 (1932) A I R 1932 Sind 137 (142) 26 Sind L R 111 140 Ind Cas 724, *Aaram Ali Shah v Hussain Ali Shah*
 7 (1901) 23 All 383 (391) 23 Ind App 111 5 Cal W N 555 11 Mad L Tim 149 3 Bom L R 311 8 Sar 27 (P C) *Jafri Begam v Syed Ali Raza*

*Where he is a party to the instrument***Article 91
Note 3**

Where A is or claims through a person who is on the face of the instrument a party thereto the following positions are possible —

- 1 The instrument may be a sham or inoperative one
- 2 It may be a void instrument
- 3 It may be a voidable instrument that is an instrument which may be affirmed or repudiated by A at his option
- 4 It may be a valid instrument

In the first case there is nothing in fact either to set aside or to cancel and A is consequently not bound to get it set aside or cancelled. The very idea of a sham or nominal transaction would imply that it is not intended to be operative or to have any effect.¹ His rights will not be affected by the failure to so get it set aside or cancelled.² He may, however, if he wishes to do so sue under Section 42 of the Specific Relief Act 1877, for a declaration that it is a sham transaction. But the suit would not be one governed by this Article.³ In *Pether Permal Chetty v. Munindas Serrai*,⁴ the plaintiff sued for possession of certain property in respect of which he had executed what

Note 3

- 1 (1927) A I R 1927 Mad 255 (200) 99 Ind Cas 571 *Venkat Rama Iyer v Krishnammal*

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- (1917) A I R 1917 All 378 (374) 39 All 633 40 Ind Cas 373 *Jagrup Sahu v. Ramanand Sahu*
 (1928) A I R 1928 All 267 (267) 50 All 510 109 Ind Cas 54 *Mahomed Nazir v. Mt. Zulaikha*
 (1924) A I R 1924 Bom 174 (176) 48 Bom 166 82 Ind Cas 533 *Sangawa v. Huchangowda*
 (1895) 23 Cal 460 (466) 469 *Sham Lal Mitra v. Amarendra Nath Bose*
 (1916) 1916 Pun W R No 34 *Taro v. Sarbdiat*
 (1927) A I R 1927 Mad 805 (812) 103 I O 150 *Subraya Chetty v. Nagappa*
 (1929) A I R 1929 Mad 478 (479) 120 Ind Cas 378 *Krishnaswamy Iyengar v. Kuppu Ammal*
 (1920) A I R 1920 Pat 538 (539) 58 Ind Cas 380 *Ram Brich Singh v. As. Sonjhas Koer*
 (1912) 15 Ind Cas 819 (821) 5 Sind L R 240 *Khanchand v. Kodumal*
 (1933) A I R 1933 Oudh 72 (73) 140 Ind Cas 709 *Mahomed Yasir Ali v. Sarju Tewari*
 [But see (1933) A I R 1933 Lah 899 (400) 142 Ind Cas 586 *Hassu v. Dasida* (Submitted wrong)]

- 3 (1899) 13 Mad 44 (45) *Nagathal v. Ponnusamy*
 (1908) 30 All 375 (377) (1908) All W N 156 5 All L Jour 421 *Jagar Deo Singh v. Phuljharis*
 (1926) A I R 1926 Rang 71 (72) 93 Ind Cas 197 *Ma Mo v. Ma Set*
 (1904) 28 Mad 849 (850) 15 Mad L Jour 228 *Singarappa v. Sanjappa*
 (Such a suit would lie but Art. 91 would govern the case — This it is submitted is not correct.)
 (1913) 18 Ind Cas 698 (698) 35 All 149 *Basant Lal v. Chhiddammi Lal*
 4 (1908) 35 Cal 551 (559) 500 35 Ind App 99 10 Bom L R 590 6 All L Jour 290 12 Cal W N 562 7 Cal L Jour 528 14 Bur L R 108 18 Mad L Jour 277 4 Mad Low Tim 12 4 Low Bur Rul 266 (P C)

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purported to be a deed of sale in favour of the defendant and alleged in his plaint that the transaction was merely a nominal instrument not intended to be operative. It was contended that the Article applicable to such a suit was this Article. Their Lordships of the Privy Council observed as follows:

'As to the point raised on the Indian Limitation Act, 1877, their Lordships are of opinion that the conveyance being an inoperative instrument, as in effect it has been found to be, does not bar the plaintiff's right to recover possession of his land, and that it is unnecessary for him to have it set aside as a preliminary to his obtaining the relief he claims. The 144th, and not the 91st Article in the Second Schedule to the Act is therefore, that which applies to the case, and the suit has consequently been instituted in time.

In the second case, there is, as in the first case, nothing to set aside. But *A* may, under the provisions of Section 39 of the Specific Relief Act, 1877, institute a suit to have the instrument adjudged void and the Court may, in its discretion, so adjudge and order the same to be cancelled. Such a suit, if instituted, would *prima facie* be governed by this Article.⁵ *A* is, however, not bound to institute such a suit as a preliminary to his obtaining the relief which he claims.⁶

5 (1925) A I R 1925 P C 216 (291) 57 Ind App 265 5 Rang 186 89 Ind Cas 773 (P C) *Kirkuood v Maung Sun* (*A* appeared as a party to a submission to an award but really was a minor who was not in law represented in the submission and therefore was not bound by the submission and award. *A* filed a suit to declare the award as void as against her. It was held that it was a suit under S 39 of the Specific Relief Act and that it was barred under this Article.)

(1899) 27 Cal 150 (165) 26 Ind App 216 4 Cal W N 274 7 Sar 590 (P C), *Beni Pershad Koeri v Dudhnath Roy*

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[See also (1902) 25 All 1 (16) 4 Bom L R 832 6 Cal W N 849 29 Ind App 902 28 S C 20 (P C) *P. S. Chatterjee v R. Bhattachar Singh* (then he Relief Ac

Such a suit would be governed by Art. 120 JJ

6 (1899) 27 Cal 156 (165) 26 Ind App 216 4 Cal W N 274 7 Sar 590 (P C) *Beni Pershad Koeri v Dudhnath Roy*

(1895) 12 Cal 69 (74 75) *Raghubar Dayal Sahu v Bhikya Lal Misser* (Arts 91 and 118 are particularly concerned with instruments or transactions which, if allowed to stand unchallenged once they

(1891) 16 Bom 186 (190) *Abdul Rohim v Kirparam Dayi* (The instruments sought to be set aside were assumed to be nullities)

In the *third* case, *A* can get the instrument set aside or cancelled. But this he can do only by bringing a *suit* for the purpose under Section 39 of the Specific Relief Act, 1877⁷ In other words, there

(1929) A 1 R 1929 Bom 24 (27, 28) 113 Ind Cas 313, *Vaillabhdas Mulji v. Pranshankar Narbhe Shankar*

(1930) A 1 R 1930 Bom 545 (553) 54 Bom 837 127 Ind Cas 897, *Shankar Bhas v. Das Shis*

(1913) 18 Ind Cas 969 (971) (Cal), *Sidhu Sahu v. Gopi Chryan Das* (It is not necessary for a party to a deed to have it formally set aside if from its inception it is void and of no effect)

(1921) A 1 R 1921 Cal 131 (133) 69 Ind Cas 476, *Nisaran Chandra Mookherjee v. Nirupama* (Do)

(1919) A 1 R 1919 Cal 728 (729) 49 Ind Cas 76, *Sanna Bibi v. Siddik Hossain* (Do)

(1921) A 1 R 1921 Cal 786 (788) 70 Ind Cas 525, *Sarat Chandra v. Kanai Lal* (Do)

(1912) 13 Ind Cas 375 (376) (Upp Bur), *Nga Paw v. Nga Lu Gale* (Do)

(1891) 1891 Pun Re No 57, *Ghulam Rasul v. Ajabgul*

(1897) 1897 Pun Re No 55 page 241 (243, 249), *Rangan v. Mahlab Chand*,

(1904) 1904 Pun Re No 74 1903 Pun L R No 2, *Murad Baksh v. Husain Baksh*

(1905) 1905 Pun L R No 103, *Durarka Das v. Sardar Lachman Singh*

(1936) A 1 R 1936 Lah 49 (50) 161 Ind Cas 592, *Bhagwan Das v. Gian Chand*

(1892) 1892 A 1 R 1912 (1912) 1892 A 1 R 1912 1892 A 1 R 1912 1892 A 1 R 1912

(1888) 1 O P L R 165 (167, 168) *Daji Rao v. Harpal* (Suit for declaration of title to property alienated by an invalid document)

(1924) A 1 R 1924 Pat 284 (285) 72 Ind Cas 748, *Mt. Bibi Kanis Zainab v. Mobarak Hossain*

(1882) 5 All 76 (81) 1882 All W N 180, *Hazari Lal v. Jadaun Singh* (Per Straight, J. Stuart, O J contra)

(1924) A 1 R 1924 All 370 (371) 46 All 260 78 Ind Cas 222, *Mulani v. Maula Bur*

(1884) 1884 All W N 60 (60), *Sarajul Haq v. Khadim Hussain*]

T. (1887) 15 Cal 58 (65) 14 Ind App 148 5 Sar 92 12 Ind Jur 9 R & J 99 (P C) *Janki Kunwar v. Ajit Singh* (The immovable property could not have been recovered until the deed of sale had been set aside, and it was necessary to bring a *suit* to set aside the deed)

(1916) A 1 R 1916 Mad 350 (352, 354 362) 38 Mad 321 19 Ind Cas 596, *Raja of Ramnad v. Arunachallam Chettiar*

Halsbury, Vol. 20, S 1745

(1890) 14 Mad 26 (27), *Unni v. Kunchi Amma*.

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must be a *judicial* avoidance or cancellation of the instrument.⁸ Such a suit would be governed by this Article^{8a} If A does not institute such a suit within the time prescribed by this Article, he cannot, in any other suit, claim any other relief inconsistent with the terms of the instrument.⁹ In other words, a suit for any relief which is

8 (1916) A I R 1916 Mad 350 (359) 38 Mad 321 19 Ind Cas 596, *Raja of Ramnad v Arunachallam Chettiar*.

See also the cases cited in Foot Note (7) above.

8a (1916) A I R 1916 Mad 350 (362) 38 Mad 321 19 Ind Cas 596, *Raja of Ramnad v Arunachallam Chettiar*

(1910) 5 Ind Cas 497 (498) (All), *Safdar Singh v Akbar Shah* (The suit fell under S 39 of the Specific Relief Act, and Art 91 applies to it)

(1903) 27 Bom 560 (562) 5 Bom L R 583, *Bakatram Nanuram v. Karsetji Juvajshet*

(1916) A I R 1916 Cal 120 (123) 35 Ind Cas 284, *Bansiram v. Secy of State*

(1921) A I R 1921 Cal 786 (789) 70 Ind Cas 525, *Sarat Chandra v Kanda Lal*

(1890) 14 Mad 26 (27), *Unni v Kunchi Amma*.

(1894) 18 Mad 189 (192) 4 Mad L Jour 106, *Srirengachariar v Ramaswami Ayyangar*

(1909) 1 Ind Cas 719 (720) 32 Mad 72, *Gowindaswamy Pillai v Ramaswamy Pillai*

(1890) 3 C P L R 182 (182), *Sheosingh Lambardar v. Jey Lal*.

[See also (1904) 6 Bom L R 925 (929) *Wasantrao v. Anandarao*]

9 (1887) 15 Cal 58 (65) 14 Ind App 148 5 Sar 92 12 Ind Jur 9 R & J 99 (P C), *Janki Kunuar v Ajit Singh*

(1927) A I R 1927 Mad 255 (260) 99 Ind Cas 571, *Venkataramier v. Krishnammal*

(1889) 11 All 456 (459 460) 1889 All W N 109, *Husan Ali v Naso* (Suit by heir of Mahomedan donor for a share of donor's property by a declaration that the gift was invalid as having been procured from the donor by fraud and undue influence)

(1934) A I R 1934 All 507 (512) 152 Ind Cas 146, *Mt Ansunissa v Siraj Husain*

(1933) A I R 1933 All 92 (105) 125 Ind Cas 220, *Singh v Mt Dulaiya* by plaintiff on the

908, *Qasim Beg v*

Muhammad Zia Beg

(1903) 27 Bom 560 (562) 5 Bom L R 583, *Bakatram Nanuram v. Karsetji Juvajshet*

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(1914) A I R 1914 Bom 59 (91) 38 Bom 449 22 Ind Cas 195, *Jan Muhammad v Dattu Jaffer*

(1916) A I R 1916 Bom 180 (131) 41 Bom 347 39 Ind Cas 23, *Naro Copal v Paragouda*

(1935) A I R 1935 - - - - - *Ram Krishna*
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(1937) A I R 1937 Cal 500 (504) 172 Ind Cas 755, *Jafar Ali v Nasuman-nissa Bili* (Where in a suit in recovery of possession, there is an assignment of a share of gift or settlement, and the share of gift or settlement is set aside, the suit for

inconsistent with such an instrument would be barred if filed after the period prescribed by this Article¹⁰ Where, however, the relief claimed is not inconsistent with the instrument but is based on a cause of action with which the instrument has no concern, the suit would not be governed by this Article Thus, where *A* has executed a sale in favour of *B* but *B* does not get possession under it, *A* can, if *B* subsequently trespasses on the land, institute a suit against him for recovery of possession and the suit would not be barred under this Article by reason of the fact that a prayer for setting aside or cancelling the instrument would be barred under this Article¹¹

In the fourth case, the instrument cannot obviously be cancelled or set aside by *A*¹²

Where he is a third party

Where *A* is not a party to an instrument, he cannot, except in certain cases, get it set aside or cancelled Thus, where *B* executes

(1933) A I R 1933 Cal 812 (813) 146 Ind Cas 1010, *Radhika Mohan v Hari Bashi Saha*

(1902) 6 Cal W N 863 (864) *Chunder Nath Bose v Ram Nidhi Pal*

(1913) 18 Ind Cas 969 (971) (Cal) *Sidhu Sahu v Gopi Charan Das*

(1903) 31 Cal 111 (129) 7 Cal W N 688, *Rameshwar Prasad Singh v Lachmi Prasad Singh* (Suit for recovery of property will be barred after three years)

(1891) 1891 Pun Re No 57, *Ghulam Rasul v Ajabgul*

(1921) A I R 1921 Mad 894 (398) 68 Ind Cas 852, *Sethupathi Aiyer v Kuppuswami Iyer*

(1905) 29 Mad 1 (12) *Roop Lal v Lakshmi Doss*

(1910) A I R 1910 Mad 850 (862) 38 Mad 321 19 Ind Cas 590, *Raja of Ramnad v Arunachalam Chettiar*

(1908) 1 Nag L R 129 (132) *Mt Tanto v Gaydhar*

(1938) A I R 1938 Pat 69 (70) 178 Ind Cas 479, *Gyan Prakash Das v Mt Dukhan Kuer*

(1930) A I R 1930 Sind 66 (68) 126 Ind Cas 737, *Sorabji Muncherji v Tarachand Ghanshamdas* (Claim for return of purchase money on the ground that the sale deed was voidable for fraud and misrepresentation)

[See also (1926) A I R 1926 Cal 167 (169) 90 Ind Cas 866, *Fazluddin Muhammad v Khetra Ghorai*]

[But see (1892) 16 Mad 311 (314) 3 Mad L Jour 144 *Sundaramayan v Seethammal* (Where it was observed that Art 91

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(1896) 22 Bom 1 (4), *Jugmohandas Vundravandas v Pallonjee Eduijee* (Do)]

* AIR 1932

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(1900) 25 Bom 78 (81) 2 Bom L R 638 *Vithas v Hari* (B trespassing on

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an instrument in favour of *C*, *A* who is not a party to it and who does not claim through either *B* or *C*, cannot get it set aside or cancelled. The reason is that as between *B* and *C* it may be a valid and binding instrument¹³ In *Unni v Kunchi Amma*,¹⁴ their Lordships of the Madras High Court quoted with approval the following observations of Turner, C J and Hernan, J, in a previous unreported case —

"If a person not having authority to execute a deed or having such authority under certain circumstances which did not exist, executes a deed it is not necessary for persons who are not bound by it to sue to set it aside for it cannot be used against them. They may treat it as non-existent and sue for their right as if it did not exist."

But *A* may, if the instrument is likely to cast a cloud upon his title, get a declaration under Section 42 of the Specific Relief Act, 1877 that the instrument is not binding upon him and cannot affect his interest¹⁵. He is however not bound to sue for such a declaration and his failure to do so will not affect the enforcement of his rights¹⁶. Even if in a suit to enforce such rights he prays for setting aside or

- 13 (1890) 14 Mad 26 (28) *Unni v Kunchi Amma*
(1887) 10 Mad 213 (215) *Pachamuthu v Chinnappan*
(1924) A I R 1924 Mad 607 (607) 78 Ind Cas 564 *Kanna Panikar v Nanchan*
(1886) 1888 Pun Re No 135 *Ramchand v Muhammad Khan*
(1896) 1896 Pun Re No 75 p 231 (233) *Amir v Mt Atiar un nissa*
(1895) 1895 Pun Re No 52 p 248 (263), *Hafiz Karim Baksh v Mt Begam Jan* (12 Cal 69 Followed)
(1902) 1902 Pun Re No 23 1902 Pun L R No 28, *Nanak v Devi Ditta*
(1915) A I R 1915 Lah 200 (202) 29 Ind Cas 199, *Radhu Ram v Mohan Singh*
(1992) A I R 1992 Nag 60 (61) 18 Nag L R 11 76 Ind Cas 884 *Seth Sagunchand v Lala Chhabilaram*
[See (1886) 1 C P L R 75 (78) *Sectaram Sadasheo v Nilu Patel*
(1912) 13 Ind Cas 989 (984) 8 Nag L R 29 *Bapu v Temsa*
(1892 96) 2 Upp Bur Rul 475 (477) *Ma Te v Ma Po Nyun*
(1895) 1 Oudh Cas 229 (231) *Sughar Kuar v Phuljhara*
(1895) 1 Oudh Cas 175 (180) *Ilitfat Hussain v Mt Zulfunnisa*
(Suit for possession governed by Art 91 if there is a document which plaintiff is bound to get cancelled)
(1912) 15 Ind Cas 819 (821) 5 Sind L R 240 *Khanch and v Kodumal*
(33 Cal 257 Followed)]
- 14 (1890) 14 Mad 26 (28)
- 15 (1906) 30 Mad 18 (20) 1 Mad L Tim 412 *Sanakaran Nair v Gopala Menon*
(1887) 15 Cal 409 (421) 15 Ind App 37 22 Ind Jur 175 5 Bar 100 (P C), *Rai Kishori Das v Debendranath Sirlar*
(1883) 5 All 322 (323) 1883 All W N 49 *Sobha Pandey v Sahodra Bibi*
(1894) 16 All 73 (74) 1894 All W N 1, *Din Dial v Har Narain*
(1888) 1888 Pun Re No 135, *Ram Chand v Muhammad Khan*
(1887) 10 Mad 213 (215) *Pachamuthu v Chinnappan*
(1912) 13 Ind Cas 932 (934) 8 Nag L R 29 *Bapu v Temsa*
(1904) 26 All 606 (607, 608) 1904 All W N 138, *Gaiga Gulam v Tapasri Prasad*
- 16 (1906) 30 Mad 18 (20, 21) 1 Mad L Tim 412 *Sanakaran Nair v Gopala Menon*
(1894) 6 All 260 (262) 1894 All W N 73 *Ithram Singh v Intizam Ali* (Suit for possession by auction purchaser against fraudulent alienation of judgment-debtor)

cancelling such an instrument, the prayer will be regarded as merely incidental to the reliefs which he claims.¹⁷ In *Rai Kishore Dass v Debendranath Sircar*,¹⁸ the High Court of Calcutta had declared at the instance of a third party that a deed of conveyance was void and had ordered the same to be cancelled. Their Lordships of the Privy Council held that this was erroneous and they observed —

Their Lordships observe that the High Court has declared the deed of conveyance to be void and that it be cancelled and retained in Court. It is not because a man conveys property to which he is not entitled that the conveyance is absolutely void

- (1883) 6 All 75 (76-77) 1883 All W N 212 *Uma Shankar v Kalka Prasad* (Court auction purchaser suing for possession from alienation from judgment debtor)
- (1899) 22 All 90 (93) 1899 All W N 169 *Muhammad Baqar v Mango Lal* (Do)
- (1884) 1884 All W N 88 (89) *Bannur Lal v Bhagwan Din* (Do)
- (1890) 1890 All W N 115 (117) *Ajuba Begam v Nasir Ahmad*
- (1887) 1887 Bom P J 263 *Shank Sadodan v Bahmanbhai*
- (1933) A I R 1933 Cal 810 (813) 146 Ind Cas 1010 *Radhika Mohan v Hari Bashi Saha*
- (1916) A I R 1916 Cal 120 (123) 35 Ind Cas 284 *Bansiram v Secretary of State*
- (1909) 30 Cal 433 (437-438) *Danku Behari Shaha v Krishna Gobind Joardar* (Suit for possession)
- (1902) 4 Cal L Jour 442 (467) *Alamgir Khan v Kamrunnessa Khanum*
- (1905) 1905 Pun Re No 79 p 248 (250) 1905 Pun L R No 102 *Karm Kuli v Har n Dad*
- (1908) 1908 Pun W R No 5 *Amir Shah v Haidar Shah*
- (1916) A I R 1916 Lah 247 (248) 1916 Pun Re No 83 33 Ind Cas 943 *Sajjad Ali v Muhammad Zulfikar Ali Khan* (Art 91 is restricted to a suit between the parties to the instrument or their predecessors in interest and a plaintiff is not bound to set aside an instrument not executed by himself or by his predecessor in title)
- (1931) 1931 Mad W N 856 (856) *Lakshminarayana Navada v Madappayya*
- (1914) A I R 1914 Nag 75 (77) 10 Nag L R 133 26 Ind Cas 813 *Hussain v Rajaram*
- (1922) A I R 1922 Nag 60 (61) 18 Nag L R 11 76 Ind Cas 884 *Sagun chand v Chhabisleram*
- (1924) A I R 1924 Pat 551 (551) 78 Ind Cas 705 3 Pat 575 *Jai Narayan v Kishun Dutta*
- (1922) 65 Ind Cas 224 (230) (Pat) *Abdul Rahman v Wali Mohamed*
- (1900) 3 Oudh Cas 105 (107) *Sital Singh v Lackman Kuar* (Suit for possession not barred)
- (1934) A I R 1934 Oudh 55 (55) 9 Luck 365 147 Ind Cas 910 *Ram Rup v Court of Wards Balramprasad Estate*
- (1923) A I R 1923 Rang 82 (83) 74 Ind Cas 164 *Mr San Ma Khawng v Shwe Ba*
(See (1911) 12 Ind Cas 140 (145) (Lah) *Umar Ali v Aman Ali*)
(See also (1924) A I R 1924 Lah 396 (397) 71 Ind Cas 822 *Arum Khan v Karim*)
- (1916) A I R 1916 All 839 (340) 39 Ind Cas 930 *Mt Bageshra v Sheo Nath*
- 17 (1884) 1884 All W N 88 (89) *Bannur Lal v Bhagwan Din*
- (1934) A I R 1934 All 507 (511) 152 Ind Cas 146 *Anzunissa v Siraj Hussain*
- (1888) 1888 All W N 256 (257) *Shro Sahas v Muhammad Askari* (A in possession of property transferred to him by B—C the real owner suing for possession—Art 91 does not apply)
- 18 (1887) 15 Cal 409 (421) 15 Ind App 37 5 Bar 100 12 Ind Jur 175 (P C)

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or ought to be cancelled or retained by the Court. It was unnecessary to do more after declaring the plaintiffs' right than to declare that defendant No. 1 had no right to take possession of, or to transfer any part of the property mentioned in the will, and that the deed passed no right in any part of such property to the defendant No. 2."

The exception referred to above has reference to cases such as those falling under Section 53 of the Transfer of Property Act, 1882, and to cases of Hindu reversioners at whose option an alienation by a Hindu widow is voidable. (See Notes 4 and 14 *infra*.)

4. **Alienation by Hindu widow.**—An alienation by a Hindu widow is not a void transaction, but is only voidable at the option of the reversionary heir¹ But, though it is a voidable instrument the reversioner is not bound to institute a suit to set aside or cancel the same before he can claim the relief which he wants² He may elect to avoid it without the intervention of the Court In *Bijoy Gopal Mukerjee v Krishna Mahishi Debi*,³ where a Hindu widow had executed an *izara* lease of her husband's property and, after her death, the reversioner sued for a declaration that the lease was inoperative against him since her death and for *khas* possession, and it was contended that the reversioner not having sued within the period prescribed by this Article for setting aside the alienation, the suit

Note 4

- 1 (1906) 34 Ind App 87 (91, 92) 34 Cal 329 9 Bom L R 602 11 Cal W N
424 5 Cal L Jour 334 2 Mad L Tim 183 17 Mad L Jour 154
4 All L Jour 329 (P C) *Bijoy Gopal v Krishna Mahishi Deb*
(1897) 25 Cal 1 (8) 24 Ind App 164 1 Cal W N 433 7 Mad L Jour 127
7 Sar 194 (P C) *Mothu Sudan v Rooke* (The reversioner may affirm
it or repudiate it)
(1909) 3 Ind Cas 78 (79) (Cal) *Kishori Pal v Bhushan Bhusiya*
(1924)) 48 Bom 411 79 Ind Cas

" " " " " " " " " " " " " " " " " " " " "
No 116 *Mt Atar Kaur v Sardar Sohan Singh* (It is pre
(1904) (It
This

2 (1905) 83 Cal 257 (269 270) 9 Cal W N 636 1 Cal L Jour 408, *Harshar*
Ojha v Dasarathi Misra
(1906) 3 Nag L R 35 (40) *Anand Rao v Bansinath*
(1901) 8 Cal W N 802 (804) *Narwada Devi v Soshidhisun Di*
(1906) 31 Bom 1 (4) 8 Bom L R 655 *Rahimabai Pandurang v Keshav*
Raghunnath
(1925) A I R 1925 Bom 9 (11) 48 Bom 651 84 Ind Cas 374, *Hanamgouda*
Shidgouda v Irigouda Shingouda

" " " " " " " " " " " " " " " " " " " " "
"adho Gir
v Maroti
838, Chajju Val

See also the cases cited in Foot Note (1)

- 7 (1906) 31 Ind App 87 (91, 92) 34 Cal 329 9 Bom L R 602 11 Cal W N
421 5 Cal L Jour 934 2 Wad L Tim 133 11 Wad L Jour 154
4 All L Jour 329 (P C)

was barred by limitation, their Lordships of the Privy Council observed as follows —

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"A Hindu widow is not a tenant for life, but is owner of her husband's property subject to certain restrictions on alienation and subject to its devolving upon her husband's heirs upon her death. But she may alienate it subject to certain conditions being complied with. Her alienation is not, therefore, absolutely void, but it is *prima facie* voidable at the election of the reversionary heir. He may think fit to affirm it, or he may, at his pleasure, treat it as a nullity without the intervention of any Court, and he shows his election to do the latter by commencing an action to recover possession of the property. There is, in fact, nothing for the Court either to set aside or cancel as a condition precedent to the right of action of the reversionary heir. It is true that the appellants prayed by their plaint a declaration that the *vyaya* was inoperative as against them, as leading up to their prayer for delivery to them of *khas* possession. But it was not necessary for them to do so, and they might have merely claimed possession, leaving it to the defendants to plead and (if they could) prove the circumstances, which they relied on for showing that the *vyaya* or any derivative dealings with the property were not, in fact, voidable, but were binding on the reversionary heirs."

5. Alienation by guardian. — There was no Article corresponding to the present Article 44 in the Act of 1871, and Article 44 of the Act of 1877 was restricted to suits to set aside sales by guardians. A suit, consequently, before the Act of 1877, to set aside any transfer by the guardian, and a suit after the Act of 1877 to set aside any transfer by the guardian other than a sale, were held governed by the provision corresponding to this Article.¹

The present Article 44 covers all cases of transfers by guardians and being a special provision, this Article will not apply to cases falling within the special provision.

See Notes to Article 44 *ante*

6. Alienation by coparcener in joint Hindu family. — *A and B are members of a joint Hindu family governed by the Mitakshara law. A alienates family property to X. B, not being a party to the transaction, cannot, on the principles stated in Note 3 ante, get it set aside or cancelled, but may sue either for a declaration that it is not binding on him and does not affect his interests,¹ or may sue*

Note 5

- 1 (1894) 19 Bom 593 (602) *Channurappa v Danata* (Partition)
(1904) 1901 Pan Re No 23 Page 93 (94) 1904 Pan L R No 107, *Moti Singh v Ghanis Singh* (Mortgage)

Note 6

- 1 (1918) 20 Ind Cas 147 (148, 149) (Oudh), *Raghubar Dayal v Mahesh Gir*
(1912) 13 Ind Cas 547 (548) (Oudh), *Bunda Prasad v Gaya Prasad Singh*
(1924) A I R 1924 Oudh 120 (123) 27 Oudh Cas 140 77 Ind Cas 329,
Dwarika Prasad v Mt Ram Dei

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for any other relief to which he is entitled, ignoring the transaction by *A* and the suit would not be barred by reason of the fact that he had not sued to set aside the transaction within the period prescribed by this Article² Even where *B* asks for the setting aside or cancellation of the transaction by *A*, the prayer will be regarded as merely one for a declaration ancillary to the other reliefs claimed. This Article would not apply to such cases³ The above principles would apply even though *A* is the father or the manager of the family⁴

7. Alienation by lambardar.—The position of a *lambardar* with reference to his co-sharers in the matter of alienation cannot be well put higher than that of a manager of joint property of a Hindu family. On the principles stated in Note 6 *ante*, a co sharer is entitled to sue for a declaration that an alienation by the *lambardar* is not binding on him and such a suit would not be barred by this Article¹

8. Alienation by karnavan of Malabar tarwad.—The principles stated in Note 6 *ante* would equally apply to alienations by the *karnavan* of a Malabar *tarwad*. This Article would not apply to a suit by a member of the *tarwad* for recovery of property alienated by the *karnavan*,¹ or for a declaration that such alienation is not binding on him²

9. Alienation by member of Aliyasantana family.—On the principles stated in Note 6 *ante* it would follow that where one member of an Aliyasantana family has alienated family property, it is not necessary for the other members to set aside or cancel the alienation made. They may ignore it and sue to recover the property so alienated. This Article has no application to such cases¹

2 (1915) A I R 1915 Nag 62 (55) 32 Ind Cas 242 12 Nag L R 12, *Asaram v Ratansingh*

(1909) 1 Ind Cas 670 (674) (Oal) *Banwari Lal v Sheo Sankar Misser*

3 (1894) 16 All 73 (75) 1894 All W N 1, *Din Dial v Har Naram*

(1910) 6 Ind Cas 841 (842) (All) *Muktabal Singh v Haran Singh*

(1915) A I R 1915 All 113 (114) 27 Ind Cas 687, *Kalyan Singh v Pitaribar Singh* (Possession also asked for—Article 144 applies)

4 (1901) 3 Bom L R 682 (684) *Balwantrao v Ramkrishna* (Father)

(1922) A I R 1922 Lah 386 (387) 68 Ind Cas 731, *Sunder v Shiaman* (Manager)

(1915) A I R 1915 Lah 200 (201 202) 29 Ind Cas 190, *Radhu Ram v Mohan Singh* (Do)

Note 7

1 (1921) A I R 1921 Nag 74 (76) 17 Nag L R 169 64 Ind Cas 775, *Kunj Lal v Chandar Singh*

Note 8

1 (1890) 14 Mad 26 (26), *Unni v Kunchi Amma*

(1890) 14 Mad 101 (102), *Anantan v Sankaran*

(1924) A I R 1924 Mad 607 (607) 78 Ind Cas 564, *Kanna Panikar v Nanchan*

(1914) A I R 1914 Mal 415 (446) 15 Ind Cas 587 (588) 37 Mad 420, *Mandoth Veeil Chappan v Puthanpurayal Ranu*

2 (1892) 16 Mad 189 (189) *Puraken v Pariathi*

Note 9

1 (1914) A I R 1914 Mad 693 (700) 24 I C 246, *Kunkanna v Timmaju*

10. Transfer by mohunt of mutt or trustee of temple.—The *mohunt* of a *mutt* or the trustee of a temple does not claim through his predecessor in office and is therefore not a 'party' to an alienation made by his predecessor in office. Where such alienation is not binding on the *mutt* or the temple, the succeeding *mohunt* or trustee may ignore the alienation and sue for possession or other appropriate relief. Such a suit would not be barred by this Article which does not apply to such cases.¹ See Note 3 *ante*.

11. Alienation by sonless proprietor in the Punjab.—The position of the reversioner of a childless male proprietor in the Punjab is analogous to that of the reversioner of a Hindu widow having an interest in her husband's property for life.¹ Where such proprietor has alienated property, the reversioner cannot, in the lifetime of the proprietor, bring a suit to set aside or cancel the alienation.² But he can sue for a declaration that such alienation does not affect his interests.³ He is not, however, bound to sue for such a declaration, and is not precluded from suing for possession on the death of the alienor within the period prescribed for such suits.⁴

12. Alienation by executor or administrator.—A legatee under a will does not claim through the executor appointed under the will. Where the executor makes an alienation of the testator's property, the legatee not being a party or a person claiming through a party to the instrument of alienation, cannot and is not bound to sue to set aside or cancel the alienation. He can sue for a declaration that the alienation does not affect his interests, or simply treat it as not binding on him and sue for the recovery of the property bequeathed to him. In either case this Article has no application. In *Ganapathi Iyer v Sivamalai*,¹ where a legatee sued to recover certain property which had been alienated by the executor, the High Court of Madras observed as follows —

We do not think that the plaintiff could not succeed in recovering the property without setting aside the alienation. The alienation was not one made by him or by any one from

Note 10

- 1 (1929) A I R 1929 Lah 816 (817) 122 Ind Cas 476 *Maitra Das v Gopal Nath* (Alienation by mahant)
 (1915) A I R 1915 Mad 1196 (1195-1197) 39 Mad 456 29 Ind Cas 1, *Narayanan v Lazmanan* (Alienation by trustee)
 (1896) 24 Cal 77 (82) *Sheo Shankar Gur v Ram Shewak Chowdhri* (Do)

Note 11

- 1 (1903) 1903 Pun Re No 56 1903 Pun L R No 93 (F B) *Dheru v Sidhu* (Per Chatterji J)
 2 (1903) 1903 Pun Re No 56 1903 Pun L R No 93 (F B) *Dheru v Sidhu*
 3 (1903) 1903 Pun Re No 56 1903 Pun L R No 93 (F B) *Dheru v Sidhu*
 4 (1900) 1900 P. & F. No. 116 (from 870) (F B) *Dheru v Sidhu*

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Note 12

- 1 (1912) 17 Ind Cas 4 (5) 36 Mad 575

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whom he claims the property as heir. The executor's alienation would be binding on the plaintiff if it was valid, if it was not, it would have no effect as against him. It cannot be held to be a transaction binding on him until he set it aside, although, no doubt, he could ratify the act done by the executor. No authority has been cited in support of the application of Article 91 in such a case.¹

Where an administrator sells property without the leave of the Court, the heirs can treat the sale as not binding on them and sue for possession. This Article would not apply to such a case.² In the undermentioned case³ it was held that such a transaction being a *voidable* one at the instance of the party affected, the heir is bound to set it aside under this Article before he can claim any other relief. It is submitted that this view is not correct. The heir is not a party to the instrument, nor does he claim through the administrator who is a party to the instrument. On the principles stated in Note 3 *ante*, he is not bound to sue to avoid the same even though the transaction may be a voidable one.

13 Alienation by Court of Wards on behalf of disqualified proprietor.—The position of the Court of Wards is that of a guardian of the disqualified proprietor. An alienation by the Court of Wards, like an alienation by the guardian of a minor, would, in law, be an alienation by the disqualified proprietor himself and would therefore be binding upon him until it is set aside in proper proceedings. A suit to set aside the alienation by the Court of Wards would be governed by this Article.¹ Article 44 will not apply, inasmuch as a disqualified proprietor is not a *minor* and as that Article applies only to cases of minors. Where, however, the alienation by the Court of Wards is a *void* transaction, there is no need to set it aside and a suit by the disqualified proprietor for appropriate reliefs will not be barred merely by reason of the fact that a suit to set aside the alienation was not brought within the period prescribed by this Article.²

14. Alienation voidable under Section 53 of the Transfer of Property Act.—A transfer by *A* in favour of *B* with intent to defeat or delay the creditors of *A* is, under Section 53 of the Transfer of Property Act, *voidable* at the option of any creditor so defeated or delayed. This is an exception to the general rule that a third party to an instrument cannot get the same set aside or cancelled but can only sue for a declaration under Section 42 of the Specific Relief Act that

2 (1919) A I R 1919 Low Bur 53 (55) 9 Low Bur Rul 186 50 Ind Cas 324, *Ma Ngi Ma v Lung Myat*

3 (1927) A I R 1927 Rang 186 (187) 5 Rang 266 103 Ind Cas 264 *Ma Aun v Ma Bun*

Note 13

1 (1916) A I R 1916 Cal 161 (165) 28 Ind Cas 818 *Awarman Singh v Hansi*
li Murza

2 (1916) A I R 1916 Cal 164 (166) 28 Ind Cas 818 *Awarman Singh v Hansi*
li Murza

the instrument is not binding upon him. A suit to adjudge the instrument voidable would be clearly one within Section 39 of the Specific Relief Act and would consequently be governed by this Article. This is the view of the High Court of Allahabad in *Tawangar Ali v Kura Mal*¹. The High Court of Madras² and the Chief Court of Oudh³ have, however, held that such a suit would be governed by Article 120. It is submitted that this view does not seem to be sound on principle.

15. Alienation by minor as major—Suit for possession after majority.—An instrument executed by a person as a major but who on that date was really a minor, is void and inoperative against him. He is therefore not bound to set it aside but can sue for possession within the ordinary period limited for such a suit. This Article does not apply to such a case.¹

16 "Instrument," meaning of.—An instrument is a formal legal writing for example a record, charter, deed or agreement.¹ It includes an award² but not a decree.³ It has been held by their

Note 14

- 1 (1881) 9 All 894 (390) 1881 All W N 2
- 2 (1887) 10 Mad 213 (215) *Pachamuthu v Chinnappan* (It was observed that the instrument would be operative between the actual parties. But S. 39 of the Specific Relief Act was not referred to.)
- (1907) 80 Mad 402 (404) 17 Mad L Jour 288 2 Mad L Tim 560 *Sundar*
- 3 (1931) A I R 1931 Oudh 333 (339) 182 Ind Cas 51 7 Luck 131 *Parlash Narain v Birendra Bikram Singh* (The ground on which the decision proceeds is that Art. 91 applies only to parties and privies to the instrument. This has been shown to be incorrect in Note 3 ante. Further the document in the case was a sham document and therefore a suit for a declaration that it was sham would not be governed by Art. 91.)

Note 15

- 1 (1918) A I R 1918 Bom 189 (193) 42 Bom 633 47 Ind Cas 581 (F B) *Narasagauda v Chauwagauda*

Note 16

- 1 Wharton's Law Lexicon
- 2 (1925) A I R 1925 P O 216 (221) 52 Ind App 265 89 Ind Cas 773 5 Rang 186 (P C) *Kirkwood v Maung Sin*
- (1901) 23 All 383 (391) 28 Ind App 111 5 Cal W N 585 11 Mad L Jour 149 3 Bom L R 311 8 Sar 27 (P C) *Jafri Begam v Syed Ali* (Assumed)
- (1900) 25 Bom 10 (18 19) 2 Bom L R 207 *Vulley Muhammad v Dattu bhoy Hassam*
- (1927) A I R 1927 Lah 172 (170) 100 Ind Cas 596 *Nidhan Singh v E D Sassoon & Co*
- (1904) 1 Nag L R 129 (132) *Yt Tanto v Gajadhar*
- (1892 1896) 2 Upp Bur Rul 4 5 (477) *Ma Te v Ma Po Nyen*
[See also (1937) A I R 1932 Sind 187 (142) 96 Sind L R 111 140 Ind Cas 724 *Karamalishah v Hussainalishah*]
- 3 (1905) 8 Oudh Cas 191 (192) *Dwarika v Salik*
- (1936) 164 Ind Cas 561 (565) 69 Cal 612 *Nibaran Chandra v Matilal Shaha*

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Lordships of the Privy Council that this Article has no application to the case of a will⁴. And this view has been followed in a number of cases⁵. It was held in the undermentioned case⁶ that an entry in *wajib ul arz* does not require to be set aside by a suit subject to a limitation reckoned from the date of the instrument. Where there is no instrument at all in question, this Article will not apply⁷.

17. "Plaintiff."—The word "plaintiff" in the third column of the Article would include any person from or through whom a plaintiff derives his right to sue¹. See also Notes under Section 2 clause 8.

16. Disability of plaintiff—Extension of time—Where the plaintiff is under a disability at the time when his right to sue accrues he is entitled to bring the suit within the same period after the disability has ceased as would otherwise be allowed from the time prescribed therefor in the third column of the Article¹.

19. Onus of proof.—Where a suit or application is, on the face of it, barred, it is for the plaintiff to satisfy the Court that there are circumstances which would prevent the statute from running¹. It has been held by the Court of Judicial Commissioner of Nagpur² and the High Court of Calcutta³ that where, under the Act, time does not

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- (1922) A I R 1922 Lah 166 (167) 2 Lah 164 62 Ind Cas 794 *Jita Singh v Man Singh*
 4 (1895) 23 Cal 1 (10) 22 Ind App 171 6 Ear 627 (P C) *Sajid Ali v Ibad Ali*
 5 (1908) 1903 Pun Re No 134 page 610 (612) 1903 Pun W R 199 *Jahan Khan v Shahamad*
 (1909) 4 Ind Cas 923 (929) (Lah) *Mt Gauhar Bibi v Ghulam Muhammad*
 (1920) A I R 1920 Lah 635 (635) 96 Ind Cas 835 *Firoz v Sultan*
 (1901) 4 Oudh Cas 6 (14), *Marjad Kuar v Aalka Bakhsh Singh* (23 Cal 1 (P C) Followed)
 (1911) 12 Ind Cas 49 (51) (Lah) *Murad Bibi v Khadim Hussain*
 [But see (1892) 19 Cal 629 (684) *Mahabir Prasad Singh v Hurrikur Pershad Narain Singh*
 (1895) 1895 Pun Re No 52 *Hafiz Karim Balsh v Mt Begam Jan* (Assumed)]
 6 (1866) 1 Agra 233 (234) *Bhola Singh v Bulraj Singh*
 7 (1919) A I R 1919 Low Bur 53 (55) 9 Low Bur Rul 186 50 Ind Cas 824, *Ma Nya Ma v Aung Myat* (Oral sale)
 (1882) 1882 All W N 173 (174) *Jaspal Singh v Mata Bakhsh* (Suit for declaration that land in suit was not mortgaged to defendant)

Note 17

- 1 (1930) A I R 1930 Bom 545 (552) 54 Bom 837 127 Ind Cas 697, *Shankar bhai v Bas Shew*
 (1921) A I R 1921 Mad 394 (399) 68 Ind Cas 352 *Rajarajeswara Selhupathi v Kuppasani*

Note 18

- 1 (1907) 1907 Pun L R No 29 1907 Pun W R No 6, *Fetah Muhammad v Foja*

Note 19

- 1 (1923) A I R 1923 Oudh 254 (264) 74 Ind Cas 517 *Yaqub Beg v Rasul Beg*
 2 (1906) 2 Nag L R 93 (100), *Tanto v Gajadhar*
 (1925) A I R 1925 Nag 398 (400) 89 Ind Cas 625, *Gunabai v Motilal* (2 Nag L R 93 Followed)
 3 (1921) A I R 1921 Cal 191 (189) 69 Ind Cas 476 *Nibran Chandra Mukerjee v Arupama Debi* (17 Bom 341 (P C) Followed)

begin to run unless and until the plaintiff has knowledge of certain facts, the onus of proving the knowledge of facts at a date anterior to that admitted by the plaintiff lies on the defendant. The High Court of Madras has dissented from this view.⁴

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20. Starting point.—Time, under this Article, runs from the date "when the facts entitling the plaintiff to have the instrument cancelled or set aside become known to him."¹ In other words, two conditions are necessary to be satisfied before time begins to run, namely—

1 there must be facts in existence entitling the plaintiff to have the instrument cancelled or set aside, and

2 he must become aware of such facts. The knowledge may be that of the plaintiff or of his agent. The reason is that the law imputes to the principal the knowledge of the agent.²

Suit to set aside instruments for fraud

In the case of instruments voidable on the ground of fraud, it is the fact of fraud that entitles the plaintiff to get the instrument cancelled or set aside, and such fact exists on the date of the instrument itself but the plaintiff may become aware of such facts at a later date. In such cases time will run only from the date when the plaintiff becomes aware of the fraud.³ In *Tauangir Ali v Kura Mal*,⁴ A fraudulently transferred his property to B with intent to defeat or delay his creditor C, and C was aware of the same at the date of the transfer. He had then filed a suit on his debt but a decree was passed subsequent to the date of the transfer. It was held that time ran from the date of the decree and not from the date of the plaintiff's knowledge of the fraudulent transfer. The Court observed that the words "when the facts entitling the plaintiff to have the instrument cancelled or set aside become known to him" must be construed to mean "when, having knowledge of such facts, a

4 (1921) A I R 1921 Mad 894 (899) 68 Ind Cas 352, *Raja Rajeswara Sethupathi Atergal v Kuppasami Iyer*

Notes 20

- 1 (1881) 3 All 846 (846) 1881 All W N 95, *Bhawani Pershad Singh v Bishehar Prasad Mistr*
 (1924) A I R 1924 All 370 (371) 46 All 260 78 Ind Cas 222, *Mt Mulani v Maula Baksh*
 (1923) A I R 1923 All 53 (62) 45 All 169 69 Ind Cas 971, *Udit Narain Singh v Randhir Singh*
 (1909) 2 Ind Cas 625 (626) (All), *Manram Singh v Bhola Singh*
 (1902) 4 Bom L R 146 (153) *Sheikh Ismail v Amr Dibi*
 (1927) A I R 1927 Oudh 629 (629) 106 Ind Cas 903, *Tirbhuvan Datt v Someshwar Datt*

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2 (1902) 25 All 1 (17) 29 Ind App 203 4 Bom L R 632 6 Cal W N 849 8 Sar 340 (P C), *Rampal v Balbhadar*

3 (1897) 1 Cal W N (Notes) 257 (259) *Rakunuddin v Narannessa*

4 (1881) 3 All 894 (896) 1881 All W N 2

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cause of action has accrued to him, and he is in a position to maintain a suit" In *Subramania Mudali v Kuppammal*,⁵ where in pursuance of a fraudulent document the defendant attempted to take possession of the property conveyed, it was held that the cause of action arose when he attempted to take possession, that therefore time ran from that date and not from the date when the plaintiff became aware of the fraud. It is submitted that the two last cited decisions are not correct on principle. It is not permissible to read words into the provisions of a statute which are not found therein. Further, the assumption that the cause of action for setting aside an instrument for fraud does not arise until in the first case a decree is obtained and in the second case when the defendant attempts to take possession, does not seem to be correct.

Suit to set aside instrument for want of consideration

Where an instrument executed by the plaintiff to the defendant is not supported by consideration, the fact that would entitle the plaintiff to set it aside is the want of consideration. This fact exists on the date of the instrument itself. The plaintiff must also necessarily, even on the date of the document itself, be aware of the said fact. Limitation under this Article would, therefore, run in such a case from the date of the execution of the instrument.⁶

Suit to set aside instrument on the ground of undue influence

The fact of undue influence which would entitle the plaintiff to sue to cancel or set aside an instrument voidable on the ground of such influence, exists on the date of the instrument itself. But the plaintiff may be aware of this fact on the date of the document itself or may become aware of it later on. If he is aware of it on the date of the document itself, time under this Article, will run from that date.⁷ If he becomes aware of it later on, time will run from that date.⁸ The fact that the undue influence continued till a later date than the date of knowledge will not postpone the starting point. In *Someshwar v Tribhawan*,⁹ their Lordships of the Privy Council observed as follows:

"The error into which the Chief Court fell, in their Lordships' opinion, is that they thought the three years permitted by the

5 See (1916) A I R 1916 Mad 851 (851) 31 Ind Cas 106 (28 Mad 349 16 Mad 311 and 25 Bom 78, Followed. The case was one of an instrument voidable for fraud.)

6 (1915) A I R 1915 All 212 (213) 37 All 640 29 Ind Cas 968, *Qasim Beg v Muhammad Zia Beg*

7 See (1905) 29 Mad 1 (11) *Roop Lal v Lakshmi Doss*
(1929) A I R 1929 Oudh 67 (70 71) 4 Luck 270 114 Ind Cas 806, *Ram Sumran v Sarjoo Pershad* (It was admitted that the facts were known to the plaintiff on the date of the instrument itself.)

8 See (1921) A I R 1921 Mad 394 (399) 68 Ind Cas 352, *Raja Rajeswara Sethupathi Iyer v Kuppusami Iyer*
(1916) A I R 1916 Mad 850 (852) 38 Mad 821 19 Ind Cas 596, *Raja of Ramnad v Arunachallam Chettiar*

9 (1934) A I R 1934 P C 180 (194) 61 Ind App 224 9 Luck 178 149 Ind Cas 480 (A I R 1931 Oudh 31, Reversed.)

Limitation Act began to run not from the discovery of the plaintiff of the true nature of the deed which he had signed but from the date when he escaped from the influence by which according to the plaintiff he was dominated. It suffices to say that for the doctrine of the Chief Court their Lordships are unable to find any sufficient justification.

The undermentioned cases¹⁰ holding a contrary opinion are in view of the Privy Council decision no longer good law.

Suit to set aside an award

Where the plaintiff and his guardian were aware of the facts entitling the plaintiff to set aside an award it was held by their Lordships of the Privy Council that the plaintiff must prove that he attained majority within three years of the suit and that time ran from the date of the award and not from the date when the Court refused to file it.¹¹

It has been held in some cases that time will run only from the date when facts which arouse the apprehension of the plaintiff that the instrument if left outstanding would cause him serious injury, come to his knowledge. Thus in the undermentioned cases,¹² time was held to run from the date of the registration of the instrument as having given rise to the apprehension of the plaintiff. In the case cited below¹³ where a sham document had been executed in favour of the defendant it was held that time ran from the date when the defendant began to set up a claim to the property comprised in the document. The defendant's setting up the claim was regarded as a fact which gave rise to an apprehension on the part of the plaintiff such as is referred to in Section 39 of the Specific Relief Act. It is submitted that the said view is not correct. It would practically enable the plaintiff to choose his own starting point by alleging that certain facts alone aroused his apprehension and not others.

In *Sheshrao v Maroti*¹⁴ it was held that time ran from the date when the right to sue for possession accrued to the plaintiff. The case was one of a reversioner suing for possession of the property alienated by a Hindu widow. It was assumed (and this as has been shown in

10 (1934) A I R 1934 All 507 (512) 152 Ind Cas 146 *Mt Azizunnissa v Siraj Hussain*

(1932) A I R 1932 All 63 (64) 135 Ind Cas 232 *Deo Singh v Mt Rani Drlaiya*

(1918) A I R 1918 Mad 400 (401) 43 Ind Cas 164 *Raja of Ramnad v Rajagopala Iyer*

11 (1925) A I R 1925 P C 216 (221) 89 Ind Cas 773 5 Rang 186 52 Ind App 265 (P C) *Kirkwood v Maung Sin*

12 (1919) A I R 1919 Mad 679 (679) 47 Ind Cas 505 *Balasundaram Pandiam Pillai v Authimula n Chettiar*

(1917) A I R 1917 Oudh 188 (190) 39 Ind Cas 456 *Ali Mirza Beg v Hasan Raza Khan* (Where an instrument cannot take effect until it is

14 (1920) A I R 1920 Nag 239 (240) 55 Ind Cas 407

Article 91
Note 20

Note 4 *supra*, is not correct) that the reversioner was bound to set aside the instrument but that time ran from the death of the widow. It is submitted that the decision is not correct.

Article 92

92.* To declare the forgery of an instrument issued or registered.	Three years.	When the issue or registration becomes known to the plaintiff
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Synopsis

1. Legislative changes.
2. Scope of the Article.
3. "Issued."
4. Starting point.

1. Legislative changes. — Article 93 of the Act of 1871 ran as follows —

"To declare the forgery of an instrument, issued or registered or attempted to be enforced	Three years	The date of the issue, registration or attempt"
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Under the Act of 1877, this Article was split up into two Articles, namely 92 and 93, and the date from which time was to run in the case of an instrument issued or registered was fixed as the date when the issue or registration *became known to the plaintiff*, while in the case of an instrument attempted to be enforced, the *terminus a quo* was as before *the date of the attempt*.

The present Articles 92 and 93 are the same as the corresponding Articles of the Act of 1877

2. Scope of the Article. — The Article applies only to suits where the *main relief* asked for is the declaration of the forgery of an instrument¹. A party who challenges a document as a forgery is

*	Act of 1877, Article 92
	Same as above
	Act of 1871, Article 93
	See Note 1, Legislative Changes
	Act of 1859
	No corresponding provision

Article 92 — Note 2

- 1 (1892) 16 Bom 186 (189 190) 1891 Bom P J 79, *Abdul Rahim v Karparam Das*
 (1893) 16 Mad 311 (314) 3 Mad L Jour 144 *Sundaram v Sithammal*
 (1905) 28 Mad 339 (343) *Narayanan Chetty v Kannammal Achi*

under no obligation to sue for a declaration that it is a forgery.² He can ignore it and pray for a substantial relief or he can ask for a declaration and also for a substantial relief. This Article will not apply to such cases.³ The reason is that the declaration is only a *subsistent* or *merely ancillary* relief and not necessary for the granting of the substantial relief prayed for.⁴ Thus where the suit is substantially to obtain the declaration of title to certain lands and it is not necessary to have stated anything about the will set up by the defendant being a forgery, this Article will not apply even though the suit may involve the determination of the genuineness of the will.⁵

Article 92.
Notes
2—4

3 "Issued" — It was held in the undermentioned case that a will which was concocted could not be said to have been issued within the meaning of Article 92.¹ In *Hurri Bhushan Mukerjee v Upendra Lal Mukerjee*² where an unregistered *anumatipatra* (deed of permission to adopt) was attacked as a forgery, it was held by the Privy Council that the word issued was intended to refer to the kinds of documents to which people commonly apply that term in business and that it has no application to an instrument such as a power to adopt.

4 Starting point — Time runs under this Article from the date when the issue or the registration becomes *known to the plaintiff*. A mere attempted registration of the document does not give any starting point.¹ As to whether an attempt to get a document registered is an attempt to enforce the document within the meaning of the next Article see Notes thereunder. The words issued or registered in the third column of the Article in the Act of 1871 were held to mean that if the document was issued then time ran from the date of issue and that if the document was registered then

(1914) A I R 1914 Bom 59 (90) 38 Bom 449 22 Ind Cas 195 *Jan Mahomed Abdulla Datu v Datu Jaffar*

(1927) A I R 1927 All 826 (827) 102 Ind Cas 287 *Mt. Muradan v Raghunandan Prasad*

2 (1918) A I R 1918 Mad 1198 (1199) 37 Ind Cas 649 *Venkamma v Narasimham*

(1912) 17 Ind Cas 504 (506) (Cal) *Nagendra Lal v Srimati Raja Bibi*

3 (1918) A I R 1918 Mad 1198 (1199) 37 Ind Cas 642 *Venkamma v Narasimham*

[See also (1878) 2 Cal L R 10 (12) *Trilochan v Nobokishore Ghutack*]

4 (1892) 16 Bom 186 (189 190) 1891 Bom P J 79 *Abdul Rahim v Kusraram*

[See also (1892) 16 Mad 311 (314) 3 Mad L Jour 144 *Sundaram v Sthammal*

(1905) 28 Mad 338 (343) *Narayanan Chetty v Kannammal*]

5 (1878) 2 Cal L R 561 (563) *Nisfarins Dasse v Anundmoye Dasse*

(1903) 26 Mad 291 (314) 13 M L J 27 *Ratnamasars v Ahislandam nai*

Note 3

1 (1909) 4 Ind Cas 923 (999) (Lab) *Gauhar Bibi v Ghulam Muhammad*.

2 (1897) 24 Cal 1 (7) 23 Ind App 97 6 Sar 680 (P C)

Note 4

1 (1915) A I R 1915 Bom 136 (137) 40 Bom 22 30

Rayapa v Gopal Subbaya

Article 92
Note 4

time ran from the date of the registration ² Under the present Article time runs from the date when the issue or registration becomes known to the plaintiff

Article 93

93. To declare the forgery of an instrument attempted to be enforced against the plaintiff.	Three years.	The date of the attempt
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Synopsis

1. Legislative changes.

2. Scope of the Article.

1. Legislative changes.—See Note 1 to Article 92 *ante*. The words 'against the plaintiff' were absent in Article 93 of the Act of 1871. It was held in the undermentioned case¹ under that Act that time will run from the attempt to enforce the instrument, although that attempt might not have been known to the plaintiff. Under the present Article it is clear that the attempt must have been directed against the plaintiff otherwise the Article will not apply.²

2. Scope of the Article.—An attempt to enforce an instrument would mean an attempt to recover some benefit under the instrument.¹ It is not necessary that the person who is to profit by the instrument should seek to obtain the entire profits of it. It is quite enough if, having obtained the instrument he seeks to place himself in an advantageous position which but for the instrument, he could not occupy.²

* Act of 1877, Article 93

Same as above

Act of 1871, Article 93

Same as given under Article 92

Act of 1859

No corresponding provision

- 2 (1879) 4 Cal 209 (212) 2 Cal L R 573 *Fakharuddin Mahomed v Pogose*
[See also (1892) 8 Cal 178 (168) 4 Shome L R 202 8 Ind App 197 10
Cal L R 176 4 Sar 270 (P C) *Fakharuddin Mahomed Ahasan*
v Official Trustees of Bengal]

Article 93 — Note 1

- 1 (1909) 4 Ind Cas 923 (929) (Lah) *Gauhar Bibi v Ghulam Muhammad*
2 (1878) 2 Cal L R 561 (563) *Nistaringy Dossee v Aminudmoye Dossee*

Note 2

- 1 (1915) A I R 1915 Bom 136 (137) 40 Bom 22 30 Ind Cas 399 *Adhyut Rayappa Shanbhag v Gopal Subbaya Shanbhag* (An attempted registration of an instrument is not an instrument attempted to be enforced.)
2 (1878) 4 Cal 209 (212) 2 Cal L R 573 *Fakharuddin Mahomed v Pogose*
270 4 Shome
al Trustees of
by deed the
an appeal pro
s an attempt

What does or does not constitute an attempt to enforce a forged instrument must depend upon the facts in each case. But as a general proposition the expression means the institution of any proceedings in which the genuineness of the instrument is *directly* put in issue and to which the person against whom it is sought to be enforced is a direct and necessary party.³ It is not necessary, however, that the attempt to enforce the instrument should have been made by the person relying upon it as a *plaintiff* in a suit.⁴

The Article applies only to suits where the *main relief* asked for is the declaration of the forgery of an instrument. It does not apply to suits where the declaration is *subsidiary* or *ancillary* and not necessary to the main relief claimed.⁵ Thus the mere mention of the existence of a will in the written statement filed in a previous suit without producing the will or doing anything to obtain a decision on its genuineness or binding character cannot be said to be an attempt to enforce the will.⁶ Similarly an adoption by the widow under an *anumatipatra* (a written authority) cannot be said to be an enforcement of the *anumatipatra* against the reversionary heirs.⁷

The date of the attempt in the third column means the date of the attempt to enforce the instrument.⁸

Article 93 Note 2

94.* For property which the plaintiff has conveyed while insane	Three years	When the plaintiff is restored to sanity, and has knowledge of the conveyance
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Article 94

* Acts of 1877 and 1871

Same as above

Act of 1859

No corresponding provision

- 3 (1917) A I R 1917 Mad 570 (571) 32 Ind Cas 99 *Kanalanabhan v Sathirazu* (Application by a widow for succession certificate as heir to her deceased husband if an attempt)
- (1921) A I R 1921 Mad 545 (546) 62 Ind Cas 531 *Achanna Pantulu v Seethamma*
- 4 (1921) A I R 1921 Mad 545 (546) 62 Ind Cas 531 *Achanna Pantulu v Seethamma*
- (1921) A I R 1921 Mad 545 (546) 62 Ind Cas 531 *Abdul Rahim v Kurparam Kannamalai Achi* (Where it was held that the sale deed upon the suit was not governed by the provisions of the Act)
- (1878) 2 Cal L R 10 (12) *Trilochan v Nobokasore*
- 6 (1921) A I R 1921 Mad 545 (546) 62 Ind Cas 531 *Achanna Pantulu v Seethamma*
- (1918) A I R 1918 Mad 1198 (1199) 37 I C 642 *Venamma v Narasimham*
- (1878) 2 Cal L R 561 (563) *Vistaram Dossee v Anundmoye Dossee*
- (1935) A I R 1935 Mad 709 (712) 153 Ind Cas 121 *Chennamm v Mangamma*
- 7 (1896) 24 Cal 1 (8) 23 Ind App 97 6 Sar 650 (P C) *Hurri Bhus Upendra Lal*
- 8 (1881) 8 Cal 178 (188) 8 Ind App 197 10 Cal L R 176 4 Sar 20 4 S L R 207 (P C) *Fakharuddin Mohamed v Official Trustee of Be*

Article 95

95.* To set aside a decree obtained by fraud, or for other relief on the ground of fraud.	Three years.	When the fraud becomes known to the party wronged.
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Synopsis

1. Legislative changes.
2. Scope of the Article.
3. Distinction between this Article and Section 18.
4. Cause of action for the suit must be fraud.
5. Fraud, meaning of.
6. Setting aside decree for fraud.
7. Decree against shebait — Suit by successor to set aside.
8. Fraud by Hindn widow — Suit by reversloner.
- 8a. Transfer in fraud of creditors — Suit to set aside.
9. Fraud in execution proceedings.
10. "For other relief on the ground of fraud."
11. Suit for refund of money advanced on a transfer found to be fraudulent.
12. Starting point.
13. Knowledge of agent is knowledge of principal.
14. Fraud by shebait — Suit by succeeding shebait within three years from date of knowledge.
15. Knowledge of fraud is a question of fact.
16. Plea of fraud.
17. Burden of proof.
18. Plea of fraud in defence.
19. Suit to set aside ex parte decree for fraud.

* Act of 1877, Article 95

Same as above

Act of 1871, Articles 95, 96

95 — For relief on the ground of fraud	Three years	When the fraud becomes known to the party wronged
96 — To set aside a decree obtained by fraud	Three years	When the fraud becomes known to the party wronged

Act of 1859, Section 10

Computation of period of limitation in suits where the cause of action is founded on fraud

In suits in which the cause of action is founded on fraud the cause of action shall be deemed to have first arisen at the time at which such fraud shall have been first known by the party wronged

Other Topics

Article 95 Notes 1—2

Compromise decree

See Note 6, Pt 3

Decree against benamidar

See Note 6 Pt 11

Fraud to be extraneous to decree

See Note 6 Pts 4 to 6

Plaintiff not party to decree or transaction — Article does not apply

See Note 2 Pts 6 to 8 Note 6, Pt 10, Note 8

1. Legislative changes. — There was no specific provision corresponding to this in the Act of 1859. A suit of the nature contemplated by the present Article was held to fall within clause 16 of Section 1 of that Act which prescribed a period of six years from the time "when the cause of action arose".¹ And Section 10 of that Act provided that in suits in which the cause of action was founded on fraud, the cause of action should be deemed to have first arisen at the time at which such fraud first became known to the party wronged.²

The Act of 1871 contained two Articles 95 and 96, the former providing for suits for relief on the ground of fraud, and the latter for setting aside a decree on the ground of fraud. The two Articles were combined in the Act of 1877 in the form in which the present Article is framed.

2. Scope of the Article. — This is a specific Article providing the period of limitation for all suits for relief on the ground of fraud. As was observed by Mr Justice Duthoit in *Natha Singh v Jodha Singh*,¹ "fraud vitiates all transactions, and prevents the application of any other law of limitation than that specially provided for relief from its consequences". It follows that where a suit falls within this and another Article, this will be the Article applicable and not the other. This is in accordance with the general principles of interpretation of statutes that where a case falls within a general as well as a special provision, the special provision will prevail over the general.² Thus, a suit to set aside an execution sale on the ground of fraud would be governed by this Article and not by Article 12, *ante*.³

Article 95 — Note 1

- 1 (1866) 1 Agra 114 (115), *Ameen Chund v Oomed Singh*
(1868) 4 Mad H C R 266 (269), *Ramaswamy Mudali v Valayuda Mudali*
- 2 (1868) 4 Mad H C R 266 (269) *Ramaswamy Mudali v Valayuda Mudali*
(1868) 9 Suth W R 553 (554), *Bhugwan Chunder Roy v Raj Chunder Roy*
(For the interpretation of Section 10)
- (1868) 10 Suth W R 104 (104) 1 Beng L R A C 76, *Gopal Chandra Dey v Pemu Bibi*

Note 2

- 1 (1884) 6 All 406 (414) 1884 All W N 140
- 2 See Note 24 to Preamble
- 3 (1926) A I R 1926 Pat 401 (402) 5 Pat 759 96 Ind Cas 529, *Rameshwar Narain Singh v Mahabir Prasad*
(1933) A I R 1933 Pat 473 (480) 149 Ind Cas 129, *Madho Saran Singh v Vanna Lal*
(1884) 6 All 406 (414) 1884 All W N 140, *Natha Singh v Jodha Singh*
(1886) 11 Bom 119 (125), *Parekh Ranchor v Bas Vahhal*
(1889) 13 Bom 221 (223), *Dajaji v Pirchand*

Article 95

<p>95.* To set aside a decree obtained by fraud, or for other relief on the ground of fraud.</p>	<p>Three years.</p>	<p>When the fraud becomes known to the party wronged.</p>
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Synopsis

1. Legislative changes.
2. Scope of the Article.
3. Distinction between this Article and Section 18.
4. Cause of action for the suit must be fraud.
5. Fraud, meaning of.
6. Setting aside decree for fraud.
7. Decree against shebait — Suit by enccessor to set aside.
8. Fraud by Hindu widow — Suit by reversioner.
- 8a. Transfer in fraud of creditors — Suit to set aside.
9. Fraud in execution proceedings.
10. "For other relief on the ground of fraud."
11. Suit for refund of money advanced on a transfer found to be fraudulent.
12. Starting point.
13. Knowledge of agent is knowledge of principal.
14. Fraud by shebait — Suit by succeeding shebait within three years from date of knowledge.
15. Knowledge of fraud is a question of fact.
16. Plea of fraud.
17. Burden of proof.
18. Plea of fraud in defence.
19. Suit to set aside ex parte decree for fraud.

* Act of 1877, Article 95

Same as above

Act of 1871, Articles 95, 96

<p>95.—For relief on the ground of fraud</p>	<p>Three years</p>	<p>When the fraud becomes known to the party wronged</p>
<p>96 —To set aside a decree obtained by fraud</p>	<p>Three years.</p>	<p>When the fraud becomes known to the party wronged</p>

Act of 1859, Section 10

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In suits in which the cause of action is founded on fraud, the cause of action shall be deemed to have first arisen at the time at which such fraud shall have been first known by the party wronged

Other Topics

Article 95 Notes 1—2

Compromise decree

See Note 6 Pt 3

Decree against benamidar

See Note 6 Pt 11

Fraud to be extraneous to decree

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The Act of 1871 contained two Articles 95 and 96, the former providing for suits for relief on the ground of fraud, and the latter for setting aside a decree on the ground of fraud. The two Articles were combined in the Act of 1877 in the form in which the present Article is framed.

2. Scope of the Article — This is a specific Article providing the period of limitation for all suits for relief on the ground of fraud. As was observed by Mr Justice Duthoit in *Natha Singh v Jodha Singh*,¹ fraud vitiates all transactions and prevents the application of any other law of limitation than that specially provided for relief from its consequences. It follows that where a suit falls within this and another Article this will be the Article applicable and not the other. This is in accordance with the general principles of interpretation of statutes that where a case falls within a general as well as a special provision, the special provision will prevail over the general.² Thus a suit to set aside an execution sale on the ground of fraud would be governed by this Article and not by Article 12, *ante*.³

Article 95 — Note 1

- 1 (1866) 1 Agra 114 (115) *Ameer Chund v Oomed Singh*
- (1868) 4 Mad H C R 266 (269) *Ramaswamy Mudali v Valayuda Mudali*
- 2 (1868) 4 Mad H C R 266 (269) *Ramaswamy Mudali v Valayuda Mudali*
- (1868) 9 Suth W R 553 (554) *Bhugwan Chunder Roy v Raj Chunder Roy*
(For the interpretation of Section 10)
- (1868) 10 Suth W R 104 (104) 1 Beng L R A C 76, *Gopal Chandra Dey v Pemu Bibi*

Note 2

- 1 (1894) 6 All 406 (414) 1884 All W N 140
- 2 See Note 24 to Preamble
- 3 (1926) A I R 1926 Pat 401 (402) 5 Pat 759 96 Ind Cas 529, *Romeshwar Narain Singh v Mahabir Prasad*
- (1933) A I R 1933 Pat 473 (480) 149 Ind Cas 129 *Madho Saran Singh v Vanna Lal*
- (1884) 6 All 406 (414) 1884 All W N 140 *Natha Singh v Jodha Singh*
- (1886) 11 Bom 119 (125) *Parekh Ranchor v Bas Vakhol*
- (1889) 13 Bom 221 (223), *Bajaj v Pirchand*

Article 95
Notes
2—3

Similarly, where a suit falls both within Article 62 as well as this Article, it will be governed only by this Article⁴ On the same principle, it is this Article that will apply where the suit falls within this as well as Article 36, *ante*⁵

The Article has reference to cases where a party has been induced fraudulently to enter into some transaction, execute some deed, or do some other act, and desires to be relieved from the consequences of those acts⁶ In other words, the fraud contemplated by this Article is a fraud practised upon a *party to a decree or a party to a transaction in which the fraud was committed*⁷ and the suit contemplated is one by *such party as plaintiff* for relief on the ground of such fraud⁸ Where therefore the plaintiff is not a party to the decree or to the fraudulent transaction, this Article will have no application See Notes 6 to 8 *infra*

3. Distinction between this Article and Section 18. — The scope of Section 18 is entirely distinct from that of this Article Section 18 applies to all cases, whether a suit is based on fraud as the cause of action or is based on some other cause of action, where the plaintiff is kept from the *knowledge of his right to sue* by means of fraud The Article applicable to the suit may be *any* of the Articles in the First Schedule, but in reckoning the period prescribed by that Article the starting point will be the date when the fraud becomes known to the person injuriously affected thereby This Article however, applies only where the *cause of action* for the suit is fraud practised upon the plaintiff In *Syamlal Mandal v Nilmony Das*,¹ the High Court of Calcutta observed as follows

“It must be remembered that the scope of Section 18 is entirely distinct from that of Article 95 Section 18 only enlarges the time when the person entitled to sue has been kept from the knowledge of his right to sue or of the title on which it is founded by means of fraud that Section does not contemplate that the injury of which the plaintiff complains is the consequence of fraud Where relief is sought on the ground of fraud, Article 95 is appropriately applicable, and we are not prepared to restrict its application, because Section 18 may be of assistance to the plaintiff from an entirely different standpoint”

(1910) 31 Mad 143 [150] 7 Ind Cas 60, *Venkata Suryanarayana Jagapathi raju v Bapiraju*

(1886) 9 Mad 457 (460), *Venkatapathi v Subramanya*

4 (1925) A I R 1925 Pat 765 [767, 769] 4 Pat 448 93 Ind Cas 129 *Tofalal Das v Moimuddin Mirza*

5 (1935) A I R 1935 All 995 (1000) 159 Ind Cas 977, *Dehra Dun Mussoorie Electric Tramway Co Ltd v Hansraj*

6 (1878) 3 Cal 504 (507) 2 Cal L R 147, *Chundernath Choudhry v Thirthanund Thakoor*

7 (1907) 30 Mad 402 [404] 17 Mad L Jour 288 2 Mad L Tim 300 *Sundarappa v Sivanulu*

8 (1868) 9 Suth W R 553 [554], *Bhuguan Chunder Roy v Raj Chunder Roy*

Note 3

1 [1907] 31 Cal 241 (246) 5 Cal L Jour 385

Where the plaintiff seeks relief on the ground of fraud practised upon him and also alleges that by means of fraud he has been kept from knowledge of his right to sue for relief on the ground of such fraud, this Article as well as Section 18 will apply, so that the starting point will be the date when the fraud by means of which he was kept from knowledge of his right to sue becomes known to the plaintiff²

4. Cause of action for the suit must be fraud.—In order that this Article may apply, it is necessary that the relief is claimed in the suit on the sole ground of fraud,¹ in other words, that the cause of action is fraud². A plaint which does not disclose fraud as the basis of the claim is not governed by this Article³. Where, however, the cause of action for the suit is fraud, that is, where the fraud alleged is the essence and the substance of the claim, the Article applicable is only this Article and no other⁴.

2 (1866) 6 Suth W R 163 (165) *Mt Jaisoman Koonwar v Roop Narain Singh*

Note 4

1 (1898) 23 Cal 49 (52) 2 Cal W N 76, *Gour Mohun v Karmokar*

2 (1884) 6 All 406 (414) 1884 All W N 140, *Natha Singh v Jodha Singh*

(1868) 9 Suth W R 533 (534), *Bhugwan Chunder Roy v Raj Chunder Roy*

(1936) A I R 1936 Bom 322 (325) 165 Ind Cas 184 60 Bom 818, *Kaikhusrro Manekshah v Gangadas Dwarkadas* (Art 95 of the Limitation Act applies and must apply to a case where the plaintiff has sustained loss or damage on account of the fraud of the defendant. It has no application to a suit for return of bonds lost or acquired by theft, or dishonest misappropriation or conversion)

[See also (1903) 80 Cal 369 (384) 7 Cal W N 353 *Nistaram Dasn v Nundo Lal Bose*]

Dhai Nettoys (The Article has no application when on the face of the plaint no equitable relief is claimed on the ground of fraud)

(1936) 164 Ind Cas 501 (563) 62 Cal 642, *Nibran Chandra Saha v Matilal Shaha*

(1886) 13 Cal 155 (158) *Torab Ali Khan v Nisruttan Lal*

4 (1878) 3 Cal 300 (302 303) *Bhobun Chunder Sen v Ram Soonder Surma*

tion 1 e Art 95 }

(1930) A I R 1930 All 573 (576) 124 Ind Cas 180 *Benares Bank Ltd v Ram Prasad* (Suit for recovery of money taken away from bank by fraud — Art 95 applies)

(1916) A I R 1916 Mad 83 (89) 38 Mad 1076 29 Ind Cas 314, *Pasumarti Payidanna v Lakshminarasamma*

(1883) 6 Mad 344 (350) 7 Ind Jur 358, *Viraraghava v Arishnasami*

(1878) 1878 Pun Re No 19 *Budha Singh v Hira* (H and V, representing themselves to be S's agents, received from B a certain number of cattle in payment of a debt which B owed to S, and instead of

Article 95
Note 4

The test to see whether this Article applies or does not apply to any particular case is to see whether the plaint discloses a cause of action *irrespective of any fraud that may be alleged in the plaint*.⁵ If no such independent cause of action exists, this Article will apply. But, if there is a cause of action *irrespective of the fraud alleged*, and the fraud alleged is merely a part of the machinery by which, if the plaintiff's case is true, the defendant has kept the plaintiff out of the enjoyments of the rights to which he was entitled,⁶ or if the fraud alleged enters merely as an element in the conduct of the defendant,⁷ this Article will not apply.

Illustrations

- 1 A purchased certain property in execution of a decree, but when he went to take delivery of possession of the property, he was resisted by a person who alleged that he was a mortgagee from the judgment debtor. A thereupon instituted a suit for possession on his title as auction purchaser, but alleged that the mortgage in favour of the obstructor was a fraudulent transaction. It was held that the suit was not barred by this Article.⁸
- 2 At a partition of a joint Hindu family, a person who had no authority to deal with the share of a minor member professed to act on his behalf. The minor member was allotted a share which was less than what he was entitled to. The minor member on attaining age filed a suit to recover his full share alleging that the prior partition was fraudulent. It was held that this Article did not apply to the case.⁹

giving the cattle to S they appropriated them to their own use in consequence of which B was compelled by suit to pay the debt a second time. B thereupon sued H and M to recover the value of the cattle wrongfully and fraudulently received and appropriated by them. Held that the case was one coming under Art. 95.)

- 5 (1898) 25 Cal 49 (52) 2 Cal W N 76 *Gour Mohun v. Harmohar* (3 Cal 501 Followed)
- (1937) A I R 1937 Pat 331 (333) (1937) 9 Ind Rul Pat 402 (403) 167 Ind Cas 481, *Sitan Naram Deo v. Dasrath Deo*
- 6 (1878) 3 Cal 504 (507) 2 Cal L R 147 *Chunder Nath Choudhry v. Terthanund Thakoor*
- 7 (1898) 25 Cal 49 (52) 2 Cal W N 76 *Gour Mohun v. Harmohar*
- 8 (1883) 6 All 75 (77) 1883 All W N 212 *Uma Shanker v. Kalka Prasad*
[See also (1891) 16 Bom 1 (8-9) *Burjorji Dorabji Patel v. Dhunbai* (Execution purchaser unable to sell his property to others owing to claims set up by defendants on strength of fraudulent deed—Suit for declaration of title—Art. 95 does not apply)]
- (1937) A I R 1937 Pat 331 (333) 167 Ind Cas 481 *Sitan Naram Deo v. Dasrath Deo* (Mortgagee of tenure purchasing property in execution of decree—Tenure sold for arrears of rent during mortgage litigation—Suit by mortgagee alleging that certificate sale was fraudulent and did not affect the encumbrances.)
- 9 (1892) 11 All 409 (410) 1892 All W N 212 (1) 117 Ind Cas 117

3 *A* gave an indemnity bond to *B* indemnifying *B* against the fraud and misbehaviour of *C*. *C* having committed fraud, *B* filed a suit against *A* on the indemnity bond. It was held that the cause of action for the suit was not fraud but was a breach of contract.¹⁰

4 *A*, a member of a family which has become divided, collects a debt due to the family and fraudulently appropriates it to himself. *B*, another member of the family, thereupon sues for his share of the collection. The suit is not governed by this Article, as independent of any question of fraud, the plaintiff is entitled to succeed.^{10a}

See also the undermentioned cases.¹¹

5. Fraud, meaning of. — See Note 4 to Section 18, *ante*

6. Setting aside decree for fraud. — A decree passed with jurisdiction is *prima facie* binding on the parties thereto and, except in certain cases, no suit will lie at the instance of the parties to set it aside. One exception is where the decree has been obtained by fraud. In that case, a suit will lie at the instance of a party to the decree to set it aside.¹ Such a suit would be governed by this Article.² Another exception is where the decree is a voidable one, as where a compromise decree has been obtained against a minor without leave of the Court. A suit to set aside such a decree on the ground that it is voidable and not on the ground that it is fraudulent

10 (1875) 12 Bom H C R 238 (939) *Shapurji Jalalgirji v Superintendent of Poona City Jail*

10a (1921) A I R 1921 Mad 2-3 (253) 69 Ind Cas 274 *Pamalaagu Serrai v So ai Serrai*

11 (1908) 25 Cal 49 (52) 2 Cal W N 76 *Gour Mohun v Karmotar* (Suit for declaration that a decree obtained by *A* against *B* was benami for the plaintiff — There is a cause of action irrespective of the fraud alleged — Art 95 does not therefore apply)

(1931) A I R 1931 Sind 27 (27) 130 Ind Cas 552 *Uttamchand Manghirmal v Salamatrai Khubchand* (Suit for partition of property omitted from previous partition by fraud of the defendants — Art 95 does not apply)

(1918) A I R 1918 Cal 809 (810) 41 Ind Cas 747 *Antulla v Sadatullah* (A plaintiff who was co-vendee of land with defendants but whose name was omitted from the conveyance by the fraud of the defendants can recover possession of his share even though the limitation period for rectification of the conveyance under Section 31 has expired)

Note 6

1 (1907) 34 Cal 83 (89) *Surendrana h Ghouse v Heriargiri Das*
(1893) 17 Mad 299 (800) *Tirthavaram v Seshagiri Pas*

2 (1905) 4 Cal L Jour 472 (473) *Rohini Kumar v Pagu Nath Das*

(1916) A I R 1916 Pat 131 (137) 37 Ind Cas 797, *Mahmed Jan v Commissioner of Patna* (Compromise decree)

[See also (1916) A I R 1916 Cal 905 (906) 33 Ind Cas 767, *Pajkumar Sarkel v Pajkumar Mali*]

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The test to see whether this Article applies or does not apply to any particular case is to see whether the plaint discloses a cause of action *irrespective of any fraud that may be alleged in the plaint*⁵. If no such independent cause of action exists, this Article will apply. But, if there is a cause of action irrespective of the fraud alleged, and the fraud alleged is merely a part of the machinery by which, if the plaintiff's case is true, the defendant has kept the plaintiff out of the enjoyments of the rights to which he was entitled,⁶ or if the fraud alleged enters merely as an element in the conduct of the defendant,⁷ this Article will not apply.

Illustrations

- 1 A purchased certain property in execution of a decree, but when he went to take delivery of possession of the property, he was resisted by a person who alleged that he was a mortgagee from the judgment debtor. A thereupon instituted a suit for possession on his title as auction purchaser, but alleged that the mortgage in favour of the obstructor was a fraudulent transaction. It was held that the suit was not barred by this Article⁸.
- 2 At a partition of a joint Hindu family, a person who had no authority to deal with the share of a minor member professed to act on his behalf. The minor member was allotted a share which was less than what he was entitled to. The minor member on attaining age filed a suit to recover his full share alleging that the prior partition was fraudulent. It was held that this Article did not apply to the case⁹.

giving the cattle to S they appropriated them to their own use in consequence of which B was compelled by suit to pay the debt a second time. B thereupon sued H and M to recover the value of the cattle wrongfully and fraudulently received and appropriated by them. Held that the case was one coming under Art 95.)

- 5 (1898) 25 Cal 49 (52). 2 Cal W N 76. *Gour Mohun v Karmohar* (3 Cal 504, Followed.)

(1937) A I R 1937 Pat 331 (333). (1937) 9 Ind Rul Pat 402 (403). 167 Ind Cas 481, *Sitan Narain Deo v Dasrath Deo*.

- 6 (1878) 3 Cal 504 (507). 2 Cal L R 147. *Chunder Nath Choudhry v Tirthanund Thakoor*.

- 7 (1898) 25 Cal 49 (52). 2 Cal W N 76. *Gour Mohun v Karmohar*.

- 8 (1883) 6 All 75 (77). 1883 All W N 212. *Uma Shanker v Kalka Prasad*.

[See also (1891) 16 Bom 1 (8-9) *Burjorji Dorabji Patel v Dhunbai* (Execution purchaser unable to sell his property to others owing to claims set up by defendants on strength of fraudulent deed—Suit for declaration of title—Art 95 does not apply.)

(1937) A I R 1937 Pat 331 (333). 167 Ind Cas 481, *Sitan Narain Deo v Dasrath Deo* (Mortgagee of tenure purchasing property in execution of decree — Tenure sold for arrears of rent during

3 *A* gave an indemnity bond to *B* indemnifying *B* against the fraud and misbehaviour of *C*. *C* having committed fraud, *B* filed a suit against *A* on the indemnity bond. It was held that the cause of action for the suit was not fraud but was a breach of contract.¹⁰

4 *A*, a member of a family which has become divided, collects a debt due to the family and fraudulently appropriates it to himself. *B*, another member of the family, thereupon sues for his share of the collection. The suit is not governed by this Article, as, independent of any question of fraud, the plaintiff is entitled to succeed.^{10a}

See also the undermentioned cases.¹¹

5. Fraud, meaning of. — See Note 4 to Section 18, *ante*.

6. Setting aside decree for fraud. — A decree passed with jurisdiction is *prima facie* binding on the parties thereto and, except in certain cases, no suit will lie at the instance of the parties to set it aside. One exception is where the decree has been obtained by fraud. In that case, a suit will lie at the instance of a party to the decree to set it aside.¹ Such a suit would be governed by this Article.² Another exception is where the decree is a voidable one, as where a compromise decree has been obtained against a minor without leave of the Court. A suit to set aside such a decree on the ground that it is voidable and not on the ground that it is fraudulent

10 (1875) 12 Bom H C R 238 (239) *Shapurji Jahangirji v Superintendent of Poona City Jail*

10a (1921) A I R 1921 Mad 283 (283) 69 Ind Cas 274 *Ramalingu Sertai v Sotas Sertai*

11 (1898) 25 Cal 49 (52) 2 Cal W N 76 *Gour Mohun v Karmohar* (Suit for declaration that a decree obtained by *A* against *B* was benami for the plaintiff — There is a cause of action irrespective of the fraud alleged—Art. 95 does not therefore apply.)

(1931) A I R 1931 Sind 27 (27) 130 Ind Cas 552 *Uttamchand Mangharmal v Salamatrai Khubchand* (Suit for partition of property omitted from previous partition by fraud of the defendants—Art. 95 does not apply.)

(1918) A I R 1918 Cal 809 (810) 41 Ind Cas 747 *Asitulla v Sadatullah* (A plaintiff who was co vendee of land with defendants but whose name was omitted from the conveyance by the fraud of the defendants can recover possession of his share even though the limitation period for rectification of the conveyance under Section 31 has expired.)

Note 6

1 (1907) 34 Cal 83 (89) *Surendranath Ghose v Hemangini Das*

(1893) 17 Mad 299 (300) *Tirthasami v Seshagiri Pai*

2 (1905) 4 Cal L Jour 472 (473), *Pohani Kurnar v Ragu Nath Das*

(1916) A I R 1916 Pat 131 (132) 37 Ind Cas 797, *Malomed Jan v Commissioner of Palna* (Compromise decree.)

[See also (1916) A I R 1916 Cal 905 (906) 33 Ind Cas 767, *Pajkumar Sarkel v Rajkumar Mali*.]

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is not governed by this Article^{2a} A compromise decree only embodies a contract and like a contract can be set aside on grounds other than fraud³

The fraud that will enable the Court to set aside the decree at the instance of a party must be a fraud which is *extraneous* to the decree⁴ That is to say, it must be a fraud which was not one of the elements before the Court for consideration in arriving at a decision in the case Thus, the fact that a decree was obtained by perjured evidence is not a fraud extraneous to the decree and therefore no suit will lie to set aside the decree on that ground⁵ See also the under-mentioned cases⁶ as to what kind of fraud is sufficient for setting aside a decree

Where a person is bound by a decree as being a *party* thereto, he cannot seek any relief negatived by such decree, unless he gets the decree set aside for fraud In other words, a suit for such a relief, though governed ordinarily by an Article prescribing a longer period of limitation, would be barred after the period of limitation prescribed by this Article⁷ And this result cannot be avoided by framing the

2a (1924) A I R 1924 All 625 (633) 46 All 575 83 Ind Cas 782, *Phulwanti v Janeshar Das*

(1922) A I R 1922 Lah 166 (167) 62 Ind Cas 794 2 Lah 164, *Jala Singh v Man Singh*

3 (1906) 34 Cal 83 (89) *Surendra Nath Ghose v Hemangini Das*

(1922) A I R 1922 Cal 493 (497) 74 Ind Cas 770, *A Y Rely v Rajkumari*

4 (1926) A I R 1926 Lah 86 (87) 89 Ind Cas 736, *Mahomed Din & Sons v B D Berry & Co*

(1921) 62 Ind Cas 591 (593) (Pat) *Jagarnath Prasad v Bahurani*

5 (1919) A I R 1919 Mad 1011 (1016) 41 Mad 743 45 Ind Cas 774 (F B), *Kadirelu Nainar v Kuppuswami Naicker*

(1922) A I R 1922 Mad 401 (401) 89 Ind Cas 12, *Bala Krishna Mudaliar v Suaminatha Mudaliar*

(1921) A I R 1921 Pat 12 (14) 60 Ind Cas 124 6 Pat L Jour 1, *Jangal Choudhry v Lalji Pasban*

v Kamakshi (Quare)
37, *Ravi Chhakra Kumar*
Non service of summons is

NOT FRAUD ;

(1935) A I R 1935 Cal 95 (96) 154 Ind Cas 414, *Abbas Ali Bhuiya v Ram Kana* (Non service of summons is not sufficient)

(1926) A I R 1926 Lah 86 (87) 89 Ind Cas 736 *Mahomed Din & Sons v B D Berry & Co* (Do A I R 1922 Pat 291, Followed)

occident Company
fraudulent sup

3 946, *Akhshiram*

Pohumal v Ghanshamdas

(1904) 1 Nag L R 20 (22, 23), *Raja Ratan Singh v Thakur Man Singh*

7 (1903) 16 C P L R 131 (134) *Ramcharan Sao v Rameshwar Singh* (Suit for possession by a party to a decree)

(1919) A I R 1919 Pat 134 (135) 49 Ind Cas 953 *Jagdeo Singh v Ajodhya Singh* (Suit for possession on ground that decree under which plaintiff was dispossessed was obtained by fraud is governed by Art 95 and not by Art 141)

(1916) A I R 1918 Pat 491 (495, 496) 46 Ind Cas 562, *Upendra Chandra Singh v A B Choudhry*

suit as one for a declaration⁸ or for possession⁹

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It is however, only a person *bound* by the decree that can sue to set it aside. A person *not a party* to it and therefore not bound by it can ignore it and claim the relief he wants¹⁰. Thus a decree passed against a *benamidar* of a person cannot be said to be one against the real owner himself, so as to compel the latter to be bound by it in the absence of circumstances which would estop him from questioning its validity as against him. *D* purchased from *J*, *benam* in the name of *S*, the *darpatni* right in a certain tenure in the year 1886. In 1889 *R*, the *patnidar* entered into a fraudulent arrangement with *S* and obtained a decree against him for arrears of rent under which the *darpatni* was sold and purchased by *R* himself. *D* became aware of the fraud in July 1892 and filed a suit in October 1895 against *R* and *S* to recover possession of the *darpatni*. Their Lordships of the Privy Council held that the suit was not governed by this Article and was not barred by limitation¹¹. Their Lordships observed as follows:

On the facts, as now admitted, Dhan Krishna Mandal (*D*) was the true owner of the interest in the land which was sold by Jogendra Nath Singh (*J*) and nothing that happened between Sarat Chandra Mandal (*S*) and Raghunath Punja (*R*) could affect his title unless he was estopped from denying the authority of his *benamidar* to deal with it. The onus on this point was on the defendants who, to make good their defence on the statute must show that the plaintiff cannot succeed without setting aside the decree. The plaintiff's title therefore, for anything that appears to the contrary was in no way affected by the sale under order of the Court, and it is not necessary for him to have the sale set aside.

Where a decree is *void as being without jurisdiction*, even a party thereto is not bound to set it aside before claiming reliefs inconsistent with it, and a suit by him for the relief which he wants would not

(1925) A I R 1925 Pat 625 (631) 4 Pat 510 89 Ind Cas 141 *Harendra Singh v Rameswar Singh*

(1931) A I R 1931 Cal 69 (71) 129 Ind Cas 871 *Kali Prasanna Sinha v Haripada Ghose*

(1926) A I R 1926 Cal 167 (168) 90 Ind Cas 866 *Fazlu Uddin Mahomed v Khetra Ghorai*

(1866) 6 Suth W R 165 (165) *Mt Jhisoman Koonwar v Babu Rup Narain Singh*

(1916) A I R 1916 Cal 905 (906) 33 Ind Cas 767 *Rajkumar Sarkel v Rajkumar Vals*

(See also (1916) A I R 1916 Oudh 289 (289) 36 Ind Cas 811 19 Oudh Cas 119 *Raghuraj Giv v Rudhra Pratap Singh*)

8 (1925) A I R 1925 Cal 819 (820) 85 Ind Cas 629 *Sarada Prasad Roy v Rai Mohan Saha*

9 (1935) A I R 1935 Lah 961 (961) *Gurbachan Singh v Hazara Singh*

10 (1930) A I R 1930 All 420 (421) 123 Ind Cas 830 *Abdul Akad v Chhaba Ram* (Suit by *A* for declaration that a decree obtained by *B* against *C* is not binding on *A*)

11 (1907) 34 Cal 711 (717) 34 Ind App 139 4 All L Jour 467 9 Bom L R 743 6 Cal L Jour 17 11 Cal W N 817 17 Mad L Jour 353 2 Mad L Tim 397 (P C) *Annada Pershad Punja v Prasannamoy Das*

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be barred by this Article, but would be governed by the Article appropriate to such relief ¹²

7. Decree against shebait—Suit by successor to set aside.—Where a decree is obtained against *A* as shebait of an idol in respect of the idol's property, it is the idol that really is the party. The decree is binding, in the absence of fraud, on the idol's estate and succeeding shebait will also be bound by it. Where, however, the decree against *A* has been obtained fraudulently, the succeeding shebait is entitled to sue to set it aside and this Article would apply to such a suit ¹

8. Fraud by Hindu widow—Suit by reversioner.—Where a Hindu widow fraudulently colludes with a third person and allows him to obtain a decree against her in respect of her husband's estate, it is not binding on the reversioner and he is not bound to set aside the decree within the time prescribed by this Article. He is not a party to the transaction in which the fraud was committed and, in this view also, this Article would not apply to a suit by him either for a declaration of his rights or for other appropriate relief ¹

8a. Transfer in fraud of creditors—Suit to set aside.—Where *A* transfers property to *B* in fraud of creditors, any creditor can, under Section 53 of the Transfer of Property Act, sue to get the transfer set aside. The suit is, however, not one governed by this Article ¹. The reason is that though the suit is for relief on the ground of fraud, the creditor plaintiff is not a party to the transaction in which the fraud was committed.

9. Fraud in execution proceedings.—When fraud is committed in the course of proceedings in execution of a decree, parties to the

- 12 (1916) A I R 1916 Pat 375 (381) 35 Ind Cas 404, *Jahnay Prasad Singh v Gharbaran Dubey* (Execution sale a nullity—Suit for redemption)
(1913) 19 Ind Cas 980 (981) (Cal) *Meher Abzal v Rahman Ali Meah* (Suit for possession of rayafi holding after setting aside *ex parte* decree as

. Animal
15, Mathura
guardian—

Minor is not properly represented—Decree nullity—Suit to set aside—
Art. 120 applies }

- (1910) 8 Ind Cas 232 (233) (Lah) *Dial Singh v Allah Ditta* (Decree against plaintiffs not set aside for fraud within three years—Plaintiffs cannot ignore it and sue for possession)

Note 7

- 1 (1906) 4 Cal L Jour 472 (473) *Rohini Kumar Panja v Raghu Nath Das*

Note 8

- 1 (1907) 30 Mad 402 (404) 17 Mad L Jour 288 2 Mad L Tim 360, *Sunda rappa v Sriramulu*
(1912) 21 Ind Cas 605 (606) (All) *Muhammad Fayyaz Ali Khan v Bikhram bar Das*

[But see (1887) 11 Bom 119 (125) *Parekh Ranchor v Das Vakhat* (Art. 95 was applied to such a suit—Submitted not correct)]

Note 8a

- 1 (1916) A I R 1916 Mad 494 (491) 29 Ind Cas 62, *Authikesataloo Nascher v. Shah Abdulla Hussain Sahib Khadri*

decree are barred from instituting *suits* for relief on the ground of fraud.¹ The reason is that the question of fraud in such cases is one arising in execution, discharge or satisfaction of the decree within the meaning of Section 47 of the Code of Civil Procedure which expressly bars a suit for relief in respect of such matters.² Thus, a suit to set aside an execution sale on the ground of fraud will not lie.³ But where not only are the execution proceedings attacked on the ground of fraud but the *decree itself* is attacked on the ground that it was obtained by fraud, a suit at the instance of a party to set aside the execution sale would lie⁴ and would be governed by this Article for purposes of limitation.⁵

An auction purchaser can sue to recover his purchase money on the ground of the fraud of the decree holder and such a suit would be governed by this Article.⁶

10. "For other relief on the ground of fraud." — The fraud referred to in the latter part of the first column of the Article is not fraud of the same nature as that in a decree obtained by fraud which is referred to in the first portion of the Article.¹ The words 'for other relief on the ground of fraud' have no reference to any decree² and the mention of a decree in the first part of the language of the Article does not, in any way, detract from the generality of the latter part thereof.³ The latter part is comprehensive enough to include any relief. It will include *compensation* for damage caused to the plaintiff by the fraud practised by the defendant.⁴ A suit for the

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Note 9

- 1 (1882) 6 Bom 148 (150) *Paranjpe v Kanade*
- (1885) 9 Bom 468 (471) *Sakharam Goring Kale v Damodar Akharam Gujar*
- (1890) 17 Cal 760 (776) *Mohendro Narayan Chaturaj v Lopal Mondul*
- 2 (1882) 5 Mad 217 (219) *Viraraghava Ayyangar v Venkatacharyar*
See also Notes to Article 12 ante, and Notes to Section 47 of the Authors' Commentary on the Code of Civil Procedure
- 3 (1882) 5 Mad 217 (219) *Viraraghava Ayyangar v Venkatacharyar*
- (1921) A I R 1921 Pat 54 (57) 6 Pat L Jour 16 61 Ind Cas 126 *Pahlad Singh v Sajjan Ram*
- 4 (1899) 26 Cal 326n (332) 3 Cal W N 395, *Matl Lal Chakrabutty v Russick Chandra Dasnagi*
- 5 (1899) 26 Cal 326n (332) 3 Cal W N 395, *Matl Lal Chakrabutty v Russick Chandra Dasnagi*
- 6 (1910) 34 Mad 143 (148 150) 7 Ind Cas 60 *Venkata Suryanarayana Jagapathiraju v Goluguri Bapiraju*
- (1912) 16 Ind Cas 215 (216) (Mad) *Dalsubramanya Chetty v Maruthamalai Gounden*

Note 10

- 1 (1908) 35 Cal 877 (888) *Prayag Raj v Sidhu Prasad Tewari*
- (1919) A I R 1919 Pat 131 (135) 49 Ind Cas 953, *Jagdeo Singh v Ajodya Singh*
- (1903) 27 Mad 843 (845) *Bank of Madras v Mullan Chand Kanyala*
- 2 (1930) A I R 1930 All 573 (576) 124 Ind Cas 150, *Benares Bank Ltd v Ram Prasad*
- 3 (1930) A I R 1930 All 573 (576) 124 Ind Cas 150 *Benares Bank Ltd v Ram Prasad*
- 4 (1903) 27 Mad 843 (845) *Bank of Madras v Mullan Chand Kanyala*

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rectification of the deed under Section 31 of the Specific Relief Act on the ground of fraud would be governed by the latter part of the Article.⁶ A suit to set aside a sale under the Public Demands Recovery Act for fraud of the purchaser would be governed by the latter part of the Article.⁶ Where one of several co sharers has lost his property by reason of the fraud of his co sharers who have by a contrivance purchased the property, the sale need not be formally set aside but the plaintiff may obtain relief by getting the property re conveyed to him and a suit for such a relief would be governed by this Article.⁷

11. Suit for refund of money advanced on a transfer found to be fraudulent.—Where *A* advanced money on a usufructuary mortgage of property to *B* but found that *B* had already mortgaged it with possession to another and had fraudulently kept the fact from the knowledge of *A*, and thereupon *A* sued *B* for the recovery of the advance, it was held in the undermentioned case¹ that Article 116 and not Article 95 applied to the case. In a somewhat similar case² where the defendant sold a certain property to the plaintiff to which he had no title and the plaintiff sued for the return of his sale price, it was held by the same Court that Article 97 or Article 95 applied to the case. The Chief Court of Oudh held in one case³ the same view, but in later cases⁴ held that the suit would be governed by Article 95 only if the alleged fraud was established and, if not, by Article 116.

12. Starting point.—It is a fundamental principle of the law of limitation that so long as a person on whom fraud has been practised remains in ignorance of the fraud no time shall run against him.¹

suits for the return of money advanced on a usufructuary mortgage of property to a stakeholder for damages.)

5 (1901) 1901 Pnn Re No 62 page 204 *Gopal Shah v Arura*

6 (1907) 34 Cal 241 (245) 5 Cal L Jour 385, *Syam Lal Mandal v Nilmony Das*

v Nilmony Das
Pran Gopal Mookerjee
oy v Raj Chunder Roy

Note 11

1 (1916) A I R 1916 Lah 312 (312 313) 36 Ind Cas 282 *Bhiken Singh v Dadna*

2 (1913) 19 Ind Cas 5 (6) (Lah) *Sohan Singh v Lakhu Mal*

3 (1910) 6 Ind Cas 1013 (1014) 13 Oudh Cas 148, *Udit Narain Singh v Sahib Ali*

4 (1922) A I R 1922 Oudh 113 (114) 67 Ind Cas 595 *Zhamman Singh v Dal Chand*

(1917) A I R 1917 Oudh 232 (233) 37 Ind Cas 351, *Lachhman Prasad v Rambhal*

Note 12

1 (1883) 5 All 291 (296) 1883 All WN 40, *Muhammad Bahsh v Mula Ahmad Ali*

(1930) A I R 1930 Mad 173 (174) 120 Ind Cas 880 *Basavayya v Papanna Rao*

The third column of the Article provides, in accordance with this principle, that the *terminus a quo* is the date when the fraud becomes known to the party wronged²

The knowledge referred to is clear and definite knowledge of the facts constituting the particular fraud and not a mere suspicion³. It must be such knowledge as would enable the person wronged to seek his remedy in Court, and the Court must find exactly when the plaintiff got knowledge of the fraud.

In England the right of a person defrauded to seek for relief would be deemed to have first accrued at and not before the time such fraud was or with *reasonable diligence might have been discovered*. Under this Article time will run only when the fraud becomes known. As has been seen in Notes to Section 18 *ante*, negligence in pursuing means available for discovering the fraud will not, in this country, start limitation running before the date of the actual knowledge. *A*, a stakeholder of a *luri chit*, who owed money to *B*, transferred to *B* certain bonds which had been executed in *A*'s favour by *C* and *D*, who were other subscribers, for future payments of their subscriptions. *B* sued *C* and *D* on the bond. They filed a written statement stating that nothing was due on the bonds as all subscriptions had been duly paid. *B*'s suit was dismissed and he, thereupon, sued *A* for damages for the fraud practised by him. It was held that the written statements of *C* and *D* first gave notice to *B* of the fraud practised by *A* but that *B* was not bound to assume that that was true and could not be assumed to have known it to be true before his suit was actually dismissed. It was consequently held that time ran from the dismissal of the suit and not from the date when the written statements of *C* and *D* were filed which created a suspicion in the mind of *B*⁴.

In the light of the above discussion, the contrary view expressed in the undermentioned case⁵ cannot be accepted as correct.

13. Knowledge of agent is knowledge of principal.—The knowledge of the agent is, in law, the knowledge of the principal. In *Rampal Singh v Balbhaddar Singh*,¹ their Lordships of the Privy Council observed as follows:

“It is not a mere question of constructive notice or inference of fact, but a rule of law which imputes the knowledge of the agent to the principal, or (in other words) the agency extends to receiving notice on behalf of the principal of whatever is material to be stated in the course of the proceedings.”

2 (1894) 19 Bom 593 (602) *Chantrappa v Danasa*

3 (1909) 3 Ind Cas 316 (317) 37 Cal 81 14 Cal W N 101, *Indernath Danerjee v Rooke*

4 (1908) 31 Mad 230 (233) 4 Mad L Tim 80 18 Mad L Jour 19 *Punnayil Kuttu v Raman Nair*

5 (1892) 20 Cal 425 (431, 432), *Ashrams Singh Deo v Aslu Nair*

Note 13

1 (1902) 25 All 1 (17) 29 Ind App 203 6 Cal W N 819 4 Bom L R 832 8 Sar 340 (P C)

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14. Fraud by shebait — Suit by succeeding shebait within three years from date of knowledge — Where a decree is obtained fraudulently against *A*, the *shebait* of an idol in respect of the idol's property, the idol is really the party to the suit. Time for a suit to set aside the decree on the ground of fraud will run when the fraud comes to the knowledge of the *shebait*. Where *A* himself is guilty of fraud and the fraud comes to the knowledge of the succeeding *shebait*, the starting point for a suit by the latter to set aside the decree will run from the date of his knowledge¹.

15. Knowledge of fraud is a question of fact. — The question when the fraud came to the knowledge of the plaintiff, is a pure question of fact, which must be ascertained from the facts and circumstances of each case¹.

16. Plea of fraud. — Where a plaintiff charges the defendants with fraud, he must distinctly, accurately and specifically set forth in the plaint the facts constituting the alleged fraud¹. He must also state the time when the fraud was discovered to enable the defendant to meet it, and the Court to see whether the discovery might not have been made earlier². In *Ganga Narain Gupta v Tiluckram Chowdhry*,³ their Lordships of the Privy Council observed as follows:

"When fraud is charged against the defendants it is an acknowledged rule of pleading that the plaintiff must set forth the particulars of the fraud which he alleges. Lord Selborne said, in *Wallingford v Mutual Society*,⁴ 'with regard to fraud, if there be any principle, which is perfectly well settled, it is that general allegations, however strong may be the words in which they are stated, are insufficient even to amount to an averment of fraud of which any Court ought to take notice'."

17. Burden of proof. — It has been seen in the Notes to S 18 *ante* that allegations of fraud must be substantially proved, though it does not mean that every puzzling artifice or contrivance resorted to by the opposite party must be unravelled, that fraud

Note 14

- 1 (1906) 4 Cal L Jour 472 (473), *Rohini Kumar Panja v Raghu Nath Das*

Note 15

- 1 (1889) 12 Mad 512 (516) 5 Sar 455 13 Ind Jur 409 (P C), *Krishnan v Sridevi*

Note 16

- 1 (1916) A I R 1916 All 356 (357) 38 All 126 33 Ind Cas 913, *Lachmi Narain Prasad v Kishan Kishore Chand*
(1895) 19 Bom 593 (601) *Chanturappa v Danara*
(1916) A I R 1916 Cal 120 (122) 35 Ind Cas 284, *Dansuram v Secretary of State*
2 (1916) A I R 1916 Cal 120 (123) 35 Ind Cas 284, *Dansuram v Secretary of State*
3 (1889) 15 Ind App 119 (120, 121) 15 Cal 533 12 Ind Jur 254 5 Sar 169 (P C)
4 (1880) L R 5 App Cas 685 (697) 50 L J Q B 49 43 L T 258 29 W R (Eng) 81.

cannot be presumed until the person relying upon it establishes his case and that the Court must not be too ready to presume fraud from suspicious circumstances¹ though a number of such circumstances may when combined, lead to the inference of fraud. The onus of proof of fraud in the first instance is on the plaintiff². Such proof must be consistent with the case set out in the plaint and where one kind of fraud is alleged, another kind of fraud cannot, on failure of proof of the fraud alleged, be substituted for it³.

Once fraud is established, however, the burden will be shifted to the person who has committed it to show that the person wronged has had knowledge of the transaction beyond the period of limitation⁴. Where it is doubtful at what precise time the fraud became known to the plaintiff, the onus is on the defendant to show that the suit is out of time⁵. Where the plaintiff has *prima facie* evidence in favour of the date alleged by him, it is, on the same principle, for the defendant to rebut the plaintiff's allegations and to prove that the knowledge of the fraud was acquired at an earlier period⁶.

18. Plea of fraud in defence. — A claim can be resisted in defence on the ground that the claim was based on fraud even though the defendant may not have and could not have, owing to time bar brought a suit to set aside the transaction on the ground of fraud¹. This principle applies even where a decree or judgment which has been obtained by fraud is sought to be enforced against the defendant. The latter is entitled to show that the decree was obtained by fraud or collusion and need not, before doing so, have

Note 17

- 1 (1905) 1 Nag L R 20 (22) *Rajaratan Singh v Thakur Man Singh* (It is for the defendant to allege and prove that the plaintiff was aware of the fraud on a date earlier than that assigned in the plaint)
- (1935) A I R 1935 All 995 (995) 53 All 342 159 Ind Cas 977, *Dehra Dun Mossoorie Electric Tramway Co Ltd v Hansraj*
- 2 (18 G) 25 Suth W R 193 (194) *Auderoodeen v Jegul Shaha*
- 3 (1916) A I R 1916 Cal 120 (123) 35 Ind Cas 284, *Bansram v Secretary of State*
- 4 (1928) 112 Ind Cas 847 (848) (Lah) *Mt Jannat v Abdul Raman Khan*
(1916) A I R 1916 Cal 120 (123) 35 Ind Cas 284, *Bansram v Secretary of State*
(1912) 16 Ind Cas 464 (465) (Cal) *Narayana Sahu v Damodara Das*
(1893) 17 Bom 341 (347) 20 Ind App 1 17 Ind Jur 40 6 Sar 256 (P C), *Rahimbhoy Habibbhoj v Charles Agnew Turner*
- 5 (1908) 31 Mad 230 (233) 18 Mad L Jour 19 4 Mad L Tim 60 *Punnayil Kuttu v Raman Nair*
- 6 (1884) 6 All 406 (414) 1884 All W N 140 *Natha Singh v Jodha Singh*
(1889) 12 Mad 512 (516) 13 Ind Jur 409 5 Sar 435 (P C) *Krishnan v. Sridevi*

Note 18

- 1 (1904) 28 Bom 639 (642) 6 Bom L R 592 *Ranganath v Gorynd*
(1906) 30 Bom 395 (404) 8 Bom L R 296, *Minalal v Kharsely*
(1916) A I R 1916 Pat 396 (397) 34 Ind Cas 897, *Banley Behary Lal v Phagandas Marwari*
(1911) 11 Ind Cas 892 (893) (Cal) *Kali Kumar v Kashi Chandra* (29 Bom 639 Followed)

Article 95
Notes
18—19

sued to set it aside for fraud.² See Section 44 of the Evidence Act In *Reg v The Saddlers' Company*,³ Mr Justice Willes observed

"A judgment or decree obtained by fraud upon a Court binds not such Court nor any other, and its nullity upon this ground, though it has not been set aside or reversed, may be alleged in a collateral proceeding"

19. Suit to set aside ex parte decree for fraud. — Where the plaintiff had applied to set aside an *ex parte* decree under Order 9 Rule 13 of the Code of Civil Procedure and failed, it was held by their Lordships of the Privy Council that a suit to set aside the decree on the ground of fraud would not be barred in the absence of proof that the question of fraud in obtaining the decree was raised and decided in the previous proceedings.¹ In another similar case before their Lordships, it was held that where the fraud alleged for getting the decree set aside could not have been the subject matter of the decision in proceedings under Order 9 Rule 13, the failure of the applicant in such proceedings and his failure to appeal from the order passed against him would not bar a suit to set aside the decree on the ground of fraud.² See also the undermentioned case.³

Article 96

96.* For relief on the ground of mistake.	Three years.	When the mistake becomes known to the plaintiff.
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* Act of 1877, Article 96

Same as above

Act of 1871, Article 97

The first column was 'For relief on the ground of mistake in fact' the second and third columns were same as above

Act of 1859

No corresponding provision

- 2 (1902) 24 All 242 (246) 1902 All W N 38 *Bansi Lal v Dhapo*
(1900) 27 Cal 11 (23) 3 Cal W N 660 *Rajb Panda v Lakhon Sindh Maha*
raira
(1923) A I R 1923 Cal 79 (81) 70 Ind Cas 548, *Pulin Behari Day v Satya*
Charan
(1926) A I R 1926 Cal 1 (37) 93 Ind Cas 385, *Prayag Kumar Deb v Sita*
Prasad Singh
(1928) A I R 1928 Cal 810 (811) 110 Ind Cas 571 (572) *Bholanath Boss v*
Nagendra Bala
(1921) A I R 1921 Pat 193 (202) 62 Ind Cas 962 (970) (F B) *Hare Krishna*
Sen v Umesh Chandra Dutt
3 (1863) 138 R R 217 (231) 10 H L C 404 32 L J Q B 337 9 Jur (n s) 1031
9 L T (N s) 60 11 W R (Eng) 1001

Note 19

- 1 (1901) 28 Cal 475 (478) 5 Cal W N 757 (P C) *Radharaman Shaha v Pran*
nath Poy
2 (1902) 29 Cal 305 (400) 29 Ind App 93 4 Bom L R 363 6 Cal W N 473 8
Sar 266 (P C) *Ahoyendranath Mahala v Prannath Roy*
3 (1899) 21 All 289 (290) 1899 All W N 67, *Duarla Prasad v Lachhoman*
Das (Application to set aside *ex parte* decree dismissed as barred by
limitation — Suit to set aside decree for fraud, not barred)

Synopsis

Article 96
Notes
1—2

1. Legislative changes.
2. Scope of the Article.
3. "Mistake."
4. Illustrations of suits falling within this Article.
5. Starting point.

Other Topics

Declaratory suit	See Note 2, F N 7
Mistake—Discovery by one of several partners—Starting point	See Note 5, Pt 4
Mistake of law	See Note 3
Mistake—Whether should be of plaintiff	See Note 3, Pts 5, 6
Rectification of instrument	See Note 3, Note 4, Pt 2

1. Legislative changes.

1 Under Act 14 of 1859, there was no specific provision corresponding to this Article, and suits of the class specified in this Article were held governed by clause 6 of Section 1 of the Act of 1859, the period being six years reckoned from the time of the discovery of the mistake

2 Article 97 of the Act of 1871 provided for 'Relief on the ground of mistake *in fact*', the words '*in fact*' were omitted in the later Acts, so that this Article would govern suits for relief on the ground of mistake *in law* also wherever such relief can be granted under the general law

2. **Scope of the Article.**—The Article applies to suits for relief *on the ground of mistake*, i e to suits where *in order to succeed, the plaintiff is bound to prove the mistake*. If the plaintiff need not prove mistake in order to succeed, it cannot be said that the suit is for relief on the ground of mistake¹

Illustrations

1 A sold goods to B but wrongly entered it in the name of C. On C refusing to pay the price on demand, A discovered the mistake and sued B for the price. It was held that the suit was not for any relief on the ground of mistake and was not governed by this Article². It will be seen that B was the real purchaser and was bound to pay the price to A independent of any question of mistake

2 A actually conveys to B certain property, but by mistake the property is wrongly described in the conveyance. A sues for a declaration of title to the property so conveyed. The suit is not

Article 96 — Note 2

1 (1913) 18 Ind Cas 669 (574) (Cal), *Dicarka Nath Chowdhury v Shashit Kinkar* (Per Chapman, J)

2 (1938) A I R 1933 Sind 82 (33) 142 Ind Cas 470 27 Sind L R 61, *Narumal v Nanumal Benarsidas*

Article 95
Note 2

within this Article as the ground of relief claimed is title³. It is not necessary in order to succeed in the suit to prove the mistake alleged.

3 4 sues for possession of property actually conveyed to him but left out by mistake in the sale deed. The suit is not governed by this Article as it is one based on *title* ⁴

4 In a partition between co sharers a minor co sharer was given less than his lawful share by mistake. On attaining majority he sued for his full share. It was held that the suit was not governed by this Article⁵. The minor was not bound by an unequal partition whether there was any mistake or not and the suit was thus one not for relief on the ground of any mistake. But where A, B and C, major co sharers enter into a partition and an unequal allotment is made by mistake, a suit for re partition on the ground of mistake is governed by Article 96⁶. The reason is that the partition arrangement entered into by them could not be assailed by them except on the ground of a mistake or fraud and consequently the plaintiff, in order to succeed in the suit was bound to establish the mistake.

See also the undermentioned cases."

Although the Article is very general and would appear to include all suits for relief on the ground of mistake it has been held that the Article is intended to apply only to those cases in which the Court

- 3 (1927) 1 I R 192, All 355 (356) 100 Ind Cas 568 *Kesho Singh v Pajra Singh*
4 (1930) 1 I R 190 All 35 (357) 127 Ind Cas 577, *Sukhdeo Rai v Ram Narain*
5 (1909) 14 All 498 (499) 1899 All W N 61 *Lal Bahadur Singh v Suraj Singh*
6 (1900) 1900 Pun L R No 3 page 6 (9) *Sultan Mohammad v Ahim Khan*
(1931) 1 I R 1931 Mad 70 (709) 54 Mad 8-3 185 Ind Cas 9 *Bamale v. v. Sundaramayya*
[But see (1930) 1 I R 1930 Nag 100 (108) 55 Ind Cas 422 *Wasdeo v. Vastal* (Division on the mistaken view that the parties are entitled *per stirpes* and not *per capita*—Suit for re partition and declaration governed by Article 141 and not Article 96. It is submitted that the decision is not correct on principle.)]
7 (1880) 1880 Pun Re No 35 *Taja v Gulam* (Suit for declaration of title to land and for correction of settlement record.—Plaintiff held entitled to declaration even though right to demand correction is barred.—Article 96 held not to apply to such cases.)
(1910) 6 Ind Cas 401 (404) 32 All 491 *The Rajputana Walwa Py Co-operative Soc. v. Ltd v Ajmere Municipal Board* (Suit to recover octroi duty illegally levied in excess of that which ought to have been levied.—No question of mistake.—Article 62 and not Article 96 applies.)
(1910) 1 Ind Cas 576 (530) (Lab) *Khem Singh v Kesar Singh* (Suit for declaration of title where entry in the Record of Rights was erroneous
ground of mistake.—Suit is not one based on mistake but on a right to claim partition.—Article 96 does not apply.)

are asked to relieve parties from the consequences of mistakes committed by them in the course of contractual transactions^{7a}. Thus, a suit to set aside a decree⁸ or a Court sale⁹ on the ground of mistake is not within this Article. Where *A* trespassed into *B*'s coal mine under a mistake, and *B* sued *A* for damages for such trespass and removal of coal, it was held that Article 96 could have no application to the case¹⁰.

Where a case falls under this Article as well as the general Article 62 *ante*, this Article will prevail in accordance with the general principle of interpretation of statutes that a special provision will override the general provision¹¹.

3. "Mistake."—As has been seen in Note 1 *ante*, the corresponding Article in the Act of 1871 contained the words "*mistake in fact*". The omission of the words "*in fact*" in the present Article would seem to show that the Article will apply to *all* suits for relief on the ground of mistake, whether the mistake is one of *law* or *fact*¹. This, however, does not mean that a suit for relief on the ground of a mistake of *law* is always maintainable under the substantive law. This Article can be taken to mean only that if such a suit is maintainable under the substantive law, it would be governed by this Article.

Under the substantive law, a pure mistake of law is not a ground for relief, the rule being founded on the maxim *ignorantia legis neminem excusat*—ignorance of law excuses no one. This principle is found enacted in Section 21 of the Contract Act, which provides that a contract is not voidable because it was caused by a mistake as

- 7a (1911) 11 Ind Cas 537 (539) (Ondh), *Ram an Akhan v Md Yakub Khan*
 (1924) A I R 1924 Lah 924 (325) 69 Ind Cas 501, *Sher v Piara Ram*
 (1927) A I R 1927 Cal 117 (123) 101 I C 62 *Panna Lal v Adjas Coal Co*
 (1913) 18 Ind Cas 869 (874) (Cal) *Duarha Nath Chowdhury v Shashit Kinker Banerjee* (Per Chapman, J)
 (1938) A I R 1938 Lah 338 (339) *Attar Singh Sant Singh v Municipal Committee Amritsar* (Mistake not that of parties in contractual

ugar
 belief
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- 8 (1911) 11 Ind Cas 537 (539) (Ondh) *Ramsan Khan v Muhammad Yakub Khan*
 (1906) 10 Cal W N 1024 (1025), *Chand Mea v Srimathi Asima Banu* (Distinguishing 8 Cal W N 473 (476) in which it was held that a suit to correct a decree will lie)
 9 (1923) A I R 1923 Bom 62 (63) 46 Bom 914 67 Ind Cas 857, *Nugabhatta v Nagappa*
 10 (1927) A I R 1927 Cal 117 (123) 101 Ind Cas 62, *Pannalal v Adjas Coal Co Ltd*
 11 (1928) 1928 Mad W N 232 (234) *Kalandir Sahib v S I Railway Co*
 (1925) A I R 1925 Mad 1255 (1256) 48 Mad 925 91 Ind Cas 151 *Ramiah & Co v Sadasiva Mudaliar and Bros*

Note 3

- 1 (1896) 20 Bom 511 (516) *C N Pochhannala v P D Setna*

Article 96

Note 3

to any law in force in British India^{1a} But the doctrine as expressed in general terms in the Section has been interpreted by modern authority with large qualifications In *Cooper v Phibbs*,² Lord Westbury observed as follows "It is said '*ignorantia juris non excusat*', but in that maxim the word '*jus*' is used in the sense of denoting *general* law, the ordinary law of the country But, where the word '*jus*' is used in the sense of denoting a private right that maxim has no application Private right of ownership is a matter of fact, it may be the result also of matter of law, but if parties contract under a mutual mistake and misapprehension as to their relative and respective rights, the result is that, that agreement is liable to be set aside as having proceeded upon a common mistake' In *Appavoo Chettiar v S I Ry Co*,³ their Lordships of the Madras High Court observed as follows

"On account of the change of language in Article 96, it may be conceded that some kind of mistake of law may be a ground for relief If the mistake of law is of such a kind that it is mixed up with certain specific facts relating to a particular individual, so that it may be said, as the combined effect of a party's view of the law and the facts he made a mistake at the time of entering into the transaction as to the nature of the pre-existing private right, it may be said that such a mistake is not a pure mistake of law and is covered by the language of Lord Westbury in *Cooper v Phibbs*,⁴ some such limitation must be placed on the words of Lord Westbury, which on their face seem to be too wide and which if literally applied will cover cases of all mistakes of law'

It was held in that case that where a mistake was a pure mistake of law in British India and not bearing on the private right of a person resulting in payment by one person to another, the mistake is no ground for relief See also the undermentioned case⁴

It has been held in some cases⁵ that in order that this Article may apply the *plaintiff* should have been under a mistake This does not seem to be correct A suit for relief on the ground of mistake of a *third* party has been held to fall within this Article⁶

It has also been held in some cases that the Article applies only to suits for *recovery of money or property parted with* in consequence

1a See (1886) 11 Bom 174 (176) *Vishnu v Kannath*

2 (1866 67) 15 W R (Eng) 1049 (1053) L R 2 H L 149 16 L T 378

3 (1929) A I R 1929 Mad 177 (177 178) 114 Ind Cas 358 (Dissenting from 1928 Mad W N 232 (234) where it was held that a suit would lie for recovery of money paid under a mistake as to the *general* law not bearing upon particular rights)

4 (1929) A I R 1929 Mad 179 (181) 52 Mad 12 114 Ind Cas 829 *Rajah of Ramand v Secy of State* (Voluntary payment under a pure mistake of law cannot be recovered)

5 (1927) A I R 1927 Cal 117 (123) 101 Ind Cas 62 *Pannalal Ghose v Adja Coal Co Ltd*

(1933) A I R 1933 Sind 32 (33) 142 Ind Cas 470 27 Sind L R 81 *Narumal Hirachand v Nanumal Benarsidas*

6 (1906) 1906 Pun L R No 3 page 6 (9) *Sultan Muhammad v Alim Khan* (1883) 6 Mad 344 (350) 7 Ind Jur 358 *Veeraraghava v Krishnaswamy*

of the mistake of the plaintiff.⁷ This also does not seem to be correct. As will be seen from Note 4 *infra*, a suit for rectification of an instrument is one within this Article.

It has been held in the undermentioned case⁸ that in order that the mistake of a party may be a ground for relief, there must be no neglect on his part and that where there is negligence there is mistake such as will justify the grant of relief.

4. Illustrations of suits falling within this Article. — The following are all suits within this Article:

- 1 Suit to recover money delivered by mistake to the defendant¹
- 2 Suit for rectification of an instrument on the ground of mutual mistake under Section 31 of the Specific Relief Act, 1877²
- 3 Suit to set aside a discharge given by the plaintiff (creditor) to the defendant (debtor) on the ground of mistake³
- 4 In a partition between the plaintiff and defendants, a mortgage, supposed by mistake to be due, was allotted to plaintiff. Plaintiff sued on the mortgage, but it was held that the mortgage had already been discharged. Plaintiff thereafter sued the defendants for the recovery of the amount on the ground of mistake in the allotment. It was held that Article 96 applied.⁴

7 (1933) A I R 1933 Sind 32 (33) 142 Ind Cas 470 27 Sind L R 81, *Narumal Hirachand v. Nanumal Benarsidas*

8 (1911) 11 Ind Cas 537 (539) (Oudh) *Ramzan Khan v. Muhammad Yakub*
Note 4

1 (1875) 1 All 79 (81, 82), *Shuganchand v. Government, North Western Provinces*

(1886) 12 Cal 533 (534) *Mathura Nath v. Steel* (Suit for money paid in excess of road cess by mistake)

(1928) 1928 Mad W N 232 (234) *Kalandar Sahib v. S I Ry Co* (Suit for recovery of surcharge paid to railway company under a mistake as to the amount payable under law)

(1925) A I R 1925 Pat 765 (768) 4 Pat 448 93 Ind Cas 129, *Tofa Lal Das v. Syed Moynuddin* (Suit for amount paid in excess of amount legally due)

[But see (1876) 25 Smith W R 415 (416) *Radha Nath Bose v. Dama Churn Moohertee* (Suit for recovery of money over paid by mistake—Art. 96 was applied. Art. 96 was not adverted to)]

[See also (1914) A I R 1914 Lah 29 (31) 22 Ind Cas 592, *Roman Catholic Mission v. Sunder Singh* (Suit for recovery of overpayments — Art. 62 was applied — There was however no mistake alleged in the case and Art. 96 was not adverted to)]

2 (1918) A I R 1918 Cal 180 (182) 48 Ind Cas 972, *Dijoy Chand v. Secy of State* (Rectification of lease on the ground of mutual mistake)

(1930) A I R 1930 All 887 (887) 127 Ind Cas 577, *Sukhdeo Rai v. Ram Narain Rai*

(1936) A I R 1936 Cal 400 (401) 165 Ind Cas 736, *Abdul Sattar v. Abdul Rusan* (Rectification of petition for adjustment)

(1925) A I R 1925 Pat 765 (767) 4 Pat 448 93 Ind Cas 129 *Tofa Lal Das v. Syed Moynuddin*

(1927) A I R 1927 All 355 (356) 100 Ind Cas 568 *Kesho Singh v. Roopan*

3. (1904) 14 Mad L Jour 443 (459) *Mndras Consolidated Sugar and Spirit Factories Ltd v. William Samsone Shaw*

4 (1921) A I R 1921 Bom 184 (185) 45 Bom 582 61 Ind Cas 34, *Martand v. Dhondo*

Article 96
Notes
4—8

5 A sold certain bales of cloth to B who sold them to C who sold them to D. D found shortage of cloth and sued C for the recovery of the price of shortage. It was held that Article 96 applied, as both C and D were under a mistake as to the quantity of cloth in the bales.⁵

6 A made a payment into Court under a mistaken belief that he was liable to pay and the decree holder drew the amount from Court. A sued for recovery of the money on the ground of mistake. It was held that Article 96 or Article 120 will apply to the case.⁶

5. Starting point. — Time, under this Article, runs from the discovery of the mistake by the plaintiff.¹ As to when in any particular case the discovery was made would be a question of fact depending upon the facts and circumstances of that case. In the undermentioned case² the question was raised but not decided as to whether a mistake can be taken to have "become known" to the plaintiff when he ought to have discovered it if he used reasonable diligence.

Where the mistake is as to the belief of a party that a third person is liable, the mistake must be taken to be discovered when the third person repudiates his liability and communicates such repudiation to the party or to his partners.³

Where a discovery of the mistake is made by one of two partners in whom a right of action is vested, time will run from the date of such discovery notwithstanding that the other partner chooses to persist in his mistake even after the mistake is pointed out by the other.⁴

Where a mistake is discovered by reason of the decree of a trial Court time will run from the date of that decree and not from the date of the appellate decree confirming the trial Court's decree.⁵

In computing the period of limitation under this Article, the period of other proceedings *bona fide* taken in a wrong Court can, under Section 14 *ante*, be excluded.⁶

5 (1925) A I R 1925 Mad 1255 (1256) 48 Mad 925 91 Ind Cas 151, *Ramiah & Co v Sadanva Mudaliar & Bros*

6 (1910) 6 Ind Cas 654 (655) (Lah), *Fazal ud din v Zainab*

Note 5

1 (1922) A I R 1922 All 475 (477) *Ram Bah Singh v Shyam Sunder Misur*

(1925) A I R 1925 Oudh 719 (720) 87 Ind Cas 1017, *Ganesh v Jot Singh*

2 (1925) A I R 1925 Mad 1255 (1256) 48 Mad 925 91 Ind Cas 151, *Ramiah & Co v Sadanva Mudaliar & Bros*

3 (1904) 14 Mad L Jour 448 (459), *Madras Consolidated Sugar & Spirit Factories Ltd v William Sissmore Shaw*

4 (1904) 14 Mad L Jour 447 (459), *Madras Consolidated Sugar & Spirit Factories Ltd v William Sissmore Shaw*

5 (1921) A I R 1921 Bom 181 (185) 45 Bom 582 61 Ind Cas 34, *Martand v Dhondo*

[But see (1936) A I R 1936 Lah 747 (749) 168 Ind Cas 446, *Jagan Singh v Radha Kishan* (In some peculiar cases it may start from the date of the appellate decree)]

6 (1936) A I R 1936 Cal 400 (402) 165 Ind Cas 756, *Abdul Sattar v Abdul*

In the undermentioned case⁷ the period of limitation under this Article was stated to be six years, which is obviously a mistake for three years

Article 96
Note 5

97.* For money paid upon an existing consideration which afterwards fails.	Three years.	The date of the failure.
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Article 97

Synopsis

1. Scope of the Article.
2. Suit must be for the recovery of money paid.
3. Money must have been paid on an existing consideration.
4. Consideration must have afterwards failed.
5. Starting point.
6. Money paid on a void transfer without possession.
7. Money paid on a void transfer with delivery of possession.
8. Payment made in consideration of a voidable transfer, but no possession given.
9. Payment made in consideration of voidable transfer, possession also given.
10. Suit for mortgage money under S. 68 of the T. P. Act, if one based on a failure of consideration.
11. Executory consideration, when can be said to fail.
- 11a. Suit on liability under Section 65, Contract Act.
12. Failure of consideration in execution sales.

Other Topics

Applicability of Article—Conditions	See Note 1
Article 62 and this Article	See Note 11a
Article 116 and this Article	See Note 2
Consideration void in law	See Note 3 Pt 2 Note 11a, Pts 2 to 8
Failure of part of consideration—Whether sufficient	See Note 4, Pts 3, 4
Suit for damages or compensation	See Note 2, Pt 4

1. Scope of the Article.—This Article applies to suits for the recovery of money paid, based on the *failure of consideration* which existed at the time of such payment. A suit not based on the

* Act of 1877, Article 97 and Act of 1871, Article 98
Same as above

Act of 1859

No corresponding provision

Article 97
Notes
1—2

failure of consideration, as for example a suit for money expressly contracted to be refunded on the happening of a certain event,¹ or a suit based on the fact that the money was paid by mistake,² or by reason of the fraud of the other party,³ is not within this Article

The words "paid upon an existing consideration" imply that the money has been paid in pursuance of a *contract* between the parties. Where, therefore, the money has not been paid in pursuance of any contract, a suit for the recovery thereof is not governed by this Article⁴

The right to recover the money paid on the failure of the consideration for which it was paid is based on the principle that it is *inequitable* that the payee should retain the money in such a case⁵. It has been also held that in such cases there is an *implied contract* to refund the amount⁶

In order that this Article may apply, three conditions should be satisfied—

- 1 The suit must be for the recovery of the money paid by the plaintiff to the defendant. See Note 2
- 2 The money must have been paid on a consideration which existed at the time of payment. See Note 3
- 3 Such consideration must have afterwards failed. See Note 4

2. Suit must be for the recovery of money paid.—The suit contemplated by this Article is one for the recovery of the money

Article 97 — Note 1

- 1 (1908) 30 All 402 (404) 1908 All W N 185 5 All L Jour 480, *Mul Kunwar v Chaitar Singh*
 (1904) 26 All 519 (521) 1904 All W N 92, *Ramchandra Singh v Tohfa Singh*
 (1896) 19 Mad 391 (394) *Chinnathambi Goundan v Chinnana Goundan*
 (1896) 18 All 371 (372) 1896 All W N 107 *Sheo Charan Singh v Lalji Mal*
 (1908) 30 All 405 (405) 1908 All W N 185n 5 All L Jour 484, *Ram Jaggi Rai v Kauleshar Rai*
- 2 (1910) 6 Ind Cas 654 (655) (Lah) *Fazal ud din v Aft Zainab*
 (1910) 8 Ind Cas 1087 (1088) 35 Mad 89 *Banwari Reddy v Nagamma*

52 Ind Cas 818 *Deuaji v*

(1889) 13 Mad 437 (442) *Narayana v Narayana* (Money paid under a decree of same — As Art 97 only by Art 120, time

195 Koji Ram v Ishar
 decree paid into Court —
 void —
 governed by Art 120, time
 it apply

as the payment was not made in pursuance of any contract))

- 5 See (1931) A I R 1931 Cal 148 (149) 150 Ind Cas 89 *Sudha Mukhi Debi v Chairman of Commissioners, Tollygunge Municipality*
- 6 (1934) A I R 1934 Pat 148 (149) 150 Ind Cas 975 13 Pat 192, *Lalji Singh v Ramrup Singh*

which has been paid by the plaintiff to the defendant. A debt retained in part payment of the purchase money in a sale transaction between a debtor and his creditor is, as between them, a payment of that part, for the purposes of this Article¹. The leading case on the point is *Bassu Kuar v Dhum Singh*,² where in contemplation of a sale of land by the debtor to the creditor it was agreed that the debt should be retained by the former in satisfaction of part of the price, but the agreement failed owing to a difference between the parties as to certain other terms. Lord Hobhouse in delivering the judgment of the Board observed as follows:

"An action for money paid upon an existing consideration which afterwards fails, is not barred till three years after date of the failure. A debt retained in part payment of the purchase-money is, in effect and as between vendor and purchaser, a payment of that part."

An adjustment of mutual claims may also amount to a payment. A executed a sale of property X to B, and B executed a sale of property Y to A. Each sale purported to be for Rs 500, but really one sale was the consideration for the other. B was dispossessed of property X by a third person with paramount title and he thereupon filed a suit against A for the recovery of Rs 500. It was held that the adjustment of the sale deeds was equivalent to the payment of money and the suit could be regarded as one for the recovery of money paid on an existing consideration which afterwards failed³.

A suit for damages or compensation is not one for the recovery of the money paid⁴ and is not governed by this Article. The question whether a suit is one for the recovery of the money paid or is one

Note 2

- 1 (1888) 11 All 47 (57) 15 Ind App 211 5 Sar 260 12 Ind Jur 450 (P C), *Bassu Kuar v Dhum Singh*
- (1914) 25 Ind Cas 933 (934) 7 Low Bur Rul 133, *Maung Eyan v Maung Po*
- (1923) A I R 1923 Rang 87 (88) 11 Low Bur Rul 437 70 Ind Cas 121, *Maung Aung Ba v Maung Aung Po*
- (1906) 1906 Pun L R No 155 p 503 (512) *Hari Charan v C Brook*
- (1888) 1888 Pun Re No 193 *Gurumukh Singh v Chandu Shah*
[See also (1906) 28 All 466 (469) 3 All L Jour 223 (1906) All W N 65, *Jamna Das v Najmul Aissa*]
- 2 (1888) 11 All 47 (57) 15 Ind App 211 5 Sar 260 12 Ind Jur 450 (P C)
- 3 (1906) 8 Bom L R 283 (287) *Hanmant v Govind*
- 4 (1911) 9 Ind Cas 237 (237) (Lah), *Nizam Din v Nathu Ram*
- (1932) A I R 1932 Nag 5 (6, 7) 28 Nag L R 31 136 Ind Cas 225 (F B), *Kashirao v Zabu* (Art 116 applies if the contract is registered)
- (1934) A I R 1934 Pat 148 (149) 150 Ind Cas 975 13 Pat 192 *Lalji Singh v Ramrup Singh*
- (1932) A I R 1932 Bom 86 (86) 55 Bom 565 131 Ind Cas 115, *Ratanbai v Ghashiram Gangabishan*
- (1930) A I R 1930 All 771 (775) 121 Ind Cas 165 52 All 601, *Muhammad Siddiq v Muhammad Nuh*
- (1908) 1908 All W N 160 (160) 30 All 400 5 All L Jour 456, *Collector of Mirzapur v Duran Singh*

Article 97 Note 2

for compensation of damages is, however, one which must be determined having regard to the nature of the suit and the reliefs claimed⁵. But, although a suit has been framed as one for damages, the Court may, in appropriate cases, treat the suit as one for the recovery of money paid by the plaintiff to the defendant, and grant the plaintiff relief, if the claim for such relief is not barred under this Article⁶. On the same principle, a suit framed as one for the recovery of money paid may be treated as one claiming relief by way of damages if the Court finds that the plaintiff is entitled to such damages, and such relief is not barred under the Article applicable thereto⁷. Thus, where in a suit for the refund of money the plaintiff is entitled to the money as damages for breach of a covenant for title or for quiet possession embodied in a registered sale deed the Court can grant the relief if it is not barred under Article 116⁸.

It has been held in the undermentioned cases⁹ that the period of limitation under this Article is *extended* under Article 116 to six years in cases falling within both the Articles, in other words that Article 97 is covered by Article 116 in cases where the right to

- (1907) 1907 All W N 108 (109) 4 All L Jour 249 *Madan Lal v Reoti Singh* (Possession not delivered to the mortgagee — Suit for recovery of possession dismissed — Suit for compensation)
- (1908) 31 Mad 230 (233) 18 Mad L Jour 19 4 Mad L Tim 80 *Punnayil Kutu v Raman Nair* (Suit for damages for fraud)
[See also (1920) A I R 1920 Mad 634 (636) 60 Ind Cas 235 *Mahomed Ali Shersiff Sahib v Venkatpathy Raju*]
- 5 (1932) A I R 1932 All 858 (359) 136 Ind Cas 829 *Zia Uddin Ahmad Khan v Akbar Ali*
- 8 (1906) 8 Bom L R 283 (287), *Hanmant v Govind*
(1915) A I R 1915 Mad 766 (767) 21 Ind Cas 740 *Ramanatha v Raman Nambudripad*
[See also (1929) A I R 1929 Bom 361 (364, 365) 119 Ind Cas 659 *Dapu Shivaaji v Kashiram Hammantrao*
(1923) A I R 1923 Mad 28 (28) 68 I C 190 *Subbayya v Pichanna*]
- 7 See (1919) A I R 1919 Cal 404 (404) 52 Ind Cas 269, *Kanch Das v Srihari Goswamy*
- 8 (1927) A I R 1927 Pat 248 (250) 101 Ind Cas 707 6 Pat 606 *Nabinchandra Ganguli v Munshi Mander*
(1929) A I R 1929 Pat 388 (390) 8 Pat 432 117 Ind Cas 654 *Mt Lakhpat Kuer v Durga Prasad*
(1934) A I R 1934 Pat 148 (149) 150 Ind Cas 975 13 Pat 192 *Lalji Singh v Ramrup Singh*
(1932) A I R 1932 Nag 3 (4) 137 Ind Cas 61 *Bhawan Singh v Girdhari* (Suit was for damages including refund of moneys)
(1932) A I R 1932 Nag 5 (7) 23 Nag L R 31 136 Ind Cas 225 (F B) *Kashirao v Zabu*
(1934) A I R 1934 Nag 16 (17) 30 Nag L R 138 148 Ind Cas 480 *Amba Das v Waman Rao*
[But see (1935) A I R 1935 Oudh 378 (380) 11 Luck 110 155 Ind Cas 299 *Shambhu Dutt v Ram Bakhsh* (Suit was not framed as one for damages but as one for refund—Held that Art 116 could not be applied)]
- 9 (1930) A I R 1930 Sind 12 (13) 118 Ind Cas 208 24 Sind L R 172 *Abdul Rahim Fateh Mahomed Khan v Kadu*
(1920) A I R 1920 Lah 355 (356) 55 I C 413, *Nannath v Sundar*
(1931) A I R 1931 Sind 141 (142) 25 Sind L R 173 183 Ind Cas 76, *Mt. Chandrawati Bai v Valabdas*

recover the money paid arises out of transactions embodied in registered instruments. It is submitted that this view is not correct. In the first place, a suit for the recovery of the money paid on a failure of consideration is not, as has been seen above, a suit for *compensation* for the breach of any contract in writing registered. In the second place, the basis of a suit governed by Articles 115 and 116 is that the contract has been broken, while a suit governed by Article 97 assumes that the contract is *not* broken. In *Lalji Singh v Ramrup Singh*,¹⁰ Courtney-Terrell, C J, observed as follows:

"where Articles 115 or 116 apply, the very basis of the suit is that the contract has been broken, is no longer in existence and damages are sought. Article 97, on the other hand, applies when the plaintiff says the contract is still good and subsisting and an event contemplated by the contracting parties has happened, that is to say, the possible future inability of the plaintiff to enjoy the property and the plaintiff relies upon the express or implied contract on the part of the defendant that in the happening of such circumstances, the defendant will pay back the money which he has already received. Under Articles 115 and 116 the events subsequent to contract are immaterial, while under Article 97 they are material."

3. Money must have been paid on an existing consideration.—This is the second condition necessary for the applicability of the Article. It follows that where money has been paid *without* any consideration whatever, a suit for the recovery thereof will not be governed for the purposes of limitation by this Article.¹ Money paid on a consideration which at the time of payment is void in law, cannot be said to be an *existing consideration* and a suit for the recovery of money in such cases is not within this Article.² Where A pays money to B who in return therefor transfers certain property and also gives delivery of possession of the property transferred such possession will be regarded as an existing consideration even though the transfer may be void (see Note 7). On the same

(1934) A I R 1934 Nag 16 (17) 148 Ind Cas 180 30 Nag L R 138 *Ambadas v Wamanrao*

(1933) A I R 1933 Mad 389 (383) 144 Ind Cas 726 *Sadashiva Surya narayana Rao v Rajalingam*

10 (1934) A I R 1934 Pat 148 (149) 150 Ind Cas 975 18 Pat 192, *Lalji Singh v Ramrup Singh*

Note 3

1 (1892) 19 Cal 193 (126) 18 Ind App 159 6 Sar 91 (P Q) *Hanuman Kamat v Hanuman Maudur*

(1931) A I R 1931 Bom 39 (41) 128 Ind Cas 907 *Raghunath Abaji v Lahanu Vishoba* (Money paid for sham sale deed is not for an existing consideration)

[See also (1919) A I R 1919 All 18 (19) 42 All 61 52 Ind Cas 632, *Alayar Khan v Biba Kunwar*]

2 (1927) A I R 1927 Lah 101 (107) *Ghulam Murtaza v Fazal Ilahi* (Mortgage of property and attachment void)

(1916) A I R 1916 Ondh 343 (355) 47 Ind Cas 214 *Harnath Kuar v Indra Bahadur Singh* (Money paid under a void agreement)

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for compensation or damages is, however, one which must be determined having regard to the nature of the suit and the reliefs claimed⁵. But, although a suit has been framed as one for damages, the Court may, in appropriate cases, treat the suit as one for the recovery of money paid by the plaintiff to the defendant, and grant the plaintiff relief, if the claim for such relief is not barred under this Article⁶. On the same principle, a suit framed as one for the recovery of money paid may be treated as one claiming relief by way of damages if the Court finds that the plaintiff is entitled to such damages, and such relief is not barred under the Article applicable thereto⁷. Thus, where in a suit for the refund of money the plaintiff is entitled to the money as damages for breach of a covenant for title or for quiet possession embodied in a registered sale deed, the Court can grant the relief if it is not barred under Article 116⁸.

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- (1907) 1907 All W N 108 (109) 4 All L Jour 249 *Madan Lal v Reoti Singh* (Possession not delivered to the mortgagee — Suit for recovery of possession dismissed — Suit for compensation)
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[See also (1920) A I R 1920 Mad 634 (636) 60 Ind Cas 235 *Mahomed Ali Sheriff Sahab v Venkatpathy Raju*]
- 5 (1932) A I R 1932 All 859 (359) 136 Ind Cas 829 *Zia Uddin Ahmad Khan v Akbar Ali*
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(1915) A I R 1915 Mad 766 (767) 21 Ind Cas 740 *Ramanatha v Raman Nambudripad*
[See also (1929) A I R 1929 Bom 361 (364 365) 119 Ind Cas 659 *Bapu Shriya v Kashiram Hanmantraa*
(1923) A I R 1923 Mad 28 (28) 63 I O 190, *Subbayya v Pichanna*]
- 7 See (1919) A I R 1919 Cal 401 (404) 52 Ind Cas 269, *Kanok Das v Srihari Goswamy*
- 8 (1927) A I R 1927 Pat 248 (250) 101 Ind Cas 707 6 Pat 606 *Nabinchandra Ganguli v Munshi Mander*
(1929) A I R 1929 Pat 388 (390) 8 Pat 432 117 Ind Cas 654 *Mt Lakhpat Kuer v Durga Prasad*
(1934) A I R 1934 Pat 148 (149) 150 Ind Cas 975 13 Pat 192 *Lalji Singh v Ramrup Singh*
(1932) A I R 1932 Nag 3 (4) 137 Ind Cas 61 *Bhawani Singh v Girdhars* (Suit was for damages including refund of moneys)
(1932) A I R 1932 Nag 5 (7) 28 Nag L R 31 136 Ind Cas 295 (F B), *Kashirao v Zabu*
(1934) A I R 1934 Nag 16 (17) 30 Nag L R 139 148 Ind Cas 480, *Amba Das v Waman Rao*
[But see (1935) A I R 1935 Ondh 378 (380) 11 Luck 110 155 Ind Cas 299 *Shambhu Dutt v Ram Baksh* (Suit was not framed refund—Held that Art 116
- 9 (1930) * 103 24 Sind L R 172 *Abdul*
(1920) A I R 1920 Lah 355 (356) 65 I C 413 *Tamnath v Sundar*
(1931) A I R 1931 Sind 141 (142) 25 Sind L R 173 183 Ind Cas 76 *Mt Chandratilbas v Valabdas*

recover the money paid arises out of transactions embodied in registered instruments. It is submitted that this view is not correct. In the first place, a suit for the recovery of the money paid on a failure of consideration is not, as has been seen above, a suit for compensation for the breach of any contract in writing registered. In the second place, the basis of a suit governed by Articles 115 and 116 is that the contract has been broken, while a suit governed by Article 97 assumes that the contract is not broken. In *Lalji Singh v Ramrup Singh*,¹⁰ Courtney-Terroll, C J, observed as follows:

"where Articles 115 or 116 apply, the very basis of the suit is that the contract has been broken, is no longer in existence and damages are sought. Article 97, on the other hand, applies when the plaintiff says the contract is still good and subsisting and an event contemplated by the contracting parties has happened, that is to say, the possible future inability of the plaintiff to enjoy the property, and the plaintiff relies upon the express or implied contract on the part of the defendant that in the happening of such circumstances, the defendant will pay back the money which he has already received. Under Articles 115 and 116 the events subsequent to contract are immaterial, while under Article 97 they are material."

3. Money must have been paid on an existing consideration.—This is the second condition necessary for the applicability of the Article. It follows that where money has been paid *without* any consideration whatever, a suit for the recovery thereof will not be governed for the purposes of limitation by this Article.¹ Money paid on a consideration which at the time of payment is void in law, cannot be said to be an *existing consideration* and a suit for the recovery of money in such cases is not within this Article.² Where A pays money to B who in return therefor transfers certain property and also gives delivery of possession of the property transferred, such possession will be regarded as an existing consideration even though the transfer may be void (see Note 7). On the same

(1934) A I R 1934 Nag 16 (17) 148 Ind Cas 480 80 Nag L R 133 *Ambadas v Wamurao*

(1933) A I R 1933 Mad 332 (333) 144 Ind Cas 726 *Sadashira Surya narayana Rao v Rajalingam*

10 (1934) A I R 1934 Pat 148 (149) 150 Ind Cas 975 13 Pat 192, *Lalji Singh v Ramrup Singh*

Note 3

1 (1892) 19 Cal 123 (126) 18 Ind App 153 6 Sar 91 (P C), *Hanuman Kamat v Hanuman Mandur*

(1931) A I R 1931 Bom 39 (41) 128 Ind Cas 907, *Raghunath Abaji v Lahanu Vithoba* (Money paid for sham sale deed is not for an existing consideration)

[See also (1919) A I R 1919 All 16 (19) 42 All 61 52 Ind Cas 632, *Alayar Khan v Bibi Kunwar*]

2 (1927) A I R 1927 Lah 101 (102) *Ghulam Murtaza v Fasal Ilahi* (Mortgage of property under attachment void)

(1918) A I R 1918 Oudh 348 (355) 47 Ind Cas 214, *Harnath Kuar v Indra Bahadur Singh* (Money paid under a void agreement)

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principle where *A* pays money to *B* who in return promises to transfer property and also gives possession of such property, there is an existing consideration namely the delivery of possession even though the promise is unenforceable³ In *Ma Hui v Fatima Bibi*⁴ *B* mortgaged certain properties to *A* on 6 8 1907 and paid interest thereon for some time. On subsequent failure to pay interest *A* sued upon the mortgage and obtained a decree for sale of the property and got the property sold in execution thereof. *B* really had no right to the mortgaged property and *C* who was the real owner subsequently sued for a declaration that the mortgage by *B* was void as against him and obtained a decree in his favour on 11 3 1918. *A* thereupon sued on 9 8 1919 for recovery of the money paid by him for the mortgage. Their Lordships of the Privy Council held that the mortgage when made was not made without consideration. They observed as follows:

From these facts it appears that the appellant and her husband (*A* in the illustration) were from the date of the loan (6 8 1907) down to 11th March 1918 not entitled to allege that they had not received any consideration for the loan that they had made — since for a considerable time they had actually received interest upon it paid to them by the respondents (*B* in the illustration). It, therefore, appears to their Lordships that there was at the time of the loan no failure of the consideration upon which the loan of the money and the promise to repay it with interest was made since the obligation of that promise was for some time observed and it appears to them that the failure of consideration for the loan of the money did not occur until 11th March 1918.

See also the undermentioned case⁶

4 Consideration must have afterwards failed — This is the third condition necessary for the applicability of the Article. A consideration as defined in the Contract Act may be either *executed* or *executory*. An executed consideration is a *present* consideration consisting of a doing of something or an abstinence from doing something. An executory consideration is a *future* consideration consisting of a *promise* to do or to abstain from doing something¹. An executed consideration will fail if the advantage received from the act or

3 (1917) A I R 1917 Mad 296 (297) 32 Ind Cas 176 *Meecham v Krishna Royar*

[But see (1933) A I R 1933 Sind 379 (380) 147 Ind Cas 94 27 Sind

4 (1927) A I R 1927 P C 99 (101) 101 Ind Cas 414 5 Rang 283 54 Ind App 145 (P C)

5 (1937) A I R 1937 Rang 148 (150) 169 I C 915 *U Talok v Maung Tha Nyo*

Note 4

1 See Contract Act, Section 2 clause (d)

abstention is lost or withdrawn.² An executory consideration will fail if the promise ceases to be enforceable in law. See Note 12 *infra*.

There is a difference of opinion as to whether the words "existing consideration" mean the *whole* consideration for the contract, and whether the failure of a *part* of the consideration for the contract can be considered, *quoad* that part, as a failure of an existing consideration within the meaning of this Article. It was held in the undermentioned cases³ that the words "existing consideration" do not necessarily mean the "whole consideration" for the contract and that therefore where a vendee, who has been given possession of the property sold loses possession of a *portion* of such property owing to the want of title in the vendor, a suit by the vendee for a return of a proportionate part of the money would be governed by this Article. On the other hand, a contrary view has been held in the cases cited below,⁴ namely that a failure of consideration means a *total* failure of the consideration for the contract, and that the consideration cannot be said to have failed so long as any portion of the consideration for the contract is existing. It is submitted that the latter view is to be preferred.

But though a suit as on a *failure* of consideration may not lie, a suit for compensation or damages in respect of the portion lost will be maintainable⁵ and will be governed for purposes of limitation by other Articles.

5. Starting point. — The starting point of limitation under this Article is the time when the consideration fails.¹ The point of time when a consideration, whether executed or executory, will fail, has been discussed already in Note 4 above. The matter has been discussed

- 2 (1897) 11 Bom 475 (478) *Samaba Kandappa v Abaji Jotirau* (Usufructuary mortgage—Property sold subsequently for arrears of revenue of other land of mortgagor—Consideration fails.)

See also Notes 7, 8 and 9 *infra*.

- 3 (1917) A I R 1917 Mad 296 (297) 82 Ind Cas 176 *Meenakshi v Krishna Royar* (Promise to sell plus possession—Dispossession of portion.)

- (1929) A I R 1929 Bom 361 (365) 119 Ind Cas 659, *Dapu Shitaji v Kashiram Hanmantrao* (A transferred to B who transferred to C who obtained possession but was subsequently dispossessed of a portion of the property by a person with paramount title.)

- 4 (1924) A I R 1924 Oudh 377 (378) 80 Ind Cas 81 27 Oudh Cas 348 *Karim Bur v Abdul Wahid Khan* (Dispossession of portion—Consideration has not failed.)

- (1936) A I R 1936 Oudh 141 (143) 11 Luck 725 160 Ind Cas 454 *Bhagwati Prasad v Badri Prasad*

- 5 (1933) A I R 1933 Mad 382 (383) 1932 Mad W N 1111 144 Ind Cas 726, *Sadashiva Suryanarayana Rao v Rajalingam*

Note 5

- 1 (1918) A I R 1918 P C 151 (152) 46 Cal 670 46 Ind App 52 50 Ind Cas 444 (P C), *Juscurn Boud v Prithichand Lal Choudhury*
(1922) A I R 1922 All 475 (477), *Ram Dals Singh v Shyam Sunder Mahr*

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5—6

in the following Notes also with reference to different classes of cases arising in practice

6 Money paid on a void transfer without possession.—Where for money received from A, B transfers property to A and the transfer is void either because it is prohibited by law or the transferor has no title of any kind to transfer, and there is no other consideration such as the delivery of possession of the property transferred there is no existing consideration for the transfer. The money paid for such a transfer is not recoverable by A as on a failure of consideration within the meaning of this Article¹. It would be however recoverable under the provisions of Section 65 of the Contract Act under which when an agreement is discovered to be void any person who has received any advantage under such agreement is bound to restore it to the person from whom he received it². The

Note 6

- 1 See (1918) A I R 1918 P C 151 (152) 46 Cal 670 50 Ind Cas 444 46 Ind App 52 (P C) *Juscurn Bord v Prithichand Lal Choudhury* (Void putni sale—Actual possession not given—Their Lordships observed that the case would more nearly approach the formula of money had and received rather than money paid for an existing consideration which afterwards fails. The case was however decided on the assumption that Art 97 applied.)
- (1922) A I R 1922 Oudh 257 (259) 25 Oudh Cas 164 69 Ind Cas 786 *Ram Narain v Vand Kaur*
- (1921) A I R 1921 Oudh 47 (48) 61 Ind Cas 205 *Gajadhar Baksh v Gouri Shikhar*

consideration—If so Art 62 would apply) *nak Singh v*
tal failure of

- (1931) A I R 1931 Lah 448 (449) 185 Ind Cas 68 18 Lah 1 Chanan
Val v Maharaj
(See also (1915) A I R 1915 Cal 579 (583) 29 Ind Cas 429 Jagannath
Marwars v Girdhari: (No consideration—Art 62 applies)
(1916) A I R 1916 Bom 818 (319) 40 Bom 614 86 Ind Cas 564
Druai: Bai v Umedbhai Bhulabhai: (Transaction void ab
initio—Art 62 applies)
(1915) A I R 1915 All 107 (109) 27 Ind Cas 738 Mt Munni v
Madan Gopal (Sale void ab initio—Art 62 applies)]

INHOUDT Under Section 65 of the Contract Act /

- [See also (1929) A I R 1923 P C 189 (191) 50 Ind App 239 50 Cal 929 74 Ind Cas 499 (P C) *Annada Mohun v Gour Mohan Mullick*]

person paying the amount may, in cases where there is a covenant for title or for quiet possession, also be entitled to recover *compensation* for breach of such covenant, and such claim would be governed by Article 115 or Article 116 according as such covenant is unregistered or registered³

See Note 11a, *infra*.

7. Money paid on a void transfer with delivery of possession.—Where, for money received from A, B transfers property to A and the transfer happens to be void either because the transfer is prohibited by law or the transferor has no title to transfer it, but A is *given possession* of the property transferred, it cannot be said that there is no consideration for the transfer. The possession given must be considered to be part of the consideration¹. So long, therefore, as the possession continues undisturbed in A, it cannot be said that there is a failure of consideration². A suit for the recovery of the money paid for the transfer will lie when such possession is lost by reason of the fact that B's transfer was void, and the starting point of time is the date when the plaintiff has lost such possession³. In

- 8 (1926) A I R 1926 Nag 109 (115) 88 Ind Cas 699 22 Nag L R 49 *Ramdhan v Purshottam*
 (1922) A I R 1922 Oudh 257 (259) 25 Oudh Cas 164 69 Ind Cas 786, *Ram Narain v Nand Kumar*
 (1921) A I R 1921 Oudh 47 (48) 61 Ind Cas 205 *Gajadhar Balsh v Goura Shankar*
 (1915) A I R 1915 Nag 46 (47) 11 Nag L R 186 31 Ind Cas 877, *Purbhu v Mt Wazirbi*
 (1904) 2 Nag L R 174 (177) *Bahadur Lal v Jadhao*
 (1933) A I R 1933 Mad 126 (129) 140 Ind Cas 805, *Thillaiannu Achi v. Abdul Kadir Routhier* (Transfer partly void)
 (1881) 8 All 712 (716) 1881 All W N 67 6 Ind Jur 106 *Aishen Lal v Anlock*
 (1915) A I R 1915 Mad 742 (743) 25 Ind Cas 618 38 Mad 1171, *Arumachala Iyer v Ramasamy Iyer*
 (1920) A I R 1920 Lah 355 (356) 55 Ind Cas 413 *Ram Nath v Sundar Das* (It was however held in this case that Article 116 must be applied read with Article 97.—Although there was no title to mortgage at all it was assumed that the case was one of existing consideration which failed.—Submitted wrong so far as this view is concerned. See Note 2 ante.)
 (1915) A I R 1915 Bom 440 (442) 49 Bom 336 89 Ind Cas 59, *Ganappa Putta v Hanma I Saiba*

Note 7

- 1 (1930) A I R 1930 Sind 12 (13) 24 Sind L R 172 116 Ind Cas 203 *Abdul Rahim Fateh Mahomed Khan v Kadu*
 2 (1911) 10 Ind Cas 486 (487) (Cal) *Sulmoy Sarkar v Shashi Bhushan*
 (1913) 19 Ind Cas 5 (6) (Lah) *Sohan Singh v Lakhmal*
 3 (1929) A I R 1929 Bom 361 (364) 119 Ind Cas 659 *Dapu Shitaji v Kashiram Hanmantrao*
 (1919) A I R 1919 Cal 9-0 (9-0) 44 Ind Cas 719 *Parasuram Mahajan v Bhal Chandra Shaha* (Suit by vendee to recover purchase money on deprivation of possession)
 (1913) 20 Ind Cas 254 (255) 37 Bom 538, *Narsing Shitbalas v Pachu Rambakas*
 (1913) 19 Ind Cas 5 (6) (Lah) *Sohan Singh v Lakhmal*
 (1911) 10 Ind Cas 486 (487) (Cal) *Sulmoy Sarkar v Shashi Bhushan*

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the undermentioned cases,⁴ however, limitation was held to have begun to run even before the plaintiff lost the possession of the property. It is submitted that this view is contrary to the general trend of opinion and is not correct.

Where, in execution of a decree by a third person with paramount title against the plaintiff, such third party is formally put in possession of the property purchased by the plaintiff, the latter must be considered to have lost possession on such date, even though he actually continued in possession thereafter. Thus, where *A* mortgaged a certain property to *B* and put *B* in possession thereof, and *C*, a third party, obtained against the plaintiff a decree for possession on the ground that the mortgage was invalid, and in execution of the decree *C* was formally put in possession, it was held that the date of the formal dispossession was the date of the failure of consideration, though the plaintiff *B* continued in possession even after the formal delivery of possession. The subsequent possession of *B* was held to be

- (1936) A I R 1936 Oudh 141 (143) 11 Luck 725 160 Ind Cas 454 *Bhagwati Prasad v Bodri Prasad*
 (1932) A I R 1932 Nag 5 (6) 28 Nag L R 31 136 Ind Cas 225 (F B) *Kashirao v Zabu*
 (1926) A I R 1926 Oudh 19 (19) 89 Ind Cas 892 *Ram Harakh v Salik Ram* (Mortgagee getting possession)
 (1920) A I R 1920 Nag 94 (95) 55 Ind Cas 93 *Premasukhdas v Namdeo*
 (1918) A I R 1918 Nag 264 (268) 47 Ind Cas 886, *Dharamchand v Goreloli Mukhandial*
 (1915) A I R 1915 Mad 766 (767) 21 Ind Cas 740 *Ramanatha Aiyar v Raman Nambudripad*
 (1915) A I R 1915 Mad 708 (709) 23 Ind Cas 570 98 Mad 887 *Subbaraya Reddiar v Rajagopala Reddiar*
 (1902) 25 Mad 396 (399) *Sri Ramulu v Chinna Venkatasamy* (Unregistered assignment of mortgage—Possession given)
 (1926) A I R 1926 Rang 7 (9) 93 Ind Cas 119 *Maung Kyi Oh v Maung Kyaw Zan*
 4 (1895) 18 Mad 178 (174) 5 Mad L Jour 82 *Venkata Narasimulu v Peramma* (Time was held to run from the date of the decree holding that the plaintiff had no title. This view is not correct though the decision on the facts is correct as the suit was within three years of dispossession)
 (1916) A I R 1916 Bom 158 (159) 41 Bom 31 36 Ind Cas 613 *Gulabchand v Narayan* (Promise by *A* to get *B* to execute a sale deed in favour of plaintiff and delivery of possession to plaintiff—*B* transferring the property to *C*—Time runs from date of *B*'s transfer to *C* and not the subsequent dispossession by *C* because plaintiff's possession after the transfer was on the sufferance and grace of *C*)
 (1921) 62 Ind Cas 253 (954) (Lah) *Tapor Mal v Jhandoo* (*A* selling his share as well as his minor nephew's share—Possession given—Subsequent dispossession by transferee from minor after attaining majority—Starting point is not the date of dispossession but date of denial of title)
 (1935) A I R 1935 O 3 280 280 11 Luck 725 160 Ind Cas 454 *Bhagwati Prasad v Bodri Prasad*

date of the foreclosure decree and not from the date of payment out again towards the decree—It is submitted that the decision is not correct—Before the possession is disturbed the suit would be premature See A I R 1936 Oudh 141 (143)

merely that of a trespasser and not as part of the consideration for the mortgage transaction⁵

But, independent of the right to claim relief on the ground of failure of consideration, a suit may, as has been seen in Note 6 *ante*, lie for breach of a covenant for title or for quiet possession, express or implied in sale transactions, and such a suit would be governed by Article 116 of the Act⁶. Where both the remedies are available to the plaintiff, he can at his option pursue any one of them and the mere fact that one of the remedies is barred will not disentitle him to pursue the other⁷.

8. Payment made in consideration of a voidable transfer, but no possession given.—Where, in consideration of money paid by A, B executes a transfer to A, without, however, giving him possession thereof, or any other consideration, but the transfer is voidable at the option of C, there is an existing consideration for the payment¹. As illustrations of voidable transactions may be mentioned, transactions by persons with limited authority, such as agents, guardians and managers of joint Hindu families, and transactions which require election by some person authorised by law to elect in order to complete the title of the transferee². If the transfer is avoided by C, there will be a failure of consideration, and A can recover the money paid by him. The starting point for a suit for such recovery is the date when C avoids the transfer³. As to when C may be said to have avoided the transfer is a question depending on the facts of the particular case. If A, being entitled to possession under the transfer, attempts to obtain possession and fails to get it by reason of C's objection, C may be said to have avoided it and the date of the failure to get possession will be the date of the failure of consideration⁴. The fact that after such failure to get possession he sues for

5 (1933) A I R 1933 Lah 83 (84) 140 Ind Cas 760 *Nur Din v Allah Din*

6 (1916) A I R 1916 Oudh 240 (241) 33 Ind Cas 746 *Mt Nanhi Khanam v Mt Masuman* (Covenant for title)

(1924) A I R 1924 Pat 321 (322) 72 Ind Cas 653, *Jhingu Ojah v Meghnath Pandey* (Do)

[See also (1932) A I R 1932 Bom 36 (38) 55 Bom 565 134 Ind Cas 1157 *Ratanbas v Ghashirani* (Do)]

(1926) A I R 1926 Mad 255 (256) 91 Ind Cas 514 *Sigamani Pandi than v Munibadra Namar* (Covenant for quiet possession)

(1920) A I R 1920 Mad 634 (636) 60 Ind Cas 235, *Muhamad Ali Shersif Sahib v Venkatapathi Raju* (Do)]

7 (1920) A I R 1920 Nag 94 (95) 55 Ind Cas 93 *Premasukhdas v Namdeo*

(1917) A I R 1917 Mad 296 (297) 32 Ind Cas 176, *Veenaishu v Krishna Poyar*

Note 8

1 (1933) A I R 1933 Lah 581 (592) 145 Ind Cas 186 *Kulha Singh v Faral Din* (A executing a mortgage in favour of B—But B subsequently cancelling it himself on the ground of fraud—B can sue for money and the date of the failure of consideration is the date of B's avoidance)

2 (1901) 25 Bom 593 (604) 8 Bom L R 190 *Arden v Vajrangh*

3 Board of

4 Kamat

Article 97 Note 8

possession and fails, will not carry forward the starting point to the date of the decision in that suit⁵ If A sues for possession and the Court dismisses the suit on the ground that the transfer is not binding on C, the date of the decision is the date of the failure of consideration⁶ The fact that in such a case the matter is taken up on appeal and the Appellate Court confirms the decision of the first Court will not carry the starting point to the date of the appellate decision⁷ In *Juscurn Boid v Prithichand Lal*,⁸ where a sale was set aside by the decree of a Court with the result that there was a failure of consideration, their Lordships of the Privy Council observed as follows

“ the only question is whether time began to run, as the plaint alleges, from the 31d of August 1906, the date of the appellate decree, or as the defendant respondent contends, from the 24th of August 1905, the date of the original decree in Suit No 248 of 1904 Both Courts have held that the failure of consideration was at the date of the first Court's decree Their Lordships feel no doubt that as between these two decrees this is the correct view, for, whatever may be the theory under other systems of law, under the Indian law and procedure an original decree is not suspended by presentation of an appeal nor is its operation interrupted where the decree on appeal is one of dismissal ”

Where, however, the first Court decides against the plaintiff and the second Court reverses it which in its return is reversed by the High Court, the starting point will be the date of the latter decision,

- (1901) 24 Mad 27 (31) 10 Mad L Jour 217 *Venkatarama Ayer v Venkata sudramanyan*
 (1932) A I R 1932 Bom 36 (38) 55 Bom 565 134 Ind Cas 1157, *Ratanbai v Ghasharam*
 (1902) 26 Bom 750 (755) 4 Bom L R 571, *Tulsiram v Murlidhar* (For the purpose of applying Article 97, it was assumed that the transaction was a voidable transaction 19 Cal 123 (P C), Followed)
 5 (1892) 19 Cal 123 (126) 18 Ind App 158 6 Sar 91 (P C) *Hanuman Kamat v Hanuman Mandur*
 (1902) 26 Bom 750 (755) 4 Bom L R 571, *Tulsiram v Murlidhar* (19 Cal 123, Followed)
 (1901) 1901 All W N 24 (25) *Bulchand v Parmanand* (On the facts it would appear that the consideration had not totally failed but nevertheless Article 97 was applied—Submitted wrong)
 6 (1928) A I R 1928 Nag 134 (135) 109 Ind Cas 457, *Mul v Ganpal*
 (1920) A I R 1920 Oudh 185 (186) 58 Ind Cas 963 23 Oudh Cas 234, *Shambhu v Nand Kumar*
 (1932) A I R 1932 Lah 382 (383) 13 Lah 188 137 Ind Cas 828, *Lal Dilla v Dost Muhammad*
 7 (1928) A I R 1928 Nag 134 (135) 109 Ind Cas 457, *Mul v Ganpal*
 (1923) A I R 1923 Mad 392 (396 398) 74 Ind Cas 416, *Gopala Iyengar v Yummach Reddhar*
 [But see (1919) A I R 1919 Mad 887 (888) 42 Mad 507 49 Ind Cas 723, *Sarothama Rao v Chinnaasamy Pillai* (Time was held to run from the date of High Court judgment confirming the decree of the lower Court—Submitted wrong)]
 8 (1918) A I R 1913 P C 181 (153) 46 Cal 678 46 Ind App 52 50 Ind Cas 444 (P C)

for, it is then that there can be said to be a failure of consideration.⁹ Where the first Court holds in plaintiff's favour and the second Court against him, the starting point will be the date of the latter decision.¹⁰

Where *C* himself sues *A* for avoiding the transfer and obtains a decree in his favour, the starting point will be the date when he obtains such decree.¹¹ On the principle of the decision of the Privy Council referred to above, the starting point will not be postponed to the decision of the Appellate Court where such Court merely confirms the decree of the first Court.¹²

9. Payment made in consideration of voidable transfer, possession also given.—Where, in consideration of money paid by *A*, *B* transfers property to *A* and also gives possession thereof but the transfer is voidable at the option of *C*, there is existing consideration for the transfer. The mere fact that *C* avoids the transfer will not amount to a failure of consideration so long as *A* has not lost possession of the property transferred to him. The starting point for a suit to recover the money in such a case is the date when *A* loses possession of the property transferred.¹

A purchased property from *B* and went into possession. *C*, a nephew of *B*, sued for a declaration that the alienation of *B* was not binding on *C*'s reversionary interest. His suit was dismissed to two Courts but decreed in the third Court. A Letters Patent appeal from the latter decision was dismissed. *A* then sued for refund of money. It was held that time ran from the date of the decree of the third Court and not from the date of the decision of the Letters Patent appeal and that the suit was barred.² It is not clear whether

9 (1931) A I R 1931 All 651 (652) 133 Ind Cas 415 53 All 914, *Sabir Hussain Khan v Jan Muhammad* (Transfer of decree voidable on ground of fraud)

10 (1869) 11 Suth W R 24 (24) 2 Beng L R A C 170 *Ramjay Dey v Srinath Singh*

11 (1919) 21 Ind Cas 581 (582) (Oudh) *Debi Pershad v Sheo Narain* (Voidable mortgage without possession avoided by person entitled to avoid it by suit)

12 (1930) A I R 1930 Lah 993 (994) 129 Ind Cas 201 *Sahib Singh v Gurdial Singh*

Note 9

1 (1932) A I R 1932 Nag 5 (6) 28 Nag L R 31 136 Ind Cas 225 (F B), *Kashirao v Zabu*

(1925) A I R 1925 Mad 749 (750) 86 I C 755, *Venkanna v Appalaswami*

(1923) A I R 1923 Mad 46 (48) 46 Mad 40 70 Ind Cas 787, *Sanlara Varisay v Kalathil Ummar*

(1927) A I R 1927 Lah 570 (572, 573) 106 Ind Cas 604 9 Lah 191, *Mt Gopal Das v Dhanna Mal*

(1932) A I R 1932 Bom 36 (38) 55 Bom 565 134 Ind Cas 1157, *Ratanbas v Ghashiram Gangabishan*

(1901) 25 Bom 593 (606) 8 Bom L R 190, *Arden v Vajenng*

[See also (1927) A I R 1927 All 421 (422) 100 Ind Cas 745, *Raghunath Prasad v Ram Bharose*

(1915) A I R 1915 Mad 708 (710) 38 Mad 687 23 Ind Cas 570, *Subbaraya Reddiar v Rajagopala Reddiar*]

2 (1927) A I R 1927 Lah 734 (734) 100 Ind Cas 19, *Pir Balsh v Chanan Din*

Article 97
Notes
9—10

Article 97 was applied to the case. So long as *A* was in possession, there could be no question of failure of *consideration* and a suit as on such failure would in fact be *premature*.

A purchased property from *B* as guardian of *C* and obtained possession of the property purchased. *C* later on filed a suit to recover the properties sold *A*, in order to save himself from losing the property, compromised with *C* and paid her the value of the property. Thereafter he sued *B* for return of the money paid. It was held that Article 97 applied and that the consideration failed when *A* had to pay money to *C*.³ Such payment would seem to have been considered as equivalent to losing possession and getting it back by purchase from *C*.

10. Suit for mortgage money under Section 68 of the Transfer of Property Act, if one based on a failure of consideration.—Under Section 68 of the Transfer of Property Act, a mortgagee may sue for the mortgage money in the circumstances specified in that Section. But such a suit is not one for recovery of money on a *failure of consideration*.¹ Where the mortgage is valid, it is an existing consideration which does not fail by reason of the happening of the events specified in clauses (b) to (d) of the Section, though the mortgagee is entitled to recover the money on the happening of those events. A suit for the mortgage money in such cases is not therefore governed by this Article. If the liability of the mortgagor in such cases be regarded as one based on *contract*, the suit may be governed by Article 115 of the Act, if such a contract is regarded as being implied in the registered mortgage, Article 116 will apply, if the liability be regarded as a statutory one and not contractual, Article 120 may apply.²

Where the mortgage is *voidable or void* but possession has been given, and the possession is lost subsequently by reason of the fact that the transaction is void or voidable, a suit for the recovery of the mortgage money is a suit for the recovery of money as on a *failure*.

3 (1919) A I R 1919 Mad 37 (33) 50 Ind Cas 315, *Aravamudan Chariar v Aramandan Krishna Iyer*

Note 10

1 (1893) 21 Mad 242 (243) 8 Mad L Jour 81, *Unichaman v Ahmed Kutta Kays*

2 (1893) 21 Mad 242 (243) 8 Mad L Jour 81, *Unichaman v Ahmed Kutta Kays*

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[See also (1910) 6 Ind Cas 569 (570) (All) *Bhawani Singh v Jang Bahadur Singh* (Article applicable not decided)]

of consideration³ Where the mortgage is a voidable one and no possession is given, and in a suit by the person entitled to avoid it the mortgage is avoided, there is a deprivation of security under Section 68 and a consequent failure of consideration. A suit for the mortgage money will be governed by this Article and time runs from the date of the decree in the suit⁴ In the undermentioned case,⁵ A mortgaged property to B by a registered mortgage, but subsequent thereto the property was sold for payment of municipal taxes free of the mortgage B sued for the mortgage money It was held that time ran from the date when the plaintiff was dispossessed Article 97 read with Article 116 was applied See also the undermentioned cases⁶ As has been seen already in Note 2 *ante*, the view that Article 97 is covered by Article 116 is not sound

11. Executory consideration, when can be said to fail.—As has been seen before, a consideration is executory when it consists of a promise to do or to abstain from doing something¹ A valid promise is a contract² But it may cease to be enforceable by reason of subsequent events Thus, it may cease to be enforceable by reason of its being avoided by the person at whose option the contract is voidable (see Sections 19 and 19 A of the Contract Act) It may cease to be enforceable by reason of the fact that after the contract is made the act promised to be done becomes impossible or unlawful (see Section 56 of the Contract Act) In such cases there is a failure of consideration when in the one case the contract is avoided,³ or when in the other case the act promised to be done becomes impossible or unlawful⁴ In the case of a promise to abstain from doing something,

3 (1910) 6 Ind Cas 1016 (1017) 13 Oudh Cas 155, *Ram Pol Jhan v Mohadeo Prasad*

4 (1913) 21 Ind Cas 581 (582) (Oudh), *Debi Prasad v Sheo Narain*

5 (1900) 1900 Pun L R 201 (202), *Harnarain Das v Sarup Lal*

6 (1924) A I R 1924 Nag 220 (221) 78 Ind Cas 246, *Laxmichand v Bajirao* (A suit by lessee for damages for dispossession is governed by Article 97, but if the lease was registered then Article 116 applies)

(1920) A I R 1920 Lah 355 (356) 55 Ind Cas 413, *Pannath v Sundar Das*

Note 11

1 See Note 4 *ante*

2 See Contract Act, Section 2 clause (h)

3 (1918) A I R 1918 Mad 728 (730) 42 Ind Cas 519, *Gorindasamy Pillai v Municipal Council Kumbakonam* (Contract to leave by Municipality cancelled by Municipality—Smt for refund)

(1935) A I R 1935 Lah 655 (656) 160 Ind Cas 574, *Municipal Committee, Gujranwala v Charanj Lal* (Promise to give delivery of possession of lands on receiving full purchase money—Failure to deliver possession—Plaintiff avoiding contract and claiming purchase money—Article 97 was applied)

4 (1925) A I R 1925 All 360 (362) 115 Ind Cas 793, *Anant Dharathi v Sarup Singh*

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Article 97 Note 11

there will be a failure of consideration when the promisor *does* the thing which he promised to abstain from doing⁵ The starting point for a suit for the recovery of money in such cases is the date of the failure of consideration as explained above⁶ Where A contracted to sell property to B but mortgaged the properties subsequently and thereafter the mortgagee sued on his mortgage, obtained a decree and got the property sold in execution thereof it was held that the contract became impossible of performance only on the sale, that until then it could not be said to have become impossible of performance and that time ran only from the date of the sale⁷

A contract may also cease to be enforceable where a Court of law refuses to enforce its specific performance A failure of consideration will occur in such cases only when the Court refuses to enforce the

(1916) A I R 1916 Bom 158 (159) 36 Ind Cas 613 41 Bom 81 *Gulabchand Dalaram v Narayan Rama* (A promising to plaintiff to get B to

(1934) A I R 1934 Cal 148 (149) 150 Ind Cas 89 *Sudha Mukhi Devi v Chairman of the Commissioners of the Tollygunj Municipality* (Property becoming non-existent — Promise to convey becomes impossible of performance)

(1925) A I R 1925 Mad 1049 (1050) 86 Ind Cas 378 *Halls Ghalappa v* (C paying ded—C's return on B's

objection)

[See a'

if the insolvent's estate sued obtained a decree got pay rought the present suit to paid to the creditor of the governed either by Article

97 or by Article 120)

5 (1883) 1883 Bom P J 56 *Langapa v Vykunth* (Promise not to execute the decree—Promisor executing the decree—Consideration fails)

[See also (1892) 1892 Pun Re No 79 *Ganpat v Kirpa Par* (Matter is governed by either Article 97 or Article 115)]

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in realization of amount in excess of the amount due—but for recovery for excess — Article 97 did not to apply — No recovery is given)]

C (1928) A I R 1928 All 460 (363) 115 Ind Cas 793 *Inant Bharthi v Sarup Singh*

[See however (1887) 14 Cal 457 (460) *Atul Krishna Bose v Jyon & Co* (Contract to sell goods—Only part delivery given—Suit for price — Article 62 was applied—Submitted not correct—Article 97 was not adverted to)]

7 (1922) A I R 1922 Cal 216 (217) 117 Ind Cas 700 56 Cal 455 *J C Calista v Vamoodi Begum*

specific performance thereof.⁸ In *Bassu Kuar v. Dhun Singh*,⁹ A paid money to B in consideration of an agreement to sell certain properties. Subsequently, disputes arose as to the actual terms of the proposed sale and B sued to enforce the specific performance of the agreement, which was ultimately dismissed on the ground that the agreement was nonenforceable. It was held by their Lordships of the Privy Council that the consideration failed when the suit for specific performance was dismissed.

In the undermentioned case¹⁰ A paid money to B in consideration of a promise on the part of B to execute a *zarpeshgi* lease, and on B refusing to execute it A sued B for specific performance but the suit was dismissed by the Court. A sued for the return of the money paid. It was held that the cause of action arose when B refused to execute the lease. It is submitted that this decision is not correct. A refusal to perform a promise does not put an end to the contract and cannot be said to be a failure of consideration.^{10a} The undermentioned decision¹¹ also cannot on the same view be supported. On the principle of the Privy Council decision in *Juscurn Boid v. Prithichand Lal*,^{11a} referred to in Note 8 *ante*, the starting point will not be postponed by reason of the fact that the decision of the first Court as confirmed by the Appellate Court.¹²

- 8 (1889) 11 All 47 (57) 15 Ind App 211 5 Sar 260 12 Ind Jur 450 (P C)
Bassu Kuar v. Dhun Singh
(1928) A I R 1923 All 821 (321) 72 Ind Cas 86 45 All 378 *Munni Babu v. Koer Kamla Singh*
(1918) A I R 1918 Mad 645 (645) 40 Ind Cas 893 *Dominanaboyanna Aotua gulu v. Ramaraju Ankayya*
(1903) 25 All 618 (626) 1903 All W N 117 *Udit Narain Mistr v. Muham mad Vinnatullah*
(1931) A I R 1931 Lah 448 (449) 13 Lah 1 135 Ind Cas 63 *Chanan Mal v. Maharaj* (Promise to deliver possession—Failure—Suit for possession dismissed—Date of dismissal is failure of consideration)
(1904) 27 N W P H C R 199 (201) *Ramphal Lal v. Jaffir Ali*

- (1925) A I R 1925 Rang 373 (374) 92 I C 736 *Maung Po Kim v. Maung Po Oh* (Suit was held barred whether Art 97 or Art 120 applied)
(1909) 1 Ind Cas 890 (894) 31 All 68 36 Ind App 44 (P C) *Amma Bibi v. Udit Narain Mistr*
[See also (1937) A I R 1937 All 689 (691) 171 Ind Cas 923, *Hans Ram Singh v. Kishori Lal* (Failure to deliver possession on date of sale—Suit for possession dismissed subsequently—Time runs either from date of sale or at any rate from date of dismissal—Submitted that the latter date is the correct starting point)]

- 9 (1889) 11 All 47 (57) 15 Ind App 211 5 Sar 260 12 Ind Jur 450 (P C)
10 (1875) 7 N W P H C R 199 (201) *Ramphal Lal v. Jaffir Ali*

Article 97

Note 11

there will be a failure of consideration when the promisor *does* the thing which he promised to abstain from doing⁵ The starting point for a suit for the recovery of money in such cases is the date of the failure of consideration as explained above⁶ Where *A* contracted to sell property to *B* but mortgaged the properties subsequently and thereafter the mortgagee sued on his mortgage, obtained a decree and got the property sold in execution thereof, it was held that the contract became impossible of performance only on the sale that until then it could not be said to have become impossible of performance and that time ran only from the date of the sale⁷

A contract may also cease to be enforceable where a Court of law refuses to enforce its specific performance A failure of consideration will occur in such cases only when the Court refuses to enforce the

(1916) A I R 1916 Bom 158 (159) 36 Ind Cas 613 41 Bom 31 *Gulabehar d Balaram v Narayan Rama* (*A* promising to plaintiff to get *B* to execute a sale deed in favour of plaintiff—*B* selling to *C*—Consideration having

(1934)

impossible of performance)

(1935) A I R 1935 36 Ind Cas 200 36 Bom 121 11 Cal 229 *Chandrasekhar v*

objection)

(See a

recover the money which he had paid to the creditor of the insolvent *Held* that the suit was governed either by Article 97 or by Article 120)

5 (1883) 1883 Bom P J 86 *Lingappa v Vykanth* (Promise not to execute the decree—Promisor executing the decree—Consideration fails)

[See also (1892) 1892 Pun Re No 79 *Ganpat v Karpa Ram* (Matter is governed by either Article 97 or Article 115)]

[But see (1933) A I R 1933 Lah 112 (112) 140 Ind Cas 472 *Kara v Ellahi v Hari Ram* (Payments made by judgment debtor for them

C (1928) A I R 1928 All 360 (363) 115 Ind Cas 793 *Anant Bharti v Sari P Singh*

(See however (1887) 14 Cal 457 (460) *Atul Krishna Dose v Iyong & Co* (Contract to sell goods—Only part delivery given—Suit for price—Article 62 was applied—Submitted not correct—Article 97 was not adverted to)]

7 (1929) A I R 1929 Cal 216 (217) 117 Ind Cas 700 50 Cal 453 *J C Caldaus v Mamoodi Begum*

specific performance thereof.⁸ In *Basu Kuar v Dhun Singh*,⁹ A paid money to B in consideration of an agreement to sell certain properties. Subsequently, disputes arose as to the actual terms of the proposed sale and B sued to enforce the specific performance of the agreement, which was ultimately dismissed on the ground that the agreement was unenforceable. It was held by then Lordships of the Privy Council that the consideration failed when the suit for specific performance was dismissed.

In the undermentioned case¹⁰ A paid money to B in consideration of a promise on the part of B to execute a *zarpeshgi* lease, and on B refusing to execute it A sued B for specific performance but the suit was dismissed by the Court. A sued for the return of the money paid. It was held that the cause of action arose when B refused to execute the lease. It is submitted that this decision is not correct. A refusal to perform a promise does not put an end to the contract and cannot be said to be a failure of consideration.^{10a} The undermentioned decision¹¹ also cannot on the same view be supported. On the principle of the Privy Council decision in *Juscurn Boid v Prithichand Lal*,^{11a} referred to in Note 8 *ante*, the starting point will not be postponed by reason of the fact that the decision of the first Court is confirmed by the Appellate Court.¹²

- 8 (1880) 11 All 47 (57) 15 Ind App 211 5 Sar 260 12 Ind Jur 450 (P C)
Basu Kuar v Dhun Singh
 (1928) A I R 1923 All 321 (321) 72 Ind Cas 86 45 All 378 *Munni Babu v Koer Kamla Singh*
 (1918) A I R 1918 Mad 645 (645) 40 Ind Cas 893 *Dommanaboyana Lotma gulu v Ramaraju Ankappa*
 (1903) 25 All 618 (626) 1903 All W N 117 *Udit Narain Mier v Muham mad Minnatullah*
 (1931) A I R 1931 Lah 448 (449) 18 Lah 1 135 Ind Cas 63 *Chanan Mal*

that it is so barred.]

Do Kiu v Maung
 120 applied.)
 C) *Anima Bibi v*

d Cas 923, *Hans Ram Singh v Kishori Lal* (Failure to deliver possession on date of sale — Suit for possession dismissed subsequently — Time runs either from date of sale or at any rate from date of dismissal — Submitted that the latter date is the correct starting point.)

18th June 1908 — Subsequent suit for specific performance dismissed

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Article 97
'Notes
11—11a

But, even though an executory promise may not have failed, the promisee may, if the promise has been broken, sue *for damages as on breach of contract*, though such a suit is not governed by this Article¹³

11a. Suit on liability under Section 65, Contract Act. — Section 65 of the Contract Act enacts that where —

- (a) an agreement is discovered to be void, or
- (b) a contract becomes void,

any person who has received an advantage under such agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it

Case (b) above is a case of failure of an existing consideration and suit for *the recovery of the money paid* will be governed by this Article¹

Case (a) is a case of void consideration, and as has been seen in Note 3 *ante*, a suit for the recovery of the money paid is not governed by this Article. A contrary view, namely that this Article will apply to such cases, has been assumed in the undermentioned cases². It is submitted that this view is not correct. The Article that has generally been held to apply to such suits is Article 62³ and

- 18 See (1932) A I R 1932 Mad 225 (225) 138 Ind Cas 110, *Appasamy Iyengar v Krishnasamy Padayachi*

Note 11a

- 1 (1928) A I R 1928 All 360 (362 363) 115 Ind Cas 793, *Anant Bharathi v Sarup Singh*
- (1920) A I R 1920 Oudh 185 (186) 58 Ind Cas 963 23 Oudh Cas 284, *Shambhu v Nand Kumar*
[See (1899) 11 All 47 (56) 15 Ind App 211 5 Sar 260 12 Ind Jur 450 (P C) *Bassu Kuar v Dhum Singh*]
- 2 (1901) 1901 All W N 24 (25) *Bulchand v Parmanand* (Sale void in part *ab initio* — Suit for refund — Art 97 applied)
- (1926) A I R 1926 Rang 7 (9) 93 Ind Cas 119, *Maung Kyi Oh v Maung Kyaw Zan* (Do)
- 3 (1915) A I R 1915 Bom 102 (104) 39 Bom 358 28 Ind Cas 442, *Jaterbhas Jorabhas v Gordhan Narsu* (A mortgaged to B who leased the property back to A. Both mortgage and lease held void)
- (1915) A I R 1915 All 339 (340) 30 Ind Cas 410 *Janak Singh v Wahdad Khan*
- (1933) A I R 1933 Lah 581 (from 115 v 30 100 v 115 500 v 500) *Farooq Din v* (If the transferee)
- (1921) A I R 1921 Cal 596 *Bejoy Chand Mahas* (Purchaser thereafter paying rent to landlord pays without consideration)
- (1925) A I R 1925 Nag 130 (131) 81 Ind Cas 873, *Omrao v Ramadhar*
- (1932) A I R 1932 Bom 36 (38) 55 Bom 565 184 Ind Cas 1157, *Ratanbai v Ghashiram*
- (1901) 25 Bom 593 (593, 604) 3 Bom L R 190, *Ardesir v Vajesing* (Transaction partly void *ab initio* — Suit for refund of portion of amount paid)
- (1918) A I R 1918 Lah 249 (249) 46 Ind Cas 26 1918 Pun Re No 44 *Dutta Jam v Gurdas* (Do)
- (1919) A I R 1919 Cal 116 (117) 49 Ind Cas 258 *Mahomet Ayub v Elahi Baksh Mandal* (Lease of lands portion of which was already leased out to another — Void initially *quasi* that portion)

this view is based on the decision in *Hanuman v Hanuman*,⁴ where their Lordships of the Privy Council observed that where a sale was *ab initio* void, the Article applicable for a suit for a return of the money paid in consideration thereof would be governed by Article 62. If that Article applied, time would run from the *date of the receipt of the money*. It was however held in *Harnath v Indar Bahadur Singh*,⁵ that time would run from the date when the agreement was discovered to be void, which might be *later* than the date of the receipt of money. Their Lordships did not however decide what Article applied to the case. Their Lordships' view is inconsistent with the applicability of Article 62 but may be consistent with the applicability of Article 115 or Article 116 if the suit is regarded as one for compensation for the breach of an implied contract to refund the amount if the consideration is discovered to be void. This is the view that seems to have been taken in the undermentioned case.⁶

The decision in *Harnath's case*⁵ was subsequently explained by their Lordships of the Privy Council in *Annada Mohan Roy v Gour Mohan Mullick*,⁷ where it was observed that *normally* the date of the discovery would be the date of the agreement and that only under *special circumstances* the discovery would be a later date. This decision has been followed in the undermentioned cases.⁸

12. Failure of consideration in execution sales. — Under Order 21 Rule 93 of the Code of Civil Procedure, where a sale in execution is set aside under Order 21 Rule 92, the purchaser is entitled to an order for repayment of his purchase money, against any person to whom it has been paid. There is a difference of opinion as to whether a *suit* will lie for such refund. According to the Lahore¹ and Oudh^{1a} Courts such a suit will lie, while according

4 (1892) 19 Cal 123 (126) 18 Ind App 158 6 Sar 91 (P C)

5 (1922) A I R 1922 P C 403 (405) 71 Ind Cas 629 50 Ind App 69 45 All 179 26 Oudh Cas 223 (P C)

6 (1936) A I R 1936 Pat 462 (465) 164 Ind Cas 277 *Rajendra Narain v Lal Mohan* (Art 116 was applied as the contract on which the money was paid was registered)

7 (1923) A I R 1923 P C 189 (191) 50 I A 239 50 Cal 929 74 I C 499 (P C)

8 (1926) A I R 1926 Oudh 119 (120) 90 Ind Cas 340, *Sukhdeo Singh v Kashi Singh*

(1926) A I R 1926 Nag 241 (245) 92 Ind Cas 640 *Gopalal Bhawanram v Pandurung* (Art 62 was applied)

(1925) A I R 1925 Oudh 737 (739) 91 Ind Cas 176 *Ram Samraj Singh v Mt Vainath Kuer* (Six years' rule of limitation was applied)

Note 12

1 (1932) A I R 1932 Lah 401 (411, 442) 139 Ind Cas 47 43 Lah 618 (F B) *Mehar Chand v Malik Ram*

(1924) A I R 1924 Lah 115 (115) 4 Lah 354 76 Ind Cas 605 *Asad Ullah Khan v Karam Chand*

1a (1930) A I R 1930 Oudh 148 (153 159) 424 Ind Cas 644 5 Luck 552 (F B), *Bahadur Singh v Ram Phal*

Article 97 Note 12

to all the other Courts² such a suit is not maintainable³

It has been seen in Note 1 that it is only where money has been paid in pursuance of a *contract* between the parties that this Article will apply. In the case of involuntary sales the auction purchaser does not pay any money in pursuance of any contract between himself and the judgment debtor or the decree holder, and consequently this Article will not apply even where a suit for refund of the purchase money is held to be maintainable⁴. Article 120 has been held to apply to such cases⁵.

Article 98

98.* To make good out of the general estate of a deceased trustee the loss occasioned by a breach of trust

Three years

The date of the trustee's death, or, if the loss has not then resulted, the date of the loss.

* Act of 1877, Article 98 and Act of 1871, Article 99

Same as above

Act of 1859, Section 2

No suit to make good the loss occasioned by a breach of trust out of the general estate of a deceased trustee shall be maintained in any of the said Courts unless the same is instituted within the proper period of limitation according to the last preceding section to be computed from the decease of such trustee

- (1937) A I R 1937 Oudh 286 (286) 166 Ind Cas 705 *Lal Gobind Prasad v Mirza Hasan Shah* (Such suit is governed by Art. 62 or Art. 67)
- 2 (1921) A I R 1921 All 377 (381-384) 49 All 60 59 Ind Cas 105 *Ram Sarup v Dalpat Das*
- (1918) A I R 1918 All 325 (326) 46 Ind Cas 103 *Man Mohan Lal v Gopi Nath*
- (1922) A I R 1922 Bom 205 (206) 67 Ind Cas 360 46 Bom 833 *Balwant Ranganath v Bala Malu*
- (1926) A I R 1926 Cal 971 (973-974) 96 Ind Cas 64 53 Cal 759 *Rishiecase Law v Manik Molla*
- (1919) A I R 1919 Mad 498 (499) 49 Ind Cas 359 *Subbu Reddi v Ponnaiyala Reddi*
- (1918) A I R 1918 Mad 353 (354) 45 Ind Cas 109 40 Mad 1009 *Tiruvalluvar Narayan Naidu v Subramanyam Chelliar*
- (1921) A I R 1921 Nag 60 (62-63) 65 Ind Cas 230 *Lakshminchand v Chaturbhuj*
- (1905) A I R 1925 Pat 106 (110) 3 Pat 917 88 Ind Cas 219 *Nagendra Nath Ghosh v Sambhu Nath Panday*
- (1908) A I R 1928 Rang 272 (273) 6 Rang 468 112 Ind Cas 436 *Maung Naung v Maung Ba Gyi*
- 3 See also Note 4 to Order 21 Rule 93 of the Authors' Civil Procedure Code for a fuller discussion of the subject
- 4 (1912) 15 Ind Cas 707 (709) 40 Cal 18- *Amrita Lal Bagchi v Jogendra Lal Chowdhury*
- 5 (1912) 15 Ind Cas 707 (708) 40 Cal 18- *Amrita Lal v Jogendra Lal*
(1913) 19 Ind Cas 996 (999) 3 All 419 *Sideswari Preshal v Mayanand Gir*
[See however (1911) 10 Ind Cas 710 (717) 14 Oudh Cas 74 *Jot Singh v Anand Kishan* (Art. 62 was applied)]

Synopsis

Article 98
Notes
1—2

1. Scope.
2. Loss.
3. "General estate."
4. Starting point of limitation.

1. Scope.—This Article contemplates suits brought *after the death of the trustee*, against his general estate, to make good the loss occasioned by a breach of trust^{1a}

Section 10 *ante* applies to suits for the purpose of following the trust property or the proceeds thereof in the hands of the trustee or his representatives, or for an account of such property or proceeds. This Article does not cover the suits contemplated by Section 10, but even if it does, Section 10 will prevail, as it is made applicable to cases covered by it "notwithstanding anything hereinbefore contained" which would include Section 3 and the Articles in the Schedule¹

2. Loss.—It has been held by the High Court of Bombay in the undermentioned case¹ that the word "loss" in this Article is not any less occasioned by a trustee but the loss of "property vested in trust for a specific purpose, within the meaning of Section 10 of the Act, and that the meaning of this Article is that in case the specific property is irrecoverable, then the value can be recovered out of the "general estate" within the period specified in this Article. This view proceeded on the fact that under the Act of 1859, all the trustee provisions were placed in one Section which ran as follows

"No suit against a trustee in his lifetime, and no suit against his representatives for the purpose of following in their hands the specific property which is the subject of the trust shall be barred by any length of time, but no suit to make good the loss occasioned by a breach of trust out of the general estate of a deceased trustee shall be maintained in any of the said Courts unless the suit is instituted within the proper period of limitation according to the last preceding Section (i.e. three years) to be computed from the decease of such trustee, etc

It is submitted that the above interpretation of the Article cannot be accepted as correct. This Article clearly is capable of covering any loss occasioned by the trustee and there is no reason why its plain construction should be narrowed. The fact that the original Section is now divided into Section 10 and Article 98 will indeed be a ground

Article 98 — Note 1

1a (1935) A I R 1935 Nag 30 (33) *Mt Sahandra Bai v Shri Deo Ladda Lal labhji Mandir*

1 (1928) A I R 1928 Bom 58 (59) 10th Ind Cas 705 52 Bom 181 *Chintaman Raoji v Akhanderao Pandurang*

Note 2

1 (1885) 9 Bom 373 (400-401) *New Flemish Spinning and Weaving Co Ltd v Kesorjee Naik*

Article 98
Notes
2—4

for not adopting the construction adopted by the Bombay High Court

3. "General estate." — The joint family properties of the father and sons which pass by survivorship to the sons on the death of the father do not form the "general estate" of the deceased father within the meaning of this Article. If therefore such father was a trustee and committed breach of trust, a suit by the beneficiaries against the sons to recover the loss from the joint family property in the hands of the sons is not a suit to make good the loss out of the general estate of the trustee and is not governed by this Article¹

4. Starting point of limitation. — The starting point of limitation for suits under this Article where loss has resulted before the date of the death of the trustee is the date of the trustee's death, and a suit brought more than three years after the death of the trustee is barred by limitation¹

Article 99

99.* For contribution by a party who has paid the whole or more than his share of the amount due under a joint decree, or by a sharer in a joint estate who has paid the whole or more than his share of the amount of revenue due from himself and his co-sharers.	Three years.	The date of the payment in excess of the plaintiff's own share.
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* Act of 1877, Article 99

99.—For contribution by a party who has paid the whole amount due under a joint decree, or by a sharer in a joint estate who has paid the whole amount of revenue due from himself and his co-sharers	Three years	The date of the plaintiff's advance in excess of his own share
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Act of 1871, Article 100

Same as in Act of 1877, Article 99

Act of 1859

No corresponding provision

Note 3

- 1 (1910) 7 Ind Cas 898 (898) 33 Mad 808, *Subramaniam Iyyar v Gopal Iyyar*

Note 4

- 1 (1896) 21 Bom 257 (268), *Sayad Hussein Miyan v Collector of Kara*
(See also (1938) A I R 1938 Nag 20 (34) *Mt Sahandya Bai v Shri* the time)

Synopsis

Article 99
Notes
1—2

1. Legislative changes.
2. Scope of the Article.
3. Right of contribution.
4. Article is not exhaustive of the cases in which a right to contribution can be claimed.
5. "Who has paid."
6. Deposit in Court, whether payment.
7. Payment of revenue, whether creates charge in favour of person paying on shares of co-sharers.
8. Right of contribution between joint tort-feasors.
9. Starting point.

Other Topics

Execution of mortgage is payment

See Note 5, Pt 2

Joint decree—Payment in instalments—Starting point

See Note 9 Pt 3

Payment—Voluntary or involuntary

See Note 5

1 Legislative changes.—There was no provision corresponding to this in the Act of 1859 and the class of cases governed by this Article was held to be governed by Section 1 clause 16 of that Act¹

Article 100 of the Act of 1871 and Article 99 of the Act of 1877, corresponding to this Article provided in the first column thereof for a suit for contribution by a party who had paid the *whole amount due* under a joint decree or the whole amount of revenue due from himself and his co sharers. The third column of the said Article, however, provided that time ran from the date of the plaintiff's payment *in excess* of his own share. This gave rise to a conflict of opinion as to whether a suit for contribution where plaintiff paid in excess of his own share but less than the whole amount due would be governed by this Article²

The present Article has now been so worded as to include such suits

2. Scope of the Article.—As has been seen in Note 2 to Article 61, *ante*, this Article is one of a series of particular Articles

Article 99 — Note 1

- 1 (1865) 2 Suth W R 266 (266) *Doorga Monce Dossee v Doorga Mohan Doss*
(1865) 3 Suth W R 181 (185) *Nobbo Kristo Bhung v Raj Bullubh Bhung*
(1869) 12 Suth W R 191 (195) 6 Rang L R App 103, *Ram Kristo Roy v Muddan Gopal Roy* (Period is six years under Act 14 of 1859)
(1868) 10 Suth W R 31 (32) *Mt Jumeelun v Wallce Ahmed*
(1871) 15 Suth W R 125 (126) *Khuthur Paul Singh v Luckhee Narain Uitter*
- 2 (1903) 26 Mad 686 (717) 13 Mad L Jour 83 (F B) *Raja of Varianazaram v Raja Setruckeria Somasellharar* (Yes)
(1896) 20 Mad 23 (24) *Pattabhiramanna v Ramayya* (No)
(1904) 26 All 407 (425) 1 All L Jour 143 1904 All W N 74 (F B) *Ibr Hasan v Draj Phulan Siran* (No)

Article 99
Notes
2—3

specifying various situations comprised within the class of cases governed by the general Article 61¹ On general principles of interpretation of statutes, where a case falls under this Article as well as under Article 61, the former will prevail over the latter (see Note 24 to the Preamble)

The Article applies to suits for contribution in respect of only two classes of cases, namely,

- 1 where there is a joint decree and a party thereto has paid the whole or more than his share of the amount due,² and
- 2 where revenue is due by a party and his co sharers and the same has been paid by the party wholly or in excess of his share

1 obtains a decree against *B, C and D* *X* pays off *A*'s decree and subsequently *B* is compelled to pay *X* the amount paid by him to *A* *B* then files a suit for contribution against *C* and *D* in respect of the amount paid by him to *X* It was held that this Article would not apply to such a case inasmuch as *B* could not be said to have paid any money towards the joint decree in the first instance³ In *Durga Prosonno Bose v Raghunath Das*,⁴ *A* borrowed money for a partnership business under an agreement between the partners that he may so borrow and a decree was subsequently obtained against *A* on the said loan and the same was paid off by *A* *A* then sued his partners for contribution It was held that Article 99 would apply It is submitted that this view is not correct There was no joint decree against *A* and the partners against whom contribution was claimed In *Thannikachella v Shudachella*,⁵ one of two persons having a joint holding from a Mittadar, paid the whole of the Mittadar's dues for one year and then sued the other for contribution It was held that the suit was governed by this Article It is submitted that this decision also does not seem to be correct The Mittadar's dues are not revenue within the meaning of this Article

3. Right of contribution.—The right of contribution rests upon the principle enunciated by the maxim *qui sentit commodum sentit debet et onus*—he who receives the advantage ought to suffer the burden In *Dering v Earl of Winchelsea*,¹ Lord Chief Baron Eyre observed as follows

Note 2

- 1 (1910) 5 Ind Cas 440 (442) 13 Oudh Cas 23, *Debi Sahai v Gauri Shankar*
- 2 (1924) A 1 R 1924 All 843 (844) 83 Ind Cas 875, *Mt Lakhs v Mura'*
(1931) A 1 R 1931 All 632 (653) 134 Ind Cas 452, *Sat Rohan Prasad Tewari v Dharath Prasad*

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v Dama lar
- 3 (1913) 20 Ind Cas 24 (25) (Cal), *Janki Koer v Doms Lal*
 - 4 (1899) 26 Cal 254 (258) 3 Cal W N 279
 - 5 (1892) 15 Mad 258 (259)

Note 3

- 1 (1787) 1 R R 41 (44) 1 Cox 318 29 F R 1184 (1185)

"If we take a view of the cases both in law and in equity, we shall find that contribution is bottomed and fixed on general principles of justice and does not spring from contract, though contract may qualify it, . . . and the reason given in the books is, that in *equali jure*, the law requires equality, one shall not bear the burthen in ease of the rest, and the law is grounded in great equity. Contract is never mentioned."

In *Stirling v Forrester*,² Lord Redesdale observed as follows

"The principle established in the case of *Dering v Earl of Winchelsea*,¹ is universal that the right and duty of contribution is founded in doctrines of equity, it does not depend upon contract. If several persons are indebted and one makes the payment, the creditor is bound in conscience, if not by contract, to give to the party paying the debt all his remedies against the other debtors.

See also the undermentioned cases³

But it is necessary, in order to give rise to a right of contribution, that the party seeking contribution should himself have paid the amount in respect of which contribution is sought.⁴ In fact it is the payment by a party towards the common liability of himself and others that gives rise to the right of contribution.⁵ Where plaintiff borrowed money from X and paid the Government revenue and subsequently he paid off X and sued his co sharers for contribution, it was held that the cause of action for contribution arose when the plaintiff paid the Government revenue (which was the common liability) and not the date when he paid off the debt borrowed from X.⁶

4. Article is not exhaustive of the cases in which a right to contribution can be claimed. — As has been seen already, this

2 (1821) 22 R R 69 (76) 3 Bligh 575 4 E R 712

3 (1872) 19 Suth W R 24 (27) 11 Beng L R 76 *Ram Pershad Singh v Neer bhoy Singh*

(1893) 26 Cal 254 (258) 3 Cal W N 299 *Durga Prosonno v Raghunath Das*
[See also (1893) 1883 Pun Re No 79 page 255 (257) *Bhagwan Singh v Prem Singh*

(1915) A I R 1915 Cal 278 (279) 24 Ind Cas 259 *Saiya Bhusan v Arishnakali* (Contribution signifies payment by each of the parties interested of his share in any common liability. Hence an action for contribution is a suit brought by one of such parties who has discharged the liability common to them all to compel the others to make good their share. Mutuality is the test of contribution.)

Dabee v

4 (1903) 26 Mad 696 (693) 13 Mad L Jour 83 (F B) *Raja of Maranagaram v Raja Setracherla Somasekharadas*

5 (1870) 14 Suth W R 480 (481) 6 Beng L R App 101 *Bimela Dabee v Tara Soonduree Dabee*

(1867) 7 Suth W R 29 (29) *Kalle Shunkar v Huro Shunkur*

6 (1867) 7 Suth W R 29 (29) *Kalle Shunkar v Huro Shunkur*

Article 99
Notes
4-5

Article applies to suits for contribution only where money has been paid towards a *joint decree* or towards *revenue*. But these two classes of cases do not exhaust all the cases in which a right of contribution may arise. Even where there is no joint decree and no revenue has been paid, there may arise rights of contribution.¹ Suits to enforce such rights of contribution would not be governed by this Article,² but would be governed by some other Article. Thus, where A, the manager of a joint family, borrows money from X and expends it for family purposes, he may have a right of contribution against the members of the family in respect of payments made in excess of his share. A suit to enforce such a right would be governed not by this Article but by Article 107, *infra*.³

5. "Who has paid." — As seen in Note 3 above, the right of contribution arises only when the party claiming it has paid money in discharge of a common liability. A payment means a payment in money or a transfer of property which is equivalent to a payment of money.¹ Thus, the execution of a mortgage in lieu of joint liability of the plaintiff and of others is a payment and time will run, for a suit for contribution, from the date of such execution.² The mere incurring of a pecuniary obligation in the shape of a bond or promissory note is not a payment within the meaning of this Article.³ There is a difference of opinion as to whether the word "payment" means only a voluntary payment or would include an involuntary payment as, for example, where money is recovered from a party

Note 4

- 1 (1890) 12 All 110 (114) 1890 All W N 31 *Ibn Husain v Ramda* (Claim for contribution arising out of a mortgage transaction—There was no joint decree—Suit held not one falling under Article 99)
- (1924) A I R 1924 Lah 112 (114) 72 Ind Cas 885 *Walait Ram v Ram Kishen*
- (1915) A I R 1915 Nag 13 (14) 30 Ind Cas 960 11 Nag L R 156 *Dhundi raj v Waru Bai* (Claim by landholder to recover his share of the profits from his co sharer out of the rents collected by him from and out of the estate after taking into account the credit to which the defendant would be entitled in respect of his share—Article 99 does not apply)
- (1880) 6 Cal 549 (551) 8 Cal L R 209 *Ram Dutt Singh v Horakh Naram Singh* (Claim by a tenant who has paid revenue in order to protect the estate—Claim is not one coming under Article 99 as such payment is neither under a decree nor as a joint proprietor of the estate)
- 2 (1900) 1900 Pun L R 149 (151) *Mulchand v Narinjan Das*
- 3 See Note 2 to Article 107
- (1870) 14 Suth W R 480 (481) 6 Beng L R App 101, *Dinola Dabee v Tara Soonduree Dabee*
[See also (1869) 12 Suth W R 191 (195) *Ram Kristo Roy v Muddun Gopal Roy*]

Note 5

- 1 See Note 3 to Article 61, *ante*
- 2 (1931) A I R 1931 All 652 (653) 134 Ind Cas 452 *Sat Rohan Prasad Tewari v Bharath Prasad*
- 3 See Note 3 to Article 61 *ante*
[See also (1927) A I R 1927 Mad 1137 (1138) 99 Ind Cas 433, *Sannasi Chetty v Arunachala Chetty*]

under process of law See Note 3 to Article 61 for full discussion
See also the undermentioned cases ⁴

6. Deposit in Court, whether payment. — See Note 4 to Article 61, *ante*

7. Payment of revenue, whether creates charge in favour of person paying on shares of co-sharers.—Where one of several co sharers in a joint estate pays the whole or more than his share of the amount of revenue due from himself and his co sharers, it is clear that he has a right of contribution against his co sharers But there is a difference of opinion as to whether, in respect of the amount due to him as contribution, he gets a *charge* upon the share of each of the co sharers' property for their share of the revenue The High Courts of Allahabad, Bombay, Calcutta and Patna have held that in the absence of a statutory enactment creating such a charge there is no general principle of equity to the effect that whoever having an interest in an estate makes a payment, in order to save the estate, gets by reason of such payment a charge upon the estate ¹ The High Court of Rangoon is also inclined to the same view ² The High Court of Madras, on the other hand, has held that such a charge is created ³ Where the statute itself creates a charge in respect of such payment, there is, of course, no question that there is a charge ⁴ Where a charge is held to exist a suit to enforce the same and recover the contribution would be governed by Article 132 and not by this Article ⁵

- 4 (1868) 10 Suth W R 31 (32) *Mi Jumeelun v Wulhee Ahmad* (Involuntary payment is payment)
(1933) A I R 1933 Oudh 478 (480) 147 Ind Cas 1042, *Bhikham Singh v Sant Bakhsh Singh* (Assumed involuntary payment is payment ')

Note 7

- 1 (1892) 14 All 273 (295 298) 1892 All W N 117 (F B) *Seth Chitor Mal v Shih Lal*
(1902) 26 Bom 437 (441) 4 Bom L R 90 *Shitao Narayan v Pundalik Bhaire*
(1887) 14 Cal 809 (832) (F B) *Amu Ram Das v Mazaffer Hosain Shah*
(1898) 25 Cal 565 (569) 2 Cal W N 425 *Upendra Lal Mukerjee v Girindra Nath Mukerjee*
(1888) 15 Cal 542 (545) *Khub Lal Sahu v Pudmanund Singh*
(1928) A I R 1928 Pat 641 (645 649) 7 Pat 613 111 Ind Cas 84 *Bhub neshwari Kuer v Manir Khan*
2 (1928) A I R 1928 Rang 278 (280) 6 Rang 500 113 Ind Cas 801, *U Shree Bua v Maung Thauk Aye*
3 (1903) 26 Mad 686 (709) 13 Mad L Jour 83 (F R) *Raja of Suranagaram v Raja Setrucherla Somavelhararas*
(1905) 26 Mad 493 (494) 15 Mad L Jour 219 *Alaya Kammah v Subbaraya Goundar*
(1926) A I R 1926 Mad 141 (142) 90 Ind Cas 551, *Kotayya v Kotappa*
(1936) A I R 1936 Mad 782 (784) *Meghararamam Vaidu v Mahomed Mohideen Sahib*
4 (1881) 8 Cal L R 210n (211) *Deo Nandan v Deshputti Singh*
5 (1906) 23 All 743 (746) 1906 All W N 216 *Fakubali Khan v Lala Kishun Lal* (26 All 277, Followed)
(1904) 26 All 227 (233) 1904 All W N 3 *Phagran Das v Harder*

Synopsis

Article 100
Notes
1—2

1. Scope of the Article.
2. Starting point.

1. Scope of the Article. — Where trustees are *equally to blame* for a breach of trust, any one or more of the trustees who has had to refund the loss to the *cestui que trust* may compel the others to contribute¹ This right of contribution, as in the case of co-sureties, is based on general principles of justice and is the result of a general equity on the ground of equality of burden and benefit² A suit for such contribution may lie against such others if they are alive, or against their legal representatives if they are dead, to the extent of the assets they have received This Article applies to a suit for such contribution *against the estate of a deceased trustee* A suit for such contribution against a trustee who is *alive* is not governed by this Article

The principle above mentioned has been recognised in Section 27 of the Indian Trusts Act, 1882 The second paragraph of the said Section runs as follows —

"But as between the trustees themselves, if one be less guilty than another and has had to refund the loss, the former may compel the latter, or his legal representative to the extent of the assets he has received, to make good such loss, and if all be *equally guilty*, any one or more of the trustees who has had to refund the loss may compel the others to contribute "

A suit under the first portion of the above paragraph is not one for contribution and is not governed by this Article The second portion of the paragraph does not expressly state that the suit for contribution would lie against the estate of the deceased trustee who was liable to contribute, but it cannot be inferred from this that there is no such right of suit

2. Starting point. — Time runs, under this Article, from the date when the right for contribution accrues In *Robinson v Harkin*,¹

Act of 1859, Section 2

Article 100 — Note 1

- 1 (1886) 55 L J Ch 472 (475) L R 31 Ch D 390 34 W R (Eng) 311 51 L T 183, *Bahn v Hughes*
 (1896) 44 W R (Eng) 388 (389, 390) L R 1 Ch 685 63 L J Ch 313 74 L T 31, *Chillingworth v Chambers*
 (1912) 1 Ves & B 114 (117) 12 R R 195, *Lingard v Bromley*
 2 (1896) 44 W R (Eng) 702 (704) L R 2 Ch 415 63 L J Ch 773 74 L T 777, *Robinson v Harkin* (The principle laid down in *Dering v Earl of Mchelsea*, (1757) 1 Cox 312, as applicable to co-sureties is equally applicable to co-trustees)

Note 2

- 1 (1896) 44 W R (Eng) 702 (704) L R 2 Ch 415 63 L J Ch 773 74 L T 777.

Article 100
Note 2

where *A*, a trustee, and *X*, the beneficiary under the trust, sued *B* seeking to make *B* liable for the loss caused by a breach of trust, and *B* claimed contribution from *A* in respect of such loss, it was observed by Stirling, J., as follows

"It was held in *Wolmershausen v Gullick*, (1893) 2 Ch 514, that in a case of contribution between two co sureties time did not begin to run under the statutes of limitation until the liability of one of the sureties was established, that is, until the claim of the principal creditor was established against the surety. I think the like principle applies here, and that time does not begin to run as between the plaintiff Robinson and the defendant Harkin until the claim of the infant *cestui que trust* was established against the latter, and consequently that time only begins to run as between them from the date of the present judgment "

It will be seen that in the above case the suit was not for the recovery of any amount as contribution. It is submitted that a suit to recover a sum of money as contribution from the defendant co trustee will not arise until the plaintiff has been compelled to refund the loss occasioned by the breach of trust to the beneficiary. See S 27 of the Trusts Act, 1882, and Notes to Article 82 *ante*

Article 101

<p>101.¹ For a seaman's wages.</p>	<p>Three years.</p>	<p>The end of the voyage during which the wages are earned.</p>
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Synopsis

1. Seaman.
2. Right to wages.
3. Remedies in respect of wages.
4. Starting point.

1. Seaman — A "seaman" has been defined in the Indian Merchant Shipping Act¹ as meaning "every person (except masters, pilots, and apprentices duly indentured and registered) employed or engaged in any capacity on board any ship"

2. Right to wages. — Before the year 1854 the doctrine prevailed in England that "freight is the mother of wages," that is, the right to wages depended upon the freight earned in the adventure¹

* Act of 1877, Article 101 and Act of 1871, Article 102

Same as above

Act of 1859

No corresponding provision

Article 101 — Note 1

1. Act 21 of 1923, Section 2 clause 8

Note 2

1 See Halsbury, Vol 20, Page 46 Foot Notes

This doctrine was abolished by the English Merchant Shipping Act of 1854.² Section 57 of the Indian Merchant Shipping Act, 21 of 1923, also provides that the right to demand and recover wages does not depend upon the fact whether any freight has been earned, but that in all cases of wreck or loss of the ship, proof that the seaman has not exerted himself to the utmost to save the ship cargo and stores shall bar his claim to wages. See also Sections 55 to 62 of the said Act generally.

Article 101
Notes
2—4

3. Remedies in respect of wages. — A seaman who has a right to wages, has —

- 1 under Section 63 of the Indian Merchant Shipping Act, 1923, a right to sue for the same in a *summary* manner before a *Magistrate*, provided the amount claimed does not exceed 500 rupees,
- 2 a *lien* on the ship for the recovery of such wages¹ and
- 3 a right to sue in a Court of Small Causes, when the claim is less than Rs 500, or in an ordinary Civil Court where the claim exceeds Rs 500.³

This Article does not apply to the first two remedies³ but only to the last.

4. Starting point. — Time runs under this Article from the *end* of the voyage during which the wages are earned.

102.* For wages not otherwise expressly provided for by this schedule.	Three years	When the wages accrue due.
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Article 102

Synopsis

1. Legislative changes.
2. Scope of the Article.
3. Suit by archakas of temples against trustees.
4. Meaning of 'wages.'
5. Starting point.
6. Set-off of claim for wages.

*	Act of 1677, Article 102
	Same as above
	Acts of 1671 and 1859
	No corresponding provision

² See Halsbury, Vol 26, Page 47 Foot Notes

Note 3

1 37

² See Sections 63 and 64 of the Indian Merchant Shipping Act, 1923

³ See Starling's Limitation Act, 6th Edition Page 253

Article 102
Notes
1—2

1. Legislative changes. — There was no such general provision in the Acts of 1859 and 1871 and suits for wages not falling within the specific provisions corresponding to Article 7 of this Act¹ were treated as suits on breaches of contract²

A general provision corresponding to this Article was first introduced in Article 102 of the Act of 1877

2. Scope of the Article. — Articles 7 and 101 expressly provide for suits for wages in particular classes of cases This Article is a general Article providing for suits for wages not otherwise expressly provided for It follows that this Article will apply only if none of the specific Articles applies to the case¹ Thus, a suit for the wages of household servants, artisans or labourers falls under Article 7 *ante* and is therefore not governed by this Article² But a suit for wages not falling within Article 7 or Article 4 (now repealed) or Article 101 will be governed by this Article

See the undermentioned cases³

Article 102 — Note 1

1 See clause 2 of Section 1 of Act of 1859 and Article 7 of the Act of 1871

2 (1866) 1 Agra Misc App 8 (9) *Jumna Pershad v Bheem Sen*

(1864) 1864 Suth W R 68 (69) *Rajah Perladh Sen Bahadoor v Runjeet Roy*

(1872) 18 Suth W R 466 (467) *Donald McCorkindale v Eduard Young*

Note 2

1 (1930) A I R 1936 Lah 661 (661) 160 Ind Cas 1042 *Sita Ram v Jagan Nath Singh*

2 (1927) A I R 1927 Rang 279 (280) 5 Rang 477 104 Ind Cas 520 *Sewarasi v Lachminarayan* (Suit for wages by motor driver—Article 7 applies and not this Article)

(1936) A I R 1936 Lah 661 (662) 160 Ind Cas 1042 *Sita Ram v Jagan Nath Singh* (Do)

(1934) A I R 1934 Nag 260 (260) 152 Ind Cas 885 *Namdeo v Ram Krishna Mahadeo* (Suit for wages by village carpenter—Article 7 applies and not this Article)

(1916) A I R 1916 Mad 633 (633) 23 Ind Cas 956 *Kuppu Rao v Narasier* (Suit by cook for wages—Article 7 and not Article 102 applies)

3 (1912) 17 Ind Cas 658 (659) (All) *Mohan Lal v Mt Jumerat* (A wet nurse does not come within the definition of a household servant hence a suit by her to recover her wages does not fall under Article 7 but falls under Article 102)

(1919) A I R 1919 Sind 54 (55) 50 Ind Cas 37 12 Sind L R 140 *Narainmal v Mangaldas* (Suit for recovery of wages by engineer—Article 102 applies)

(1926) A I R 1926 All 172 (173) 90 Ind Cas 120 48 All 164 *Mutsaddi Lal v Bhagwan Das* (Weighman employed to work at a shop is not a household servant nor is he an artisan He cannot be treated as a mere labourer Article 102 applies to a suit by him to recover his dues from his master)

(1935) A I R 1935 Rang 235 (236) 157 Ind Cas 732 *Muwa Meah Sawdagar v Shirazulla* (Person employed to help dealer in sale of goods—Held he was not labourer but salesman—Suit by him for wages is governed by Article 102 and not by Article 7)

(1924) A I R 1924 Oudh 163 (169) 26 Oudh Cas 327 79 Ind Cas 576 *Ghan Ram v Uma Dutt* (Bisardar means a watchman who is paid by a share of crop which he watches He is an outdoor servant and is certainly not an artisan or a labourer A suit by him for his wages therefore will not fall within Article 7 but will fall under Article 102)

But the suit must be by the person who has earned the wages. Where *A* has had to pay wages to *B* in the interests of *C*, and seeks reimbursement from *C*, his suit is not within this Article inasmuch as he is not entitled to any wages from *C* and the amount claimed is really not wages at all.⁴

3. Suit by archakas of temples against trustees. — It has been seen in Note 2 to Article 7 *ante* that the *emoluments of office* of an *archaka* are "wages," but that a suit for such wages by the *archaka* against the trustee is not governed by that Article inasmuch as the *archaka*, though a 'servant' of the trustee, is not his household servant within the meaning of that Article.

This Article will govern such suits.¹

A suit for a *declaration* of a recurring right is governed by Article 131 *infra*. There is a conflict of opinion as to whether that Article applies also to suits for the *recovery* of sums due *by reason of that right* (see Notes to Article 131). But where the sums sought to be recovered are 'wages,' this Article will apply, the reason being that Article 131, even if it is held to cover the case, is a *general* Article which will not prevail against this special Article.²

4. Meaning of 'wages.' — See Note 2 to Article 7, *ante*.

5. Starting point. — Time runs from the date when the wages accrue due. The question when the wages in any particular case accrued due is one of fact to be determined with reference to the contract, if any, between the parties, or in the absence of any contract, to the course of dealing between the parties.¹

In the case of monthly wages, the wages accrue and become due in law on the final day of the month, and the period of limitation for each month's wages begins to run from that date, even if the services are terminated before the end of a month, the date of the

(1935) A I R 1935 All 102 (102) 152 Ind Cas 932 *Babulal v. Hukham Singh* (Do.)

(1937) A I R 1937 Mad 840 (841) 171 Ind Cas 72 *Kunhi Raman v. Varayali Gowdan* (Suit brought by a hotel cook for arrears of salary is governed by Article 102 and not by Article 7 as a hotel cook can not be said to be a household servant within the meaning of Article 7.)

4 (1930) A I R 1930 Oudh 420 (421-422) 128 Ind Cas 66 *Lachmi Narain v. Putli Lal*

Note 3

1 (1918) A I R 1918 Mad 866 (368) 45 Ind Cas 414 41 Mad 529, *Bharadwaja Mudali v. Arunachalla Gurukkal*

(1935) A I R 1935 Mad 129 (129) 155 Ind Cas 591, *Vedagiri Sasilar v. Sankarachariar Sivamijal, Kumbakonam*

(1936) A I R 1936 Mad 149 (150) 161 Ind Cas 475 *Shivaram Joshi v. Nagappayya* (Claim by *archaka* against trustee for *tastik* allowance.)

2 (1936) A I R 1936 Mad 149 (150) 161 Ind Cas 475 *Shivaram Joshi v. Nagappayya*

Note 5

1 (1936) A I R 1936 Cal 277 (279) 167 Ind Cas 265 *Jasendra Nath Ray v. Jnanada Kanta Das Gupta*

[See also (1917) A I R 1917 All 466 (467) 36 Ind Cas 571 23 All 61, *Sushil Chandra Das v. Gouri Shankar*]

Article 102
Notes
5—6

termination of service will not be the starting point under this Article²

See also Note 6 to Article 7.

6. Set-off of claim for wages. — See the undermentioned case¹

See also the Authors' Civil Procedure Code, Order 8, Rule 6

Article 103

<p>103.⁴ By a Muhammadan for exigible dower (<i>mu'ajjal</i>).</p>	<p>Three years.</p>	<p>When the dower is demanded and refused or (where, during the continuance of the marriage, no such demand has been made) when the marriage is dissolved by death or divorce.</p>
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Synopsis

1. Scope of the Article.
2. "Exigible."
3. Suit by the legal representatives of the wife.
4. Suit against the representatives of the husband.
5. Starting point.
6. Demand and refusal.
7. Divorce.
8. Husband, executor of wife.
9. Wife placed in possession for payment of dower — Effect.
10. Mortgage executed in consideration of dower debt.
11. Registered contract of dower.
12. Contract of dower on behalf of or in favour of a minor.

Other Topics

Article 116 and Article 103 or Article 104
Demand and refusal to be definite and unambiguous
Demand as well as refusal necessary
Lien for dower — Suit for — Article not applicable

See Note 11
See Note 6, Pt 5
See Note 6, Pt 2
See Note 1

★ Acts of 1877 and 1871

Same as above

Act of 1859

No corresponding provision

- 2 (1935) A I R 1935 All 716 (716) 151 I O 719, *Gajadhar v Dharma Nand*
(1916) A I R 1916 Mad 633 (633) 28 Ind Cas 956, *Kuppu Rao v Narasim.*

Note 6

- 1 (1936) A I R 1936 Cal 277 (279) 167 Ind Cas 265, *Jitendra Nath Ray v Jnanada Kanta Das Gupta*

1. Scope of the Article. — This Article and the next prescribe the period of limitation for suits for dower. Dower or *mahr* in Muhammadan law is a sum of money which the wife is entitled to receive from the husband in consideration of the marriage. A sum of money which may be due by the husband to the wife but which is not due in consideration of the marriage is not a dower. Thus, a customary payment of 'kassi' which is an advance given to the husband at the time of the marriage by the relations of the bride in accordance with the custom among the Moplahs of Malabar and which is repayable to the wife on dissolution of the marriage by death or divorce, is not a dower¹ and a suit therefor would not be governed by this Article or the next. In *Hamira Bibi v Zubaida Bibi*,² their Lordships of the Privy Council dealing with the nature of dower in Muhammadan law, observed as follows:

"Dower is an essential incident under the Mussalman law to the status of marriage, to such an extent this is so that when it is unspecified at the time the marriage is contracted the law declares that it must be adjudged on definite principles. Regarded as a consideration for the marriage, it is, in theory, payable before consummation, but the law allows its division into two parts, one of which is called *prompt*, payable before the wife can be called upon to enter the conjugal domicile, the other *deferred*, payable on the dissolution of the contract by the death of either of the parties or by divorce. Naturally the idea of payment of interest on the deferred portion of the dower does not enter into the conception of the parties. But the dower ranks as a debt and the wife is entitled, along with other creditors, to have it satisfied on the death of the husband out of his estate. Her right, however, is *no greater than that of any other unsecured creditor*,^{2a} except that if she lawfully, with the express or implied consent of the husband, or his other heirs, obtains possession of the whole or part of his estate, to satisfy her claim with the rents and issues accruing therefrom, she is entitled to retain such possession until it is satisfied. This is called the widow's lien for dower^{2b} and this

Article 103 — Note 1

1 (1870) 5 Mad H C R 290 (292) *Referred Case No 15 of 1870*

2 (1916) A I R 1916 P C 46 (48) 89 All 591 43 Ind App 294 86 Ind Cas 87 (P C)

2a (1873) 10 Bom H C R 430 (432) *Mahabubibi v Amina* (Right to dower is not an interest in immovable property)

(1872) 17 Suth W R 113 (114) 14 Moo Ind App 377 10 Eng L R P C 45
2 Suther 531 3 Sar 39 (P C) *Mt Bibee Bachun v Sherik Hamid Hossein* (Do)

(1869) 11 Suth W R 212 (213) 2 Eng L R 4 C 306, *Meer Meher Ally v Mt Aman* (Stands on the same footing as any other debt)

2b As to the nature and incidents of the lien for dower, see also the under-mentioned cases —

(1867) 8 Suth W R 307 (308), *Mt Waseeah v Mt Saheeda*

(1867) 8 Suth W R 51 (54) *Mt Janee Khanum v Mt Amston Fatima Khanum*

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1-3

is the only creditor's lien of the Mussalman law which has received recognition in the British Indian Courts and of this Board "

Where nothing is stated at the time of settlement as to whether the dower is prompt or deferred, the general rule is to regard the whole as prompt³ The rule laid down in some decisions⁴ that in such cases among the *Sunnis*, only one third of the whole amount fixed is prompt and the remaining two thirds deferred, is not inelastic and is subject to the particular facts and the evidence of custom in each case⁵

This Article applies to a suit for *prompt* dower and the next Article to a suit for *deferred* dower Suits in respect of the *lien* for dower will not be governed by these Articles

2. "Exigible." — The word "exigible" implies that the dower may, not that it *must*, be exacted, and is therefore not payable until the wife does something to show that it requires to be paid¹

3. Suit by the legal representatives of the wife. — A claim for dower forms part of the wife's estate and passes on her death to her heirs¹ The wife can also in her lifetime dispose of the dower

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- (1868) 9 Suth W R 318 (324 325) *Woomatool Fatima Begum v Meerunmun Nissa Khanum*
 (1869) 3 Beng L R A O 175 (178) *Sayed Umed Ali v Mt Sajjham*
 (1873) 10 Bom H O R 430 (432) *Mahabubidi v Amins*
 (1872) 17 Suth W R 118 (114) 14 Moo Ind App 377 10 Bengal L R P O 45
 2 Suther 531 3 Sar 39 (P C) *Mt Bibee Bachun v Shaikh Hamid Hussain*
 (1910) 6 Ind Cas 376 (381, 382) 32 All 551, *Ali Bakhsh v Alah Dad Khan*
 (1910) A I R 1916 P C 46 (48) 38 All 581 43 Ind App 294 36 Ind Cas 87
 (P C) *Hamira Bibi v Zubaida Bibi*
 (1920) A I R 1920 Cal 463 (465) 56 Ind Cas 8 47 Cal 537, *Nurunnissa Khanum v Muhammad Sakru*
 (1915) A I R 1915 Bom 214 (218) 40 Bom 34 80 Ind Cas 870 *Majidman Bazumian v Bibi Sahed Jan*
 (1925) A I R 1925 P C 63 (65) 52 Ind App 145 47 All 250 66 Ind Cas 579,
Mt Maina Bibi v Ch Wakil Ahmed
 3 (1889) 1889 All W N 122 (123), *Amir Ali v Jan Bibi*
 (1886) 6 All 149 (158) 1886 All W N 53 (F B) *Abdul Kadir v Salima*
 (1911) 11 Ind Cas 558 (559) 35 Bom 386 *Hussain Khan v Ghulabkhatoon*
 (1864) 1864 Suth W R (Gap) 252 (252) *Mt Beebee Jumeela v Mt Mulleka*
 (1900) 23 Mad 371 (376) 10 Mad L Jour 123 (F B), *Masthan Sahib v Asan Bivi Ammal*
 (1873) 19 Suth W R 315 (319) 2 Suther 823 (P C) *Mirza Bedar Bukht Mohamed Ali Bahadur v Mirza Khurrem Bukht Yahya Ali Khan Bahadur*
 4 (1877) 1 All 506 (508), *Taufikunnissa v Ghulam Kambar*
 (1911) 9 Ind Cas 200 (202) 33 All 291, *Umda Begam v Muhammad Begam*
 5 (1911) 11 Ind Cas 558 (559) 35 Bom 396 *Hussainkhan v Ghulab Khatoon*
 (1877) 1 All 483 (486) 2 Ind Jur 369, *Eidan v Mashar Hussain*

Note 2

- 1 (1872) 11 Beng L R 375 (381) Ind App Sup Vol 135 3 Sar 220 (P C), *Mt Mulleka v Mt Jumeela*

Note 3

- 1 (1909) 4 Ind Cas 462 (464) (Cal), *Basir Ali v Hafis Nasir Ali*
 (1864) 1864 Suth W R (Gap) 199 (201), *Hosseinooddeen Chowdree v Tajunnissa Ahaloom*

by transfer or by will just as if the amount is due on a policy of insurance² The heir or transferee will be entitled to sue for the recovery of the dower and will, for purposes of limitation, stand in the shoes of the wife³

Article 103
Notes
3—5

4. Suit against the representatives of the husband. — Where the husband dies without payment of the dower debt, the wife is clearly entitled to claim the dower debt from the legal representatives of the husband to the extent of his assets in their hands¹ The third column of the Article clearly implies this Further, it is a term implied in a contract of dower under the Muhammadan law that if the marriage was dissolved by the death of the husband, the heirs of the husband would pay the dower to the widow²

5. Starting point. — A prompt or exigible dower is, as has been seen already, a debt payable on demand It has been seen in the Notes to Article 59 that in the case of debts payable on demand, the debt is payable forthwith and no demand is necessary This principle applies equally to dower debts also and it is not necessary to make a demand before the institution of a suit¹ But it was laid down as early as 1855 by their Lordships of the Privy Council in *Ammeroonnissa v Mooradoonnissa*² that in the interests of public policy, time should not run against the wife, where she has made no demand, so long as the marriage relationship continued Their Lordships observed as follows

“It is important to consider how inconvenient it would be if a married woman was obliged to bring an action against her husband upon such an instrument it would be full of danger to the happiness of married life and we think, upon the true construction of this settlement, she had a right of suit without

(1873) 19 Suth W R 315 (310) 2 Suther 823 (P C) *Mirza Bedar Dukht Mohammad Ali Bahadur v Mirza Khurrem Dukhtiyahya Ali Khan Bahadur*

2 (1903) 4 Ind Cas 462 (465) (Cal) *Dasir Ali v Hafis Nazir Ali*

3 (1923) A I R 1923 Cal 152 (153) 70 Ind Cas 169 50 Cal 253 *Anatulla v Danish Muhammad*

(1923) A I R 1923 Cal 507 (513) 73 Ind Cas 17, *Mahomed Mozaharal Ahmad v Mohamed Asimaddin Dhuanya*

(1934) A I R 1934 All 52 (56) 151 Ind Cas 304 56 All 401 *Sabir Husain v Farid Hasan*

(1908) 6 Cal L Jour 558 (562) 12 Cal W N 64 *Mohamed Ishaq v Sheikh Akramul Huq*

(1909) 11 Suth W R 212 (214) 2 Bang L R A C 306, *Meer Meher Ally v Ut Amani*

Note 4

1 See (1872) 17 Suth W R 113 (115) 14 Moo Ind App 377 10 Beng L R 45
2 Suther 531 3 Sar 39 (P C) *Mt Bibee Bachun v Sheikh Hamid Hossein*

2 (1903) 6 Cal L Jour 558 (565) 12 Cal W N 64 *Mohamed Ishaq v Sheikh Akramul Huq*

Note 5

1 See (1855) 6 Moo Ind App 211 (229) 1 Sar 533 (P C), *Ammeroonnissa v Mooradoonnissa*

2 (1855) 6 Moo Ind App 211 (229) 1 Sar 533 (P C).

Article 103
Notes
5-6

a previous demand, and that she was not obliged to sue her husband immediately or in his lifetime '.

The principle of the said decision was held applicable generally to all cases of dower debt.³ A wife was held not obliged to make a demand even though she was living in separation.⁴

But, if she did make a definite and unambiguous demand and the same was refused, it was held, also by the Privy Council, that time would begin to run from the date of such demand and refusal.⁵ It was also held that the reasons for postponement of the starting point stated in *Ameerunnissa's case*² would not apply where the marriage is dissolved by divorce and that therefore time would run from the date of the divorce.⁶

Articles 103 and 104 were first introduced by the Act of 1871 in order to give effect to the decisions above referred to,⁷ and accordingly, time, under this Article, has been made to run from the date

- 1 when the dower is demanded and refused (see Note 6), or
- 2 where, during the continuance of the marriage no such demand has been made, when the marriage was dissolved by death or divorce

6. Demand and refusal.—In order that time may run, under this Article, during the continuance of the marriage, it is necessary that there should have been a demand and a refusal.¹ In the absence of either a demand or a refusal time will not begin to run. The words 'demand and refusal' must be understood as one phrase and time runs only when there is a demand as well as a refusal.² Thus a demand for a portion of the dower debt cannot be considered to be a demand for the rest also so as to start limitation in respect of the latter.³ Again, where the wife has not made any demand, no amount of opposition on the husband's part would set time running.⁴

- 3 (1864) 1864 Suth W R (Oap) 252 (253) *Mt Bebee Jumeela v Mt Mulleela*
(1870) 13 Suth W R 371 (374) 5 Beng L R 84 *Ranee Khejoorunnissa v*
Ranee Ryeesoonnissa Begum

[See also (1866) 6 Suth W R Civil Ref 19 (20) *Begoo Jan v Gashes Bebee*

(1869) 11 Suth W R 212 (214) 2 Beng L R A C 306 *Ueer Meher Ally v Mt Aman*]

- 4 (1866) 2 Bom H O R 293 (296) *Nathi v Dand*

- 5 (1875) 24 Suth W R 163 (166) 2 Ind App 235 3 Sar 526 15 Beng L R 306 3 Suther 182 (P O) *Ranee Khajoorunnissa v Ranee Ryeesoonnissa*

- 6 (1861) 1861 Suth W R (Gap) 252 (253) *Mt Bebee Jumeela v Mt Mulleela*

- 7 (1889) 1889 All W N 122 (123), *Amir Ali v Jan Bibi*

Note 6

- 1 (1886) 8 All 149 (159) 1886 All W N 53 (F B) *Ibdul Kadir v Salima*

- 2 (1899) 1889 All W N 122 (123) *Amir Ali v Jan Bibi*

- 3 (1866) 6 Suth W R Civil Ref 19 (20) *Begoo Jan v Gashes Bebee*

- 4 (1933) A I R 1933 Pesh 31 (30) 142 Ind Cas 833 *Mt Amtul Rasul v Karim Baksh*

- (1875) 24 Suth W R 163 (166 167) 2 Ind App 235 3 Sar 526 15 Beng L R 306 3 Suther 182 (P O) *Ranee Khajoorunnissa v Ranee Ryeesoonnissa*

The demand and the refusal must both be *definite* and *unambiguous*.⁵ Where the wife, in answer to the husband calling upon her to come back to him, stated "I shall come back if you pay up my dower debt," it was held that this was not a definite demand which would set limitation running.⁶ Again, where the wife filed an application to be allowed to sue the husband in *forma pauperis* for dower, and the application was dismissed, it was held by the Privy Council that this merely amounted to the wife saying "I desire to make a demand against my husband in the form of a suit if you will enable me effectually to do so by allowing me to sue in *forma pauperis*," and the Court saying "we will not allow you to make a demand in that way," and that consequently there was no demand.⁷ Where the wife demanded the dower and the husband paid a part of it but there was no evidence of refusal as to the rest, it was held by the Chief Court of Oudh that there was no refusal as to the rest and that consequently time did not run in respect thereof.⁸

7. Divorce.— This Article must be construed in the light of the rules of Muhammadan law. Under that law, for the purposes of dower, a marriage is dissolved by divorce on the date when it comes to the *knowledge* of the wife. Consequently, where the husband divorced his wife in her absence by *talak* and the kazi informed the wife of it on a later date, when she came to know of it for the first time, it was held that time began to run only from the latter date.¹ See also the undermentioned case.²

8. Husband, executor of wife.— Where the wife bequeathed her right to dower to certain persons and appointed the husband himself as the executor of such will, it was held that the husband was a trustee in respect of such debt and that he could not take

5 (1875) 24 Suth W R 163 (166) 2 Ind App 235 3 Sar 526 15 Beng L R 306 8 Suther 182 (P C), *Ranee Ahajooroonissa v Ranee Ryeesoon-nissa*

(1892) 1892 Pun Re No 63 *Mt Hajra v Mehra Ali Beg*

(1889) 1889 All W N 122 (123), *Amir Ali v Jan Bibi*

6 (1938) A I R 1938 Pesh 51 (52) 142 Ind Cas 833, *Mt Amtul Rasul v Karim Baksh*.

7 (1875) 24 Suth W R 163 (167) 2 Ind App 235 3 Sar 526 15 Beng L R 306 8 Suther 182 (P C), *Ranee Ahajooroonissa v Ranee Ryeesoon-nissa*

(1930) A I R 1930 Lah 202 (203) 121 Ind Cas 372, *Abdul Hamid v Sardar Begam*

8 (1925) A I R 1925 Oudh 267 (269) 78 Ind Cas 106, *Mt Zahra Bibi v Ganesh Prasad*

Note 7

1 (1931) A I R 1931 Mad 644 (649) 153 Ind Cas 9 54 Mad 622, *Ramanathan Chettiar v Lakshumanan Chettiar*

(1909) 1 Ind Cas 740 (740) 36 Cal 181, *Ful Chand Dubee v. Nawab Ali Choudhry*

2 (1909) 1 Ind Cas 740 (740) 36 Cal 181, *Ful Chand Dubee v. Nawab Ali Choudhry*

Article 103
Notes
8—12

advantage of the three years' rule of limitation prescribed by this Article¹

9. Wife placed in possession for payment of dower — Effect.—Where the husband placed the wife in possession of certain properties for the purpose of enabling her to recover the dower debt from out of the rents and profits thereof and several years after the death of the husband, before the debt had been fully discharged, the legal representatives of the husband dispossessed her and she thereupon sued for the balance of the debt due, it was held that Article 104 did not apply to such a case and that time would run from the date of dispossession¹ The suit in such a case would be for money due on a failure of a consideration

10. Mortgage executed in consideration of dower debt. —Where in consideration of a dower debt a mortgage deed is executed by the husband in favour of his wife, the dower debt ceases to be due as dower and becomes a mortgage debt. A suit to recover such mortgage debt is not governed by this Article¹

11. Registered contract of dower. —A claim for dower is one based upon contract, and where such contract is embodied in a registered document, a suit for the recovery of the dower based on such contract is not governed by Article 103 or Article 104 but by Article 116¹ The reason is that Article 116 has been regarded as a special provision controlling other provisions in the Act² See also Notes to Article 116 *infra*

12. Contract of dower on behalf of or in favour of a minor.—Under Muhammadan law, marriage is not a sacrament, but is a civil contract. Consequently, there must be capacity to contract between the parties, and a boy or a girl who has not attained puberty is not competent to enter into a contract of marriage but a contract of marriage may be entered into by the guardian on his or her behalf. The provisions of the Indian Majority Act, 1875, do not apply to matters relating to marriage, dower and divorce between Muhammadans, and a Muhammadan boy or girl, who has attained

Note 8

- 1 (1909) 4 Ind Cas 462 (465) (Cal) *Basir Ali v Hafiz Nasser Ali*

Note 9

- 1 (1911) 10 Ind Cas 282 (283) 33 All 568, *Hamidullah Khan v Hajjo*

Note 10

- 1 (1927) A I R 1927 All 268 (262) 99 Ind Cas 553 *Mt. Kubra Begam v Fazel Hussain*

Note 11

- 1 (1923) A I R 1923 Cal 152 (153) 50 Cal 253 70 Ind Cas 169, *Anatulla v Danish Muhammad*

- (1923) A I R 1923 Cal 507 (513) 73 Ind Cas 17, *Md. Mosaharal Ahmed v Md. Anmaddin Bhuiya*

- 2 See (1916) A I R 1916 P C 182 (181) 44 Cal 759 44 Ind App 65 39 Ind Cas 156 (P C), *Tricomdas Cooverjee v Sri Copinath Jai Thakur*

puberty, i.e. on the completion of the sixteenth year, is a major for the purposes of marriage, dower and divorce

Article 103
Note 12

If at the time of the marriage the wife was under sixteen years of age, and if the father as guardian enters into a contract on the infant's behalf, the right to dower can be enforced by the minor.¹ Even if the contract of dower was entered into by the father, after the marriage on behalf of the minor husband, it is still binding on the husband, and the sum mentioned in the contract must be paid.² Under Sunni law, the father, if he acts as guardian for the marriage of the infant son, is personally liable for the dower only if he expressly becomes a surety for the stipulated dower, otherwise, he merely binds the son and he is not personally liable.³ But under Shia law, where the minor had no independent means of his own for payment of the dower, the father would be personally liable for the amount. But this rule of law has been held not to apply to Muhammadans in British India, as it is opposed to the rule of "justice, equity and good conscience" required to be administered between natives of British India, and also because this vicarious liability of the father does not arise from any substantive rule of Shia law relating to marriage, but is only a rule of construction of contracts.⁴ Where the guardian is liable, as in Sunni law, on an express contract of suretyship his liability is that of a mere surety, and the suit for dower debt against him on default by the husband would not, it is submitted, be governed by this Article but only by Article 65.

104.* By a Muhammadan for deferred dower (<i>mu'ajjal</i>).	Three years	When the marriage is dissolved by death or divorce
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Article 104

1. Scope of the Article — By its very nature deferred dower is payable only on dissolution of marriage by death or divorce of either party. But, as pointed out in *Mt Nawab Begum v Allah Rakha*,¹ this is not an invariable rule, and it may be modified by

* Acts of 1877 and 1871

Same as above

Act of 1859

No corresponding provision

Note 12

1 (1925) A I R 1925 Cal 1255 (1256) 68 Ind Cas 749, *Fazara Akhatun Bibi v. Mafior Rahman*

2 (1909) 4 Ind Cas 462 (465) (Cal), *Danar Ali v Hafiz Nazir Ali*

3 (1927) A I R 1927 All 964 (964) 100 Ind Cas 636 49 All 557, *Mahomed Siddiq v Shahabuddin*

4 (1934) A I R 1934 All 52 (55) 151 Ind Cas 304 56 All 401, *Sabir Hussain v Farzand Hasan*

Article 104 — Note 1

1 (1922) A I R 1922 Lah 172 (173) 69 Ind Cas 937

Article 104
Note 1

an agreement entered into after the marriage, by which the husband agrees to pay the same as on demand

Indeed, the contract to pay by the husband the deferred dower, in case of the predecease of the wife, is presumed to be to the heirs of the wife, and the heirs become entitled to recover it on the basis of a breach of contract,² and if the contract was by registered deed, Article 116 would apply and the heirs may enforce it within 6 years of the death of the wife.³ As pointed by the Calcutta High Court, the amount of deferred dower is like the amount due on a policy of life insurance on the wife, and is payable to her nominee or her heirs,⁴ with the further advantage that it is also recoverable by the wife, in case of dissolution of the marriage by divorce or by death of the husband. In fact, the deferred dower is introduced in Muhammadan law as a sort of insurance or a check on the capricious exercise by the husband of his power to dissolve the marriage at will, without even assigning any reason, as the Muhammadan law allows him to do.

Where the deferred dower had become payable by dissolution of marriage by the husband pronouncing *talak*, and a *talaknamah* was executed by the husband, wherein he agreed to pay her the dower amount by monthly instalments, it was held that the suit by the wife to recover the dower would not apparently be governed by this Article, but would be construed as one to enforce the contract contained in the *talaknamah* (though the plaint did not mention the deed), and the wife would be given an instalment decree as per the deed, but in that case the period of limitation would be reckoned for each instalment from the final date of each month on which it fell due and claims beyond the three years' period on the date of plaint would not be recoverable.⁵

For other cases, see Notes to Article 103, *ante*.

Article 105

105.* By a mortgagor after the mortgage has been satisfied, to recover surplus collections received by the mortgagor.	Three years.	When the mortgagor re-enters on the mortgaged property.
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* Act of 1877 — Same as above

Act of 1871, Article 105 — Columns one and two, same as above

Column three was The date of the receipt

Act of 1859 — No corresponding provision

2 (1907) 6 Cal L Jour 55S (570) 12 Cal W N 84, *Mohamed Ishaq v Sheikh Akramul Huq*

3 (1923) A I R 1923 Cal 152 (153) 70 Ind Cas 169, 50 Cal 253, *Asiatullah v Danush Mohammad*

(1923) A I R 1923 Cal 607 (519) 73 Ind Cas 17, *Mohammad Motaharal Ahmad v Mohammad Arumuddin Bhuiya*.

4 (1909) 4 Ind Cas 462 (465) (Cal) *Danr Ali v Hafis Nazir Ali*

5 (1936) A I R 1936 Cal 627 (628) 167 Ind Cas 263, *Mt. Akhaur Nissa v. Mahamed Hussain Bara*.

Synopsis

Article 105
Notes
1—2

1. Legislative changes.
2. Scope of the Article.
3. "Surplus collections," meaning of.
4. Startling point.

1. Legislative changes.

- 1 There was no specific provision corresponding to this Article in the Act of 1859, and cases such as that contemplated by this Article were held governed by Section 1 clause 16 under which the limitation was six years from the time the *cause of action* arose¹
- 2 Article 105 of the Act of 1871 provided for such suits a limitation period of three years from the date of the *receipt of such profits*
- 3 Under the Act of 1877 as under this Act, time ran from the date when the mortgagor *re entered on the mortgaged property*

2. Scope of the Article. — This Article applies to a suit by a mortgagor, after the mortgage has been satisfied, to recover surplus collections received by the mortgagee. The question arises as to when such a suit is maintainable. It is well established that a claim to surplus profits or for an account against the mortgagee is one arising from and connected with the right to redeem the property.¹ The cause of action for both the claims is the *same*, and consequently, where a suit for redemption is filed in the first instance, and subsequently a suit for accounts or for the surplus profits is filed, the latter would be barred under the provisions of Order 2 Rule 2 of the Code of Civil Procedure² unless liberty had been reserved to file the fresh suit.³ This Article must be construed so as not to conflict with the provisions of Order 2 Rule 2,⁴ and consequently must be held to apply to suits which are not barred by the said provision. Thus,

Article 105 — Note 1

- 1 (1868) 9 Suth W R 167 (189) Beng L R Sup Vol 301 *Lal Dess v Jamal Ali*
Note 2

- 1 (1925) A I R 1925 Rang 13 (14) 2 Rang 352 61 Ind Cas 395 *Ma Ayo v Maung Hla Du*
(1908) 30 All 225 (227) 5 All L Jour 192 1908 All W N 96, *Fam Din v Bhup Singh*
(1907) 34 Cal 223 (232) 5 Cal L Jour 192 *Satyabadi Dehara v. Mt Hirabati*
(1927) A I R 1927 Nag 302 (303) 103 Ind Cas 290 *Zakrud-din v Clurral*
(1910) 6 Ind Cas 336 (337) (Cal), *Salari Datta v Sheikh Anudil*
2 (1908) 30 All 225 (229 230) 5 All L Jour 192 1908 All W N 96, *Fam Din v Bhup Singh*
3 (1910) 6 Ind Cas 609 (621) 33 All 244 *Mahomed Fatah Ali Fiaz v Kallu Singh*
4 (1908) 30 All 225 (229) 5 All L Jour 192 1908 All W N 96, *Fam Din v Bhup Singh*

Article 105
Notes
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the Article will govern suits for profits where the mortgagor has re entered into possession without a suit for redemption⁵ and also to cases where liberty has been given in the previous suit for redemption, to file the fresh suit for profits or for account⁶ It will also apply to a suit for profits received by the mortgagee subsequent to the date fixed for redemption in the decree in the prior suit inasmuch as such suit is not barred by Order 2 Rule 2^{6a}

It was held by the Court of the Judicial Commissioner of Nagpur in the undermentioned case⁷ that where such liberty was given to file a fresh suit, the suit must be regarded only as a part of the original suit for redemption and that it would be governed by Article 148 and not by this Article It is submitted that this view does not seem to be correct in view of the decision of the Allahabad High Court referred to above⁸

The Article applies only to suits for profits brought *after* the mortgagor has entered into possession on redemption^{9a} It has clearly no application to cases where the mortgagor *sues for redemption* and claims surplus profits therein It was held in the undermentioned case⁹ that this Article will apply in respect of the portion of the claim for profits, but that the claim cannot be barred because the right to the profits accrues only at the time of accounting on redemption It is submitted that this is not correct

3. "Surplus collections," meaning of. — "Collections means rents and profits Where trees were cut and sold by the mortgagee and it was not shown that this was wrongfully done it was held in the case noted below¹ that the proceeds were profits collected by the mortgagee In a later case it has been held that a suit for compensation

5 (1922) A I R 1922 Cal 189 (190) 64 Ind Cas 75, *Prasanna Kumar Mondal v Nilambar Mondal*

(1917) A I R 1917 Oudh 200 (202) 38 Ind Cas 610 20 Oudh Cas 25 *Dikramajit Singh v Raj Raghubar Singh*

(1907) 30 All 225 (228) 5 All L Jour 192 1908 All W N 96 *Ram Din v Bhup Singh* (The observation that the Article applied only to such suits was disented from in 8 Ind Cas 689 (691))

(1919) A I R 1919 Oudh 125 (126) 50 Ind Cas 132 *Ram Sukh v Indar Kumar* (Redemption by deposit under Section 83 Transfer of Property Act — Subsequent suit for profits)

[Bul see (1901) 4 Oudh Cas 855 (860) *Salik Ram v Ashik Husain* (This was a suit for profits brought subsequent to a suit for redemption—Question of bar under O 2 R 2 was neither raised nor adverted to)]

6 (1910) 8 Ind Cas 689 (691) 33 All 214, *Mahomed Faiyaz Ali Khan v Kallu Singh*

6a (1910) 6 Ind Cas 336 (337) (Cal) *Sakari Datta v Sheikh Anuddy* (Explaining the apparently contrary view in 34 Cal 223 and 30 All 225)

7 (1927) A I R 1927 Nag 302 (303) 103 Ind Cas 290, *Zaki ud din v Chunnilal*

8 (1910) 8 Ind Cas 689 (691) 33 All 214 *Mahomed Faiyaz Ali Khan v Kallu Singh*

8a (1899) 1 Bom L R 539 (539) *Yenkalatesh v Panlurang*

9 (1917) A I R 1916 Oudh 290 (292) 32 Ind Cas 729 *Abdul Hasan Khan v Ut Jagwanla*

Note 3

1 (1901) 4 Oudh Cas 355 (360 361) *Salik Ram v Ashik Husain*

for trees wrongfully cut by the mortgagee may be treated as a suit for collections made by the mortgagee²

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4. **Starting point.** — Under the Act of 1871, time ran from the date of the receipt of the surplus profits¹ This involved the assumption that a suit for profits could be filed even without the mortgage having been redeemed It also followed that at the time of a suit for redemption a suit for profits might be barred by limitation² As has been seen in Note 2 *ante*, both these views are incorrect The change in the language of the third column of the Article has now removed the anomaly, and time now runs only from the date of the re entry by the mortgagor into possession,³ even if the profits are every year payable to the mortgagor under the contract of mortgage

106. ³ For an account and a share of the profits of a dissolved partnership	Three years.	The date of dissolution.
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Article 106

Synopsis

1. Legislative changes
2. Scope of the Article.
3. There must have been a partnership.
4. Partnership must have been dissolved at the date of suit.
5. The suit must be one for accounts and share of profits.
6. Settlement after dissolution.
7. Suit for share in specific amounts received by one partner after dissolution.
8. Suit between partner and sub-partner.
9. Second partnership after dissolution of first—Suit for account of second partnership—Accounts of first partnership, if can be gone into.
10. Suit by assignee or successor of partner.
11. Suit against deceased partner's heirs
12. Registered partnership deed.
13. Starting point
14. Onus of proof.
15. Second appeal.

* Acts of 1877 and 1871 — Same as above

2 (1919) A I R 1919 Oudh 125 (126) 50 I C 152 *Ram Saha v Indar Kumar*

Note 4

1 (1884) C All 303 (310) 1884 All W N 92, *Jagjit Das v Girdhar Das*

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(1884) C All 303 (311) 1884 All W N 92, *Jagjit Das v Girdhar Das*

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Other Topics

Conditions for applicability of Article	See Note 2
Dissolution of partnership	See Note 13 F Ns (2) & (3)
Suit for accounts barred—Subsequent suit for relief depending on accounts is also barred	See Note 5 Pts 2, 3
Suit for accounts of family business	See Note 3
Suit for contribution	See Note 5 Pt 5
Suit for dissolution and for accounts—Article not applicable	See Note 4 Pt 3
Suit on adjusted accounts	See Note 6 Pts 2 to 4

1. **Legislative changes.** — There was no specific provision corresponding to this Article in the Act of 1859, and, suits such as those contemplated by this Article were governed by the six years rule under clause 16 of Section 1 of that Act the time running from the date of the dissolution of the partnership¹

2. **Scope of the Article.** — The Article applies to suits for an account and a share of the profits of a dissolved partnership. Before therefore this Article can apply, it is necessary that the following conditions should be satisfied —

- 1 there must have been a partnership
- 2 such partnership must have been dissolved at the date of suit,
- 3 the suit must be one for an account and a share of the profits of such dissolved partnership

Whether a suit is one for accounts and a share of the profits of a dissolved partnership is to be gathered from the allegations in the plaint and the facts and circumstances of the case. The mere *form* of the suit is not very material. It is the substance of the claim that must be looked to¹. If in substance the suit is one for an account and a share of a dissolved partnership this Article will clearly apply,² though the suit is framed as one for contribution³ or as one for possession of immovable property⁴ or as one for relief on the basis of an *existing* partnership⁵. Where the plaintiff sued for a

Act of 1859 — No corresponding provision

Article 106 — Note 1

- 1 (1866) 7 Suth W R 36 (36) *Bhuttoo Ram v Fuhul Chowdhry*
(1873) 19 Suth W R 277 (278) *Kalee Krsto Roy v Haran Chunder Dev*
(1869) 9 Agra 175 (177) *Jwala Pershad v Kedar Nath*

Note 2

- 1 (1906) 1906 Pun Re No 73 1906 P W R No 49 *Amin Chand v Gujar Mal*
- 2 (1932) 1 I R 1932 Lah 319 (521) 133 Ind Cas 375 *Karam Chand v Basheswar Nath*
(1905) 9 Cal W N 537 (540) *Mohit Lall Dutt v Raj Narain Dutt*
(1909) 4 Ind Cas 929 (931) (Lah) *Ram Pershad v Rattan Chand*
(1933) A I R 1933 Mad 353 (357) 141 Ind Cas 573 *Srinivasulu Naidu v Ramakrishna Naidu*

3 (1906) 7 Suth W R 36 (36) *Bhuttoo Ram v Fuhul Chowdhry*
4 (1909) 4 Ind Cas 929 (931) (Lah) *Ram Pershad v Rattan Chand*
5 (1933) A I R 1933 Mad 353 (357) 141 Ind Cas 573 *Srinivasulu Naidu v Ramakrishna Naidu*

statement of existing partnership will not prevent application of this Article)

declaration that the plaintiff retired from the partnership on a certain date and that, so far he was concerned, the partnership was dissolved on that date, and for accounts and a share of the profits found due to him, it was held that the case clearly fell within this Article⁶

The mere fact that there are unrealised assets outstanding at the date of dissolution and at the date of the suit would not alter the character of the suit as one for accounts within the meaning of this Article⁷

3. There must have been a partnership. — Section 4 of the Indian Partnership Act defines "partnership" as follows —

"4 'Partnership' is the relation between persons who have agreed to share the profits of a business carried on by all or any of them acting for all

"Persons who have entered into partnership with one another are called individually 'partners' and collectively 'a firm' and the name under which their business is carried on is called the 'firm name' "

It is in this sense that the word "partnership" in this Article must be understood and interpreted. A family business carried on by a joint undivided Hindu family is not a partnership. Where, however, there is a partition in such family, the members conducting the business further may become partners. In *Kotta Gundayya v Siddappa*,¹ Mr Justice Varadachariar observed as follows

"Where all the property belonging to a joint Hindu family has formed the subject of partition, it is reasonable to presume that any further conduct of business by some or all of the members of the original joint family must be the result of a contract between them, and such contract will, in law, be regarded as one in the nature of a partnership. But where, as in the present case, it is clear that only some properties of the family were divided and other properties belonging to the family including the family trade were not brought into the division at all, the mere fact that even such partial division will in law amount to a division of status between the parties will not justify the view that the mutual relationship of the members to and in respect of the family business which theretofore rested upon status or

(1916) A I R 1916 Lah 410 (411) 32 Ind Cas 833 *Amir Chand v Jawahir Wal* (Do)

(1933) A I R 1933 Mad 353 (357) 114 Ind Cas 573, *Srinivasulu Naidu v Ramkrishna Naidu* (Do)

6 (1918) A I R 1918 Cal 234 (237) 43 Ind Cas 833 *Ka : Das Choudhuri v Dandapat; Sundari Das*

7 (1905) 9 Cal W N 537 (540), *Mohit Lal Dutt v Raj Narain Dutt*

Note 3

1 (1937) A I R 1937 Mad 599 (601) . 173 Ind Cas 124

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birth must thereafter be treated as one resting on contract, so as to involve the notion of a partnership'

It was held in the above case that a suit for accounts of the family business was not one for accounts of a partnership and that it was accordingly governed not by this Article but by Article 120

4. Partnership must have been dissolved at the date of suit. — The Article does not apply unless the partnership has been dissolved¹ A suit for a relief arising out of partnership relationship when such partnership is not dissolved is not governed by this Article² Thus a suit for *dissolution* of a partnership and for accounts is not governed by this Article but would be governed by Article 120³ A suit for a *declaration* that certain persons are partners in a partnership, for the dissolution of such partnership if it should be subsisting and for winding it up if it was dissolved already, is not

Note 4

- 1 (1931) A I R 1934 Bom 491 (493) 154 Ind Cas 680 *Kasturchand Okaji v Hari Govind*
- (1935) A I R 1935 Lah 209 (211) 153 Ind Cas 969 *Bansi Ram v Jagan Nath* (Subsisting partnership—Suit for accounts—No question of limitation arises)
- 2 (1922) A I R 1922 Lah 349 (352) 68 Ind Cas 722 *Hari Chand v Jugal Kishore*
(1897) 1897 Pun Re No 37 Page 170, *Mahraj Mal v Hira Mal*
(1897) 1897 Pun Re No 20 Page 76, *Kapurchand v Narinjan Lal*
(1921) A I R 1921 Cal 538 (539) 66 Ind Cas 811, *Haramohan Poddar v Sudarson Poddar*
(1907) 12 Cal W N 455 (458) *Dwarka Das Karnani v Chuni Lal Daga*
(1931) A I R 1931 All 225 (227) 124 Ind Cas 19, *Mt Basanti Bibi v Babulal Poddar*
- (1020) A I R 1920 Mad 680 (684 685) 58 Ind Cas 969 *Venkayya Naidu v Lakshminarasayya* (Suit for establishment of right as partner in a subsisting partnership)
- (1930) A I R 1930 Lah 378 (379) 120 Ind Cas 613 *Din Muhammad v Kanshi Ram*
- (1917) A I R 1917 Lah 459 (461) 42 Ind Cas 459 *Mani Singh v Dial Singh*
- 3 (1930) A I R 1930 Lah 378 (379) 120 Ind Cas 613 *Din Muhammad v Kanshi Ram*
- (1931) A I R 1934 Bom 491 (491) 154 Ind Cas 690 *Kasturchand Okaji v Hari Govind*
- (1912) 18 Ind Cas 23 (25) (Cal), *Gokul Krishna Das v Shashi Mukhi Das*
- (1933) A I R 1933 Mad 353 (357) 144 Ind Cas 573, *Srinivasulu Naidu v Ramakrishna Naidu*
- (1928) A I R 1928 Rang 160 (162) 6 Rang 198 110 Ind Cas 819 *Khorasany v C Acla*
- (1919) A I R 1919 Mad 833 (839) 48 Ind Cas 89 *Narayanasaamy Mudali v Ganga Thara Mudali* (Though in form a suit for accounts the suit was in substance one for dissolution)
- (1908) 12 Cal W N 455 (458) *Dwarka Das Karnani v Chuni Lal Daga*
[See however (1933) A I R 1933 Nag 127 (130) 29 Nag L R 34 141 Ind Cas 277 *Binjraj v Kisanlal* (Article 106 was held inapplicable because dissolution was not prayed for)]
- (1932) A I R 1932 All 512 (519) 54 All 916 143 Ind Cas 230 *Shukrulla v Mt Zohra Bibi* (Article assumed to apply to a suit for dissolution of partnership—The observation was obiter)]

one governed by this Article ⁴

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5. The suit must be one for accounts and share of profits.—The words “for an account and a share of the profits of a dissolved partnership” must be taken to apply to every suit in which the plaintiff claims an account of the general partnership property and his share in the same and its profits ¹ Where a suit for an account is barred under this Article, a subsequent suit for a relief which the plaintiff would not have been entitled to without an account being taken and a finding being given as to the share of the profits, is also barred ² Thus, a suit for possession of a share in property alleged to have been partnership property will be barred if a suit for accounts would be barred on that date ³

But a suit in respect of a matter which is not, and has not become, an item of partnership account, is not governed by this Article Thus, where it was agreed between the partners that each of them may borrow on his individual credit and pay the money into the business and, in respect of one such borrowing a decree was obtained by the creditor against the borrowing partner and the latter paid the decree amount and then sued the other partners for contribution in respect of that item, it was held that the suit was maintainable without a prayer for adjustment of accounts ⁴ In the undermentioned case ⁵ where a suit for contribution was filed by one partner against the others in respect of a debt contracted by the partners and paid by the plaintiff, it was held that the suit was maintainable It was observed that a suit for contribution would be maintainable where the liability is not the joint liability of the entire partnership or where the said partners were only some of the partners comprising the entire partnership and the bond was not executed in the usual course of business of partnership, or where the co partners expressly promised to contribute their share of the debt after a decree was passed thereon

A suit for a declaration that a certain property, attached in execution of a decree against one of the partners as belonging solely to him is not solely owned by him and that the plaintiff has got

4 (1881) 4 All 137 (1880) 18 Q 111 35 87 7 Ind Jur 256 *Harrison v Delhi and London Bank*

Note 5

1 (1910) 8 Ind Cas 922 (1014) 1910 Pun Re No 97 *Mt Nihal Devi v Kishore Chand*

2 (1908) 30 All 279 (281) 5 All L Jour 275 1908 All W N 131, *Niaz Ahmad v Abdul Hamid*

3 (1908) 30 All 279 (281) 5 All L Jour 275 1908 All W N 131 *Niaz Ahmad v Abdul Hamid*

(1911) 11 Ind Cas 288 (289) (All) *Gobardhan v Ganesh Lal* (30 All 279, Followed)

4 (1899) 26 Cal 254 (266) 3 Cal W N 222 *Durga Prasad Das v Nath Dass*

5 (1899) 26 Cal 262n (264n) *Gudra Kulkarni v Jeyram Das*

[See however (1892) 18 2 Pun Re No 32 *Mysa Singh v Guresh D. II.*]

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a share in it, is not one for accounts or for a share of the profits of a dissolved partnership⁶

A suit for recovery of money found due to the plaintiff by the defendant as declared by a prior judgment between the parties in a suit for accounts of a dissolved partnership, is not one "for accounts" such as is contemplated by this Article⁷

6. Settlement after dissolution.—It is open to the parties to a partnership to come together and agree to an account themselves even after the expiry of three years from the date of dissolution, and such a settlement would be supported by consideration inasmuch as all the partners make mutual promises to abide by such settlement. In *Rochi Ram v Faizullah Khan*,¹ their Lordships of the Privy Council observed as follows

"The only other point that was raised was that there was no consideration for such a settlement because it is said that Article 106, Limitation Act, provides a period of limitation for suits for an account and share of profits of a dissolved partnership, the period of limitation being three years, and that the time from which the period begins to run is the date of the dissolution, and inasmuch as this settlement was arrived at more than three years from what is said to be a dissolution of the partnership, namely the determination of the joint adventure, it is said that the partners had only agreed to settle something which they were not bound to account for. In fact this seems to be due to a misapprehension of the law in respect of consideration. It may be true, and their Lordships say nothing on that point one way or the other, that one partner could only have asked an account under Article 106 within three years of March 1920, but that has no bearing at all upon the question when in fact they have come together and have agreed to an account between themselves and have made mutual promises to abide by such settlement. There is ample consideration in such a case for the promise given by each partner in the mutual promises made by the other partners, and the fact, if it be a fact, that they could not have sued originally for an account, seems to have nothing to do with the situation which arises when they do meet together and agree that an account shall be taken and make mutual promises upon that footing."

Where therefore the partnership accounts have been settled and adjusted between the parties, a suit to recover the amount due on the basis of such settlement is not a suit for accounts or for a share of the profits of a dissolved partnership, this Article does not apply

6 (1933) A I R 1933 All 926 (928) 148 Ind Cas 515, *Ananda Prasad v Bhagwant Prasad*

7. (1934) A I R 1934 Mad 665 (667) 156 Ind Cas 261, *Rathan Chand v Amichand*.

Note 6

1. (1933) A I R 1933 P C 129 (121) 142 Ind Cas 549 (P C)

to such a case² Thus, where after dissolution of a partnership an agreement was entered into by the partners that two of them should collect outstanding and pay off liabilities and that thereafter all the partners should share the balance equally, it was held that a suit for accounts based on the agreement was not governed by this Article³ Similarly, where a partnership was dissolved and accounts settled and under the arrangement of settlement provision was made for the discharge of debts and the division of outstandings and immovable properties, it was held that a suit for division of properties as per the settlement was not governed by this Article⁴

7. Suit for share in specific amounts received by one partner after dissolution.—*A, B and C are partners. A dies and the partnership is dissolved. Afterwards B receives a certain sum of money being an item of the partnership assets from a debtor to the firm. C sues for a share of this item within three years of the receipt thereof but beyond three years of the date of dissolution. Is the suit barred?* It was held in some cases,¹ purporting to follow the English case of *Knox v Gye*,² that the suit was not barred on the ground that it was based on fresh cause of action. A contrary view was held in the undermentioned cases³ The question has now been set at rest by the decision of their Lordships of the Privy Council in *Gopala Chetty v Vijayaragavachariar*⁴ It was held in that decision that such a suit was barred and that the receipt of the items after dissolution did not furnish any fresh cause of action

- 2 (1922) A I R 1922 Lah 425 (425) 3 Lah 326 69 Ind Cas 502 *Nand Lal v Partab Singh*
 (1934) A I R 1934 Mad 665 (666) 156 I C 264, *Rathan Chand v Amichand*
 (1928) A I R 1928 Lah 459 (460) 103 Ind Cas 600, *Jai Ram Singh v. Sardari Mal*
 3 (1931) A I R 1931 Lah 300 (301) 134 Ind Cas 527, *Rup Lal v Gian Chand*
 4 (1936) A I R 1936 Mad 133 (135) *Thirumallappa v Alasyam Ramappa*

Note 7

- 1 (1875) 12 Bom II C R 97 (107) *Diyal Joraj v Khatav Ladda*
 (1892) 6 Bom 629 (635) *Mervanji Hormazji v Rustumji Burjorji*
 (1895) 20 Bom 15 (35) *Ficell Cornac v Coculdas Sobhanmull*
 (1914) A I R 1914 Mad 295 (295) 22 Ind Cas 917, *Chinn Kondiah v Narasappa Nairu* (28 Mad 344 and 3 Ind Cas 486 Followed)
 (1909) 3 Ind Cas 456 (457) 32 Mad 203 *Sadhu Narayana Ayyangar v Ramaswami Ayyangar*
 (1904) 29 Mad 344 (347) *Sollanadha Iannimundar v Sollanadha*
 2 (1871) 42 L J Ch 234 (244) L R 5 H L 656
 3 (1907) 1 Sind L R 169 (170) *Verkomal Sabalmal v Gobindram Ramdas*
 (1910) 8 I C 993 (1013) 1910 Pan R. No. 97, *Nihal Dey v Kishore Chand*
 [See also (1909) 4 Ind Cas 837 (839) 34 Bom 315 *Armed Soc Co v Bhajandas Ramdas & Co*]
 4 (1922) A I R 1922 P C 115 (115 119) 45 Mad 373 49 Ind App 1-1 74 Ind Cas 621 (P C)
 [See also (1924) A I R 1924 Nag 2 3 (2 3) 25 Nag L R 49 75 Ind Cas 120 *Seh Ramchand v Prayagdas*]

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Their Lordships observed as follows

'At any rate, in all cases where for any reason it did occur that after the dissolution and complete winding up of a partnership an asset which had not been taken into account fell in it ought to be divided between the ex-partners or their representatives according to their shares in the former partnership

"If, on the other hand, no accounts have been taken and there is no contest that the partners have squared up, then the proper remedy where such an item falls in is to have the accounts of the partnership taken and if it is too late to have recourse to that remedy, then it is also too late to claim a share in an item as part of the partnership assets, and the plaintiff does not prove, and cannot prove, that upon the due taking of the accounts he would be entitled to that share'

8. Suit between partner and sub-partner. — The Article deals with suits between partners *inter se*, and the words construed in their plain and natural sense do not apply to actions between a principal partner and his sub partner. Where a partner had to bear a share of the loss sustained in the main partnership and sued his sub partner for the latter's share of such loss, it was held that this Article did not apply on the ground that the suit was not one for an account or for a share of profits of the dissolved partnership¹

9. Second partnership after dissolution of first.—Suit for account of second partnership.—Accounts of first partnership, if can be gone into. — Where a partnership is dissolved as for example by the death of one of the partners, but the partnership business is carried on by the other partners in partnership, and, after the dissolution of the second partnership also, a suit is filed for an account and a share of the profits of the second partnership, can the accounts of the first partnership also be gone into, notwithstanding that a suit for accounts of the first partnership alone would have been barred by limitation on the date of the suit? The leading English case on the point is *Betjemann v Betjemann*¹ In that case G and his two sons J and W carried on business in partnership from 1856 to 1886 G died but the accounts were not settled but J and W carried on business as partners without winding up the other partnership and without settling accounts In 1893 J died and his legal representative brought a suit for account of the partnership between J and W from 1893 W claimed the account of the old partnership to be taken from 1856 Lindley, L J, in dealing with the point observed as follows

Note 8

- 1 (1934) A I R 1934 Mad 12 (13) 57 Mad 347 148 Ind Cas 204 *Seenayya v Ramalingayya* (Article 120 applies)

Note 9

- 1, (1893) 44 W R (Eng) 182 (182, 183) (1895) L R 2 Ch 474 61 L J Ch 611
12 R 435 73 L T 2

"Now the learned Judge has directed the account from 1886, and he has dismissed, without costs, the counter-claim of the surviving partner for the account from an earlier time, and the question on the appeal is whether the learned Judge is right upon that. In my opinion he is wrong. There is no doubt that in 1886, when the father died, there was a partnership of the three which determined

"Ooe died, and, to use the expression of one of the witnesses, the other two sons went on as before, minus one. That is quite true, and there is no doubt now, after the decision of the House of Lords in *Knox v Gye* [(1871) 5 H L 656] that the executors of the father George who had died could set up the Statute of Limitations to an action for an account which was brought more than six years after his death. They did not do anything of the sort. The Statute of Limitations is set up by the plaintiff. But who is the plaintiff? The plaintiff is the executor of John, and John and William, the two sons, although, of course, they continued the partnership business, it was in point of law a different partnership—namely a partnership between two. They continued the partnership account as one account, and never broke it and never wound it up, they brought in all the balances and carried on the balances at the bankers, carried on the ledgers, and carried on the account without a break.

"Now, as between persons who deal with each other upon that footing, I fail to see that the Statute of Limitations has any application whatever. Notwithstanding, therefore, that the partnership was determined between the three and that there was a new partnership between the two, there was no break in the account and the account was never brought to an end."

The principle of the decision in *Bejemann's case*¹ has been followed in this country also in a number of cases.^{2a} In *Ahinsa Bibi v Abdul Kader Sahib*,³ it was held that if after one partnership comes to an end the other partners continue the business, for the purpose of ascertaining what shares those remaining partners brought into the new partnership, an account may have to be taken of the old partnership and that there will be no question in such a case, inasmuch as the account of the old partnership is taken, not for the purpose of enforcing the claim to the money due as profits in that partnership, but for the purpose of ascertaining what the capital supplied by the continuing partners was to the new partnership. See also the undermentioned cases to the same effect.³

1a See the cases cited in Foot note (3)

2 (1901) 25 Mad 26 (31)

3 (1924) A I R 1924 Mad 70 (702) 80 Ind Cas 37. *Abdul Jaffer Sahib v Venugopal Chettiar*

(1914) A I R 1914 Lah 517 (520) 1914 Pnn Re No 101 2nd Ind Cas 62, *Maharaj Kishan v Har Gopal*

(1912) 13 Ind Cas 23 (25) (Cal) *Goldi Krishna Das v Shashi Mohan Das*.

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10 Suit by assignee or successor of partner. — A suit by the assignee of a partner¹ or his successor-in interest² for accounts and for a share of the dissolved partnership will be governed by this Article

11. Suit against deceased partner's heirs.—Where a partner ship was dissolved on the death of the partner and it is sought to make the sons of the partner liable for debts due from him as a member of the partnership, the suit would be governed by this Article and would be barred after three years from the date of dissolution¹

12. Registered partnership deed. — It was held by the High Court of Madras in the undermentioned case¹ that a suit for accounts of a dissolved partnership would be barred under this Article after three years from the date of dissolution, even if the deed of partnership has been registered. But where, after a registered partnership agreement expressly providing that each party should bear the losses in proportion to his share, the parties settled accounts and found the loss to be Rs 45,000, and the plaintiff sued the defendant for recovery of the latter's share of the loss which the plaintiff had to pay, it was held by the same High Court that the obligation on which the suit was brought was the settlement in pursuance of the registered contract of partnership and that therefore the suit was governed by Article 116². In *Kothandapani v. Manavedan*,³ it was held that a suit for accounts was not a suit for compensation for the breach of any contract and, in that view, Article 116 did not apply to the case but only Article 106. A similar view has been taken by the Judicial Commissioner a Court of Nagpur⁴

13. Starting point.—Time runs under this Article from the date of the dissolution of the partnership¹. The question whether

(1929) A I R 1929 Sind 230 (233) 118 Ind Cas 741 *Munshilal Amannagh v. Bishenlal Dattaram* (25 Mad 26, 4 Ind Cas 600 44 W R (Eng) 182 Followed)

(1924) 46 Mad L Jour 7 (7) (Notes of Recent Cases)

Note 10

1 (1925) A I R 1925 Dom 317 (349) 87 Ind Cas 312, *Dhanaji v. Gulabchand* (Assignment itself does not operate as a dissolution)

2 (1934) A I R 1934 Mad 665 (665) 156 Ind Cas 264, *Rathan Chand Kumari v. Ami Chand* (Undivided brother of deceased partner)

Note 11

1 (1936) A I R 1936 Lah 514 (519), *Ahanhaya Lal v. Firm Devi Dayal Brij Lal*

Note 12

1 (1893) 22 Mad 14 (14) 8 Mad L Jour 151, *Vairatan Asari v. Ponnayya*

2 (1891) 14 Mad 465 (466) 1 Mal L Jour 482 *Ranga Reddi v. Chinna Reddi*

3 (1931) A I R 1931 Mad 162 (165) 57 Mad 378 151 Ind Cas 81

4 (1933) A I R 1933 Nag 127 (130) 29 Nag L R 91 141 Ind Cas 277, *Dinjraji v. Kishinlal*

Note 13

1 (1921) A I R 1921 All 411 (413) 63 Ind Cas 549, *Dhagwati Pershad v. Babu Lal*

and when a partnership has been dissolved must be decided with reference to the provisions of the Partnership Act, Sections 39 to 44, and to the facts and circumstances of the particular case. See also the undermentioned cases²

The time may, however, be extended by the application of Sections 4 to 25 of the Act where the circumstances rendering such provisions applicable exist in any particular case

14. Onus of proof. — Where a suit is *prima facie* barred, it is for the plaintiff to allege in his plaint the ground upon which exemption is claimed from the law of limitation¹. Where the plaintiff alleges dissolution within three years of the suit, or alleges that the partnership is not dissolved at all till the date of suit, the *onus* is on the defendant to prove that the dissolution was beyond three years of the suit²

15. Second appeal. — The question as to when a partnership was dissolved is a question of fact which is binding in second appeal¹

(1902) 25 Mad 26 (32), *Ahinsa Dibi v Abdul Kader Sahab*

(1901) 25 Mad 149 (103) 11 Mad L Jour 353 *Sudarsanam Maistri v Narasimhalu Maistri* (Suit after three years of termination of partnership would be barred)

(1909) 4 Ind Cas 837 (839) 34 Bom 515 *Ahmed Sooleman Juxani v Bhagandas Firam & Co*

(1930) A I R 1930 Sind 148 (150) 120 Ind Cas 746 *Hansraj Mal v Somjimal* (Death of partner dissolving partnership within three years of suit — Not barred)

(1919) 19 Ind Cas 513 (514) 36 Mad 185 (P.C.), *Joopody Sarayya v Lakshmanaswamy* (Suit after three years of dissolution is barred)

(1923) A I R 1923 P O 136 (139) 50 Ind App 192 4 Lah 350 74 Ind Cas 462 (P.C.) *Mt Jaiti v Banwari Lal*

(1917) A I R 1917 Mad 352 (352) 32 Ind Cas 427, *Ramanathan Chetty v Yegappa Chetty* (Death of manager of Hindu family who was a partner with others — Partnership is dissolved)

2 (1921) A I R 1921 P O 91 (92, 93) 57 Ind Cas 713 (P.C.), *Krishnamachariar v Sankara Sah* (Partnership not dissolved by one partner refusing to perform the duty undertaken by him)

(1925) A I R 1925 All 787 (793) 47 All 756 89 Ind Cas 122, *Chunna Lal v Sheo Charan Lal* (Partnership not dissolved by one partner neglecting duty)

Note 14

[1 (1910) 8 Ind Cas 972 (1011) 1910 Pan R. No 97, *Mt Nihal Dera v Kuthora Chand*

2 (1917) A I R 1917 Lah 453 (461) 42 Ind Cas 453, *Mans Singh v Dyal Singh*

(1930) A I R 1930 Lah 378 (379) 120 Ind Cas 613 *Din Muhammad v Kanhai Fara.*

Note 15

1. (1929) A I R 1929 Lah 154 (155) : 112 Ind Cas 375, *Fazlur Rahman v. Fazl Khan*

Article 107

107.* By the manager of a joint estate of an undivided family for contribution, in respect of a payment made by him on account of the estate.	Three years.	The date of the payment.
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Synopsis

1. Legislative changes.
2. Scope of the Article.
3. Starting point.
4. Claim barred under this Article, if can be taken into account in adjusting equities in subsequent partition

1. Legislative changes.

1 There was no provision corresponding to this Article in the Act of 1859, but suits of the kind referred to in this Article were held governed by clause 16 of Section 1 of that Act, under which the period of limitation was six years from the accrual of the cause of action. The date of payment was held in such cases to be date of the cause of action¹

2 Article 107 of Act 9 of 1871, corresponding to this Article, ran as follows — "By a Hindu manager of a joint estate for contribution in respect of a payment made by him on account of the estate," but Act 15 of 1877 changed it into its present form by substituting for the words "By a Hindu manager of a joint estate," the words "By the manager of a joint estate of an undivided family," thus enlarging the scope of the Article so as to cover suits by "managers of non-Hindu families who are governed by Hindu law by custom" (See the undernoted case²)

* Act of 1877, Article 107

Same as above

Act of 1871, Article 107

107 — By a Hindu manager of a joint estate for contribution in respect of a payment made by him on account of the estate	Three years	The date of the payment
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Act of 1859

No corresponding provision

Article 107 — Note 1

1. (1869) 12 Suth W R 191 (195) - G Beng L R App 103, *Ram Kris'io Roy v Muddun Gopal Roy*
2. (1917) A I R 1917 Bom 254 (255, 257) 41 Ind Cas 761 41 Bom 559 (F B) *Isap Ahmad Mograria v. Abhramji Ahmadji Vegraria*

on the effect of a similar amendment of Article 127 by Act 15 of 1877)

Article 107
Notes
1—3

3 The present Article is a re enactment of Article 107 of Act 15 of 1877

2. **Scope of the Article.**—Article 61 is a *general* Article applicable to suits for the recovery of money paid by the plaintiff for the defendant¹ It has been seen already in the Notes to Articles 81, 82 and 83 that those Articles form parts of a series of *particular* Articles specifying various situations in which money is paid by the plaintiff for the defendant This Article is yet another instance of such particular Articles, and applies to suits for contribution by the *manager of a joint estate of an undivided family*, in respect of payments made by him *on account of the estate* This right to contribution arises from the *implied authority* of a manager under the Hindu law to incur expenses for the benefit of the family²

The Article does not apply unless at the time of the suit the plaintiff is the manager of the joint estate of an *undivided family* A suit for contribution by a person who *was* such a manager brought after partition is not one within this Article, Article 61 may apply to the case³

Where a case falls within this Article as well as under Article 99 *ante* the latter will prevail over the former Thus, where a manager such as is referred to in this Article sues for contribution in respect of a payment made by him for discharging a *joint decree* against himself and the other members of the family, or for discharging the *revenue* due by the family estate, the Article applicable would be Article 99 and not this Article⁴ The reason is that the former is a specific Article and will, according to general principles, prevail over the latter

3. **Starting point.**—The general principle in all suits for contribution is that the cause of action accrues only on the date when the amount in respect of which contribution is claimed is *paid*¹ A manager's right to contribution will arise only when the

Note 2

1 See Notes to Article 61, *ante*

2 Mulla's Hindu Law, 8th Edition, Page 470

3 (1898) 8 Mad L Jour 271 (272), *Tirupatiraju v Rajagopala Kristnama Razu*

(1890) 5 Cal 321 (325) 5 Ind Jur 135 *Sunkur Pershad v Gours Pershad* (Article 59 of the Act of 1871 corresponding to Article 61 of the present Act held to apply)

4 (1931) A I R 1931 All 652 (653) 134 Ind Cas 452 *Sat Rohan Prasad v Bharat Prasad*

Note 3

1 (1869) 12 Suth W R 194 (195) 6 Beng L R App 103, *Ram Kristo Roy v. Muddun Gopal Roy*

(1870) 14 Suth W R 490 (491) 6 Beng L R App 101, *Bimola v Soonduree Dabee*

Article 107
Notes
3-4

payment is made *on account of the estate*, for, it is only then that the other members of the family are liable to contribute

Where the manager borrows money in his *private capacity* and expends the same for the benefit of the estate, "the payment on account of the estate" can be said to be made only when he *expends* the money and not when he subsequently repays the loan borrowed by him² The reason is that the loan is the manager's personal concern and the repayment thereof is not a payment on account of the estate. But, where a debt is incurred by a person *as the manager* of the family and the amount is spent for the estate, the debt is not merely a personal concern of the manager but is binding on the estate itself. Its discharge at a subsequent date will thus be a payment on account of the estate and time will run from the latter date³

4. Claim barred under this Article, if can be taken into account in adjusting equities in subsequent partition. — Where the manager sues for partition after his right to contribution in respect of certain money expended by him on account of the estate is barred under this Article, it has been held that he is not entitled to set off this amount in adjusting the equities between the parties. In *Vellayappa v Krishna*,¹ Sadasiva Aiyar, J, observed as follows

"I do not think that, where a statute law (in this case Article 107, Limitation Act) expressly treats a debt due even to the manager of the joint Hindu family as one to be sued for by him just as if he was a complete stranger and, if not, to have his remedy barred, it is permissible (apart from an agreement, express or implied) to defeat the intention of the Legislature by allowing it to be treated as an item of account or as a debt to be discharged from the joint family funds when partition takes place, it may be, after several years. Of course, the creditor member of the family, whether a manager or a junior member, may, before his debt is barred, take it out of any family money

(1880) 5 Cal 321 (325) 5 Ind Jur 135 *Sunkur Pershad v Gouri Pershad*
(1893) 20 Cal 18 (22), *Aghore Nath Mukhopadhyaya v Grish Chunder Mukhopadhyaya*.

2 (1869) 12 Suth W R 194 (195) 6 Beng L R App 103, *Ram Kristo Roy v Muddun Gopal Roy*

(1893) 20 Cal 18 (22) *Aghore Nath Mukhopadhyaya v Grish Chunder Mukhopadhyaya* (This Article was not however applied as the suit was after partition)

[See also (1931) A I R 1931 All 652 (652) 134 Ind Cas 452, *Sat Palan Prasad v Dharat Prasad*]

3 (1931) A I R 1931 All 652 (652) 134 Ind Cas 452, *Sat Palan Prasad v Dharat Prasad* (This Article was however not applied because the case came under the special Article 99)

Note 4

1. (1915) A I R 1915 Mad 258 (261, 262) 44 Ind Cas 423

which came to his hands before his debt is barred, but he cannot do it after his claim for recovery is barred'

Article 107
Note 4

108.* By a lessor for the value of trees cut down by his lessee contrary to the terms of the lease.	Three years.	When the trees are cut down.
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Article 108

Synopsis

1. Scope of the Article.
2. Starting point.

1. *Scope of the Article.*—The wording of the Article makes it clear that it is applicable to suits on a *breach of contract* not to cut trees Where there is no contract by which the lessee has bound himself not to cut trees, a suit for the value of the trees cut by him is it is conceived, not within this Article Where a tenant is entitled to cut trees but is not entitled to remove them, a suit by the landlord for compensation for the *removal* of such trees is not one within this Article but will be governed by Article 48 or Article 49¹

The suit contemplated is one for the *value of trees cut down* by the lessee Where under the Malabar law the landlord has a right to deduct the value of trees cut down by the *kanom* tenant from the value of improvements that may be claimed by such tenant, a claim by the landlord that, in the taking of accounts between himself and his tenant, the value of the trees so cut should be debited against the tenant's claim for improvements, is not a claim "for the value of the trees cut down" and not governed by this Article²

2. *Starting point.*—The general rule, in cases of breaches of contract, is that limitation runs from the date when the *contract is broken*¹ It has been seen already that this Article refers to a suit for a breach of contract not to cut trees Time, accordingly, has been

* Acts of 1877 and 1871

Same as above

Act of 1859

No corresponding provision

Article 108 — Note 1

1 (1909) 2 Ind Cas 955 (956) (Cal) *Mahomed Hamidar Rahman v Ali Fakir*

2 (1915) A 1 R 1915 Mad 491 (491, 492) 25 Ind Cas 704 *Kelu Kurup v Kunha mina*

Note 2

1 (1865) 3 South W R S C C Ref 9 (10), *Pajah Indooobaccun Deb Poy v Thon as J. Kenny*

Article 108
Note 2

made to run from the date when the trees are cut down. The date when the plaintiff obtains knowledge of the fact that the trees have been cut or the date of the termination of the lease is not the starting point of limitation in such cases.²

Article 109

109.* For the profits of immoveable property belonging to the plaintiff which have been wrongfully received by the defendant.	Three years.	When the profits are received.
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Synopsis

1. Legislative history.
2. Scope of the Article.
- 2a. "Wrongfully received."
3. Suits between co-owners for profits.
4. Suite for mesne profits between members of joint Hindu family.
5. Suite for profits by the cestui que trust against trustee de son tort.
6. Suite between mortgagor and usufructuary mortgagee for profits.
7. Suits between lessor and lessee.
8. Dispossession of plaintiff under decree or order subsequently set aside—Suit for profits.
9. Suit by minor for profits.
10. Claim for mesne profits in suits for possession.
11. Applications for ascertainment of mesne profits.
12. Application for profits in insolvency proceedings.
13. "Profits."
14. "Immoveable property."
15. "Belonging to the plaintiff."
15. Starting point of limitation.
17. Application for restitution.

* Act of 1877, Article 109

Columns one and two, same as above, column three was — When the profits are received, or, where the plaintiff has been dispossessed by a decree afterwards set aside on appeal, when he recovers possession

*Other Topics***Article 109
Note 1**

Applicability of Article — Conditions	See Note 2
Profits attached to office of village Joshi	See Note 14 Pt 1
Suit for mesne profits	See Note 2
Suit for profits and suit for damages	See Note 13 Pts 4 & 5

1 Legislative history

- Under the Act of 1859 suits of the kind referred to in this Article were held governed by the general clause 16 of Section 1 of that Act under which the period of limitation was six years from the date the *cause of action* arose¹
- The Act of 1871 for the first time introduced a specific Article corresponding to this Article, and the starting point was the date when the profits were received or *where the plaintiff had*

Act of 1871, Article 109

Columns one and two same as above Column three was — When the profits are received or where the plaintiff has been dispossessed by a decree afterwards set aside on appeal, the date of the decree of the Appellate Court

Act of 1859

No corresponding provision

Article 109 — Note 1

- (1864) 1 Suth W R 85 (66) *Lalla Gobind Suhaye v Monohur Misser*
- (1866) 8 Suth W R 78 (78) *Balum Bhutt v Bhooban Lal*
- (1867) 7 Suth W R 173 (173) *Muneeram v Sreemuthy Turungo*
- (1864) 1 Suth W R 83 (84) *Baboo Ram Surun Singh v Baboo Gooroo Bayal Singh*
- (1870) 14 Suth W R 82 (82) *Luckhee Kant Doss v Been Dayal Doss* (In a suit for mesne profits where a party is dispossessed of immovable property the cause of action accrues on the date on which the plaintiff would but for the fact of dispossession have received such mesne profits)
- (1865) 3 Suth W R 13 (13) *Baboo Issureenund v Parbulty*
- (1865) 3 Suth W R 38 (38) *Maharaj Koer Ramaput Singh v J Furlong* (The cause of action for mesne profits is the date on which they become annually due)
- (1866) 6 Suth W R 113 (114) *Fuzul Mahomed Mundul v Ray Coomaree Debee*
- (1874) 92 Suth W R 126 (127) *Thakoor Das Roy v Nobin Krisho Ghose*
- (1869) 12 Suth W R 5 (6) 3 Beng L R App 81 *Pratab Chandra Binwa v Rani Swarna Mays*
- (1865) 3 Suth W R 68 (69) *Ekbai Ali Khan v Kalee Pershad* (The date of dispossession is the date when the cause of action arises in suits for mesne profits)
- (1870) 5 Beng L R App 61 (61) *Lallah Kant Das Chowdhury v Ram Dayal Das*
- (1868) 10 Suth W R 486 (486) 2 Beng L R (S V) 16 *Bygnath Pershad v Badhoo Singh*
- (1872) 17 Suth W R 203 (203) *Thaloor Das Acharjee Chukerbuty v Shoshee Bhoosur Chatterjee*
- (1873) 19 Suth W R 87 (87) *Chowdhry Wahed Ali v Jumaye*
- (1864) 1864 Suth W R (Special Number) 163 (164 165) (F B) *Unnoda Gobind Chowdhry v Ranees Surnomaye*
- (1881) 1881 All W N 71 (71) *Durga Prasad v Cheta*

Article 109
Notes
1—2a

been dispossessed by a decree afterwards set aside on appeal, the date of the decree of the Appellate Court

3 In Article 109 of the Act of 1877, the words "when he recovers possession" were substituted for the words "the date of the decree of the appellate Court" which occurred in the third column of Article 109 of the Act of 1871

4 The words "or where the plaintiff has been dispossessed by a decree afterwards set aside on appeal, when he recovers possession" have now been deleted

2. Scope of the Article.—In order that this Article may apply, the following conditions must be satisfied

(i) The property in respect of which profits are claimed should "belong to the plaintiff"

(ii) The profits should have been *actually received* by the defendant

(iii) Such receipt should have been *wrongful*

The "profits" referred to in this Article is not identical with "mesne profits" which is defined in Section 2 sub section 12 of the Civil Procedure Code, as meaning "those profits which the person in *wrongful possession* actually received or *might with ordinary diligence have received therefrom*" etc

This Article will apply to a suit for profits *wrongfully received* by the defendant even though he is not in *wrongful possession*, but the suit is not for 'mesne profits' ¹ On the other hand, a suit for profits, which *might with ordinary diligence have been received* by the defendant in *wrongful possession* is a suit for "mesne profits" but is not governed by this Article ²

A suit for profits *actually* wrongfully received by the defendant in *wrongful possession* is a suit for "mesne profits" and will also be governed by this Article It is in this sense that a suit for mesne profits may be said to be governed by this Article

2a. "Wrongfully received."—In *Hollonay v. Guneshwar Singh*¹ it was held by the High Court of Calcutta that the words

Note 2

1 (1924) A I R 1924 Lah 738 (741) 79 Ind Cas 687, *Ragho v. Dwarka Das* (Mesne profits can be claimed only against the person who is in actual possession)

(1921) A I R 1921 Pat 102 (102) 61 Ind Cas 754 - 6 Pat L Jour 166 *Damodar Narain v. S. A. Miller* (Trespasser's liability arises only from the date of his possession)

2 (1910) 8 Ind Cas 162 (163) 34 Mad 502 *Pamasamy Reddi v. Authi Lakshmi Ammal*

Note 2a

1 (1903) 3 Cal L Jour 192 (186)

"wrongfully received" must be confined to cases where the possession of the defendant against whom profits are claimed *originated in a wrongful act*. This view has been dissented from by that High Court itself in a later case,² and by the other High Courts also.³ According to the High Court of Madras,⁴ the said words include receipt of profits under a claim or title *that cannot be legally substantiated*. The absence of *mala fides* on the part of the defendant will not make the receipt any the less wrongful.⁵ The receipt of profits by an alienee from a Hindu widow after her death where the alienation is set aside⁶ or by a licensee after the expiry of the period of the licence, would be a wrongful receipt of the profits.⁷ The receipt of profits by a *trespasser* would, of course, be wrongful.⁸

Where an insolvent had, within two years of his adjudication as insolvent sold his property and the sale was set aside by the Insolvency Court as null and void and subsequently the receiver sued for the profits received by the purchaser, it was held by the High Court of Bombay⁹ that in the event of the sale being set aside the receipt of profits by the purchaser must be considered to have always been wrongful within the meaning of this Article. On the same principle the receipt of the profits by the defendant while in possession under a decree or order of Court which is subsequently set aside on appeal or in a separate suit, would be wrongful within the meaning of this Article. See Note 8, *infra*.

Where the defendant has received the profits *rightfully*, this Article has no application. A compromise between A and B provided that A would be entitled to all the rents and profits accruing in respect of the properties as from 20th July 1928. A list of rent fell due on 29th September 1928 but B had collected it in advance even before 20th July 1928. A sued B for recovery of the rent collected. It was held that it could not be said that B's collection before 20th July 1928 was wrongful and that this Article did not therefore apply.¹⁰

2 (1918) A I R 1918 Cal 360 (362) 43 Ind Cas 761 *Saraj Ranjan Chowdhury v Prem Chand Chowdhury*

3 See the cases cited in Note 8 *infra*

4 (1915) A I R 1915 Mad 1133 (1134) 28 Ind Cas 85 *Rangasamy Kavundan v Alagayammal* (Dissenting from 3 Cal L Jour 182)

5 (1868) 10 Suth W R 486 (487) 2 Beng L R (S N) 16 *Bygnath Pershad v Badhoo Singh*

6 (1935) A I R 1935 Oudh 515 (517) 157 Ind Cas 960 11 Luck 435, *Bharat Singh v Gur Pershad Singh*

7 (1936) A I R 1936 Pat 362 (369) 163 Ind Cas 525 *Bengal North Western Ry Co Ltd v Janki Prasad* (Plaintiff being the Government, Article 149 was, however, applied)

8 (1931) A I R 1931 Pat 114 (128 129) 121 Ind Cas 337 *Chattri Kumari Devi v Mohan Bikram Shah*

9 (1938) A I R 1938 Bom 153 (159) 173 Ind Cas 506 I L R (1938) Bom 107, *Dullabhbhai v Gulabhbhai*

10 (1937) A I R 1937 Pat 237 (239) 16 Pat 184 163 Ind Cas 502 *Ram Ran Bijaya Prasad v Harishar Prasad*

Article 109
Note 3

3. Suits between co-owners for profits. — Where a co sharer of property is excluded from enjoyment thereof by the other co sharers he can recover from them his share of the profits received by them¹ But in such cases neither condition (i) nor condition (ii) mentioned in Note 2 *ante*, can be said to exist. The first condition does not exist as the property does not belong to the plaintiff alone but to both plaintiff and his co sharers. The third condition is not satisfied as the defendant's receipts cannot be said to be "wrongful". The wrong in such cases lies, not in receiving the profits, but in withholding the same from the defendant afterwards. The proper conception of a co sharer's claim for his share of profits is that it is one for *compensation* for wrongful exclusion. It has therefore been held in the undermentioned cases² that such suits are not governed by this Article but fall under Article 120. This view is also in accordance with the decision of their Lordships of the Privy Council in *Midnapore Zamindari Co v Naresk Narain*³ applying Article 120 to such suits. The undermentioned cases,⁴ which hold the view that Article 62 applies to such suits, do not appear to be correct.

It is however, only to suits for profits, relating to the period during which the co ownership lasts, that this Article will not apply. After an *actual* partition, the relationship of co owners ceases, and a suit for profits thereafter would be governed by this Article. But a mere decree for partition, so long as it is not executed

Note 3

- 1 (1925) A I R 1925 Nag 240 (242) 83 Ind Cas 86 *Mt Bhagat v Bheosen*
(1924) A I R 1924 P C 144 (146) 51 Cal 631 51 Ind App 293 80 Ind Cas 827 (P O), *Midnapore Zamindari Co Ltd v Naresk Narayan Roy*
(1922) A I R 1922 Mad 150 (156 157) 45 Mad 648 71 Ind Cas 177 (F B) *Perulala v Perukola*
- 2 (1935) A I R 1935 Mad 731 (734) 156 Ind Cas 640 *Siddalingana Goud v Tatanagowda Bhupana Goud*
(1896) 23 Cal 799 (804) *Robert Watson & Co v Ravi Chand*
(1925) A I R 1925 P C 93 (93) (P O) *Midnapore Zamindari Co Ltd v Kumar Naresk Narayan* (Read with A I R 1924 P C 144 (150))
(1933) A I R 1933 Lah 951 (952) 147 Ind Cas 909 *Kidar Nath v Shiv Dyal*
(1937) A I R 1937 Iesh 28 (30) 168 Ind Cas 41 *Ayub Khah v Akram*
(1928) A I R 1928 Nag 65 (65) 105 Ind Cas 777 *Budhlal v Mokham Chand*
(1923) A I R 1923 Nag 229 (229) 72 Ind Cas 45 *Bhagirathi Das v Kesho Canapaiprao*
(1916) 32 Ind Cas 102 (103) (Lab) *Khadim Hussain Khan v Murad Bibi*
(1891) 1891 All W N 71 (71) *Durga Prasad v Chet*
- 3 (1925) A I R 1925 P C 93 (93) (P C)
- 4 (1897) 1897 All W N 91 (91) *Dalip Singh v Tulshi Lam*
(1921) A I R 1921 Cal 77 (78) 66 Ind Cas 876 *Bhubaneswar Bhattacharjee v Dwarakeswar Bhattacharjee* (In this case Article 62 was not applied because the rent received by the co sharer from the tenant was payable not in cash but in kind. But this distinction it is submitted is erroneous.)
(1914) A I R 1914 All 291 (295) 22 Ind Cas 816 *Bhola Nath v Gaur*

by actual division, will not put an end to the relationship of co-owners, and Article 120 would still apply to a suit for profits received subsequent to the decree.⁵ Where an alienation by a Hindu widow was set aside at the instance of reversioners after the death of the widow as to a certain portion of the property alienated, it was held in the case noted below⁶ that the receipt by the alienee of the profits of the whole property alienated was wrongful and not one as a co owner, and that consequently this Article and not Article 120 applied. Where a Hindu father alienated certain properties but the alienation was set aside at the instance of the sons except as to the share of the father, it was held by the High Court of Madras⁷ that the alienee became a co owner with the plaintiffs that his receipt of profits was not wrongful and that a suit for profits against him was governed by Article 120 and not by Article 109.

A co owner X who is excluded from possession by another co owner Y claiming the whole property exclusively as his and who does not receive his share of the profits for over 12 years, would lose his right to the property, though his name is recorded as a co sharer in the Revenue Records.⁸ But where Y simply appropriates the profits, without repudiating the title of X to a share, X can recover his share of the profits received within six years before suit, though he had not received the profits for over 12 years.⁹

Co heirs inheriting an estate are co owners of the property comprised in the estate, and a suit for profits by one against the other would be governed, as seen already, by Article 120.¹⁰

5 (1931) A I R 1931 Rang 150 (151) 131 Ind Cas 511 *Maung Po Nyun v Ma Saw Tin*

(1871) 15 Buth W R P C 36 (41) 7 Beng L R 113 (P C) *Nilcomul Lahoree v Gonomonee Debea*

[See also (1912) 14 Ind Cas 801 (802) (Low Bur) *Subramanian Chetty v Mg Po Tl et*]

6 (1935) A I R 1935 Oudh 515 (517) 157 Ind Cas 960 11 Luck 435 *Bharat Singh v Gur Prashad Singh*

7 (1936) A I R 1936 Mad 654 (655) 162 Ind Cas 771 *Sundararaja Iyengar v Raghatia Reddi*

8 (1935) 17 All 423 (424) 1895 All W N 88 *Muhammad Hussain v Badri Prashad*

(1891) 1891 All W N 107 (107) *Rup Ram v Badri Prashad*

9 (1910) 5 Ind Cas 559 (559) 32 All 389 *Har Charan v Bindu*

10 (1924) A I R 1924 Rang 155 (160) 1 Rang 405 76 Ind Cas 555 *Maung Po Kin v Maung Shwe Byn*

[See however (1912) 18 Ind Cas 791 (792) (Mad) *Cherian Imbiel v Beebi v Syed Ali* (Art 109 held to be applicable—it is submitted this decision is wrong)]

(1916) A I R 1916 Mad 1122 (1123) 38 Mad 1099 32 Ind Cas 1002 *Mohideen Bee v Meer Sahib* (Art 109 applied to suit between Muhammad sharers)]

Article 109
Note 4

4. Suits for mesne profits between members of joint Hindu family. — In the case of a Hindu family, governed by Dayabhaga law, the members take definite shares in the family property, and are simply tenants in-common of the family property. If any member is excluded from enjoyment of the property, his suit against the others for his share of the profits will be governed by Article 120 as in the case of ordinary co owners (See Note 3, *ante*)

In the case of a Hindu family governed by the Mitakshara law, the members would be in the position of tenants in common *after there is division in status*, and the share of the members become defined, even though the properties have not been actually divided by metes and bounds. A claim by one of them for the profits of the undivided properties, against the members in possession thereof, will be governed by Article 120, and not by the present Article¹. But at the time of partition, i.e. division in status, if there was an agreement, express or even implied, between the members that the rents and profits of the properties not actually divided should be received by the members left in possession thereof pending final settlement by actual division, the agreement would create an agency and the suit for account of profits would then be governed by Article 89, and not by Article 120².

But so long as the Mitakshara family *remains joint*, no individual member can predicate at any given moment that he has a definite share in the family property³ and is consequently not entitled to any definite share of the income or profits of the family property⁴. The right of a coparcener excluded from any portion of the family property by another coparcener claiming it exclusively, is only to sue for partition, and not for a share of profits. He can only get a decree for joint possession, and not a decree for mesne profits⁵. He may, however, in certain cases, as for example, where he is *excluded*

Note 4

- 1 (1922) A I R 1922 Mad 150 (156, 157) 45 Mad 648 71 Ind Cas 177 (F B).
Yerukola v Yerukola
- (1911) 12 Ind Cas 704 (707) (Mad), *Segu Chidambaramma v Segu Balayya*
(Overruled by A I R 1922 Mad 150 (F B))
[See also (1903) 30 Cal 738 (751, 752) 5 Bom L R 461 30 Ind App 139 7 Cal W N 578 8 Sar 489 (P C), *Balkishen Das v Ram Narain*]
- 2 (1922) A I R 1922 Mad 150 (156, 157) 45 Mad 648 71 Ind Cas 177 (F B).
Yerukola v Yerukola
[But see (1901) 25 Mad 103 (106) 11 Mad L Jour 428 (F B), *Satara muthu v Athuram Rowther* (Suit for profits is not technically a suit for account though account may have to be taken to ascertain the amount due)]
- 3 (1866) 11 Moo Ind App 75 (89 90) 8 Sath W R 1 1 Suther 657 2 Sar 218 (P C) *Appoosar v Rama Subba Aiyar*
- 4 (1899) 23 Bom 144 (145) *Ganpat v Annaji*
- 5 (1922) A I R 1922 Oudh 55 (58) 65 Ind Cas 315, *Gokul Prasad v Kastab Nath*

from enjoyment of the family property be entitled to an account of the profits received by the members in possession.⁶ Such a right is not one for profits received wrongfully by the defendant within the meaning of this Article.⁷

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5 Suits for profits by the cestui que trust against trustee de son tort — A suit by a beneficiary under a trust against a trustee *de son tort* for the profits of the trust property received by him has been held to be subject to the bar of limitation as it is not covered by the language of Section 10 *ante* which refers only to express trustees.¹ (See Section 10 *ante*.) The question as to what Article applies to such a suit has been considered in the under-mentioned cases² and it has been held that it is governed only by Article 120 and not by the present Article. The reason is that a person who put himself forward as trustee cannot be said to have received the profits wrongfully within the meaning of the word in this Article and a trustee *de son tort* is therefore liable to account for the profits for six years prior to the date of suit.

6 Suits between mortgagor and usufructuary mortgagee for profits — A suit by a mortgagor after the mortgage has been satisfied to recover surplus collections received by the mortgagee is governed by Article 109 and not by this Article. The reason is that the mortgagee cannot in such a case be said to have received them wrongfully within the meaning of this Article and even if it can

(1927) A I R 1927 Oudh 220 (220) 101 Ind Cas 843 *Udai Narayan Singh v Gur Prasad Singh*

(1888) 16 Cal 897 (405 413) 16 Ind App 71 5 Sar 299 13 Ind Jour 93 R & J 106 (P C) *Shankar Baksh v Hardeo Baksh*

6 See (1879) 2 Mad 128 (136 137) 7 Ind App 88 6 Cal L R 153 4 Sar 81 8 Suther 725 4 Ind Jur 138 3 Bhome L R 175 (P C) *Raja Venkata Rao v Court of Wards*

(1882) 5 Mad 236 (238) 9 Ind App 125 6 Ind Jur 383 4 Sar 345 (P C) *Appa Rao v Court of Wards*

(1894) 19 Bom 532 (537) *Bhuvrao v Saram*

(1888) 16 Cal 897 (418) 16 Ind App 71 5 Sar 299 13 Ind Jur 93 R & J 106 (P C) *Shankar Baksh v Hardeo Baksh*

(1887) 14 Cal 493 (508 509) 14 Ind App 87 4 Sar 759 11 Ind Jur 237 R & J 97 (P C) *Pattar Lal v Jankar Singh*

7 See (1894) 4 Mad L Jour 263 (274) (Jour)

Note 5

1 (1921) A I R 1921 Mad 125 (125) 44 Mad 277 61 Ind Cas 907 *Rajah Rajeswara Dorai v Ponnasami Tevar*

(1922) A I R 1922 Mad 57 (59) 45 Mad 415 66 Ind Cas 859 *Krishnan Pattar v Lakshmi*

2 (1924) A I R 1924 All 894 (891) 47 All 17 84 Ind Cas 631 *Behari Lal v Shiv Narayan*

(1916) 32 Ind Cas 107 (103) 1915 Pun Re No 5 (Per) *Khadim Hussain Khan v Mir Murad Bhai* (Co-sharer held to be constructive trustee)

(1927) A I R 1927 Mad 57 (59) 45 Mad 415 66 Ind Cas 859 *Krishnan Pattar v Lakshmi*

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be considered 'wrongful,' Article 105 being a specific Article governing such cases, would apply to the suit.¹ But where the suit by the mortgagor does not fall under Article 105, as for example, where before regaining possession of the mortgaged property his rights are put an end to, this Article will apply.²

Where the mortgage is void or invalid against the plaintiff, the possession of the property and receipt of profits by the mortgagee would be *wrongful within the meaning of this Article*. Thus, where property is inalienable beyond the lifetime of the mortgagor, the mortgagee's possession would become wrongful against the heirs of the mortgagor on the date of his death, and a suit for profits by the heirs will be governed by this Article.³ Similarly, where a mortgagor creates a usufructuary mortgage pending suit on a prior simple mortgage, the usufructuary mortgage being *pendente lite* cannot stand against the purchaser in execution of the simple mortgage decree, and therefore a suit by the purchaser for the profits received by the usufructuary mortgagee while in possession is governed by this Article.⁴ Again, where a usufructuary mortgage is annulled under the Insolvency Acts, the effect of the annulment is to make the mortgage void *ab initio*, and render the mortgagee's possession 'wrongful' from the beginning. A suit, therefore, by the Official Assignee for the profits received by the mortgagee while in possession, would be governed by Article 109, the starting point being the date of the receipt of the profits, and not the date on which the mortgage was annulled by the Insolvency Court.⁵

On the other hand, a suit by the usufructuary mortgagee who has been dispossessed by the mortgagor for the profits received by

Note 6

- 1 (1917) A I R 1917 Oudh 200 (202) 20 Oudh Cas 25 39 Ind Cas 610, *Bikramajit Singh v Raj Raghubar Singh*
- (1910) 8 Ind Cas 689 (691) 33 All 244, *Mohammad Faiyaz Ali Khan v Kallu Singh*
- (1921) A I R 1921 All 71 (73) 60 Ind Cas 760 43 All 421, *Ahmad Beg v Dharam Das*
- (1901) 4 Oudh Cas 355 (360, 361), *Salik Ram v Ashik Hussain*
[See also (1875) 23 Suth W R 99 (102) 14 Beng L R 386 2 Ind App 48 3 Sar 419 3 Suther 61 (P O) *Juggernath Sahoo v Syed Shah Mahomed Hossein*]
- 2 (1899) 1 Bom L R 858 (859), *Lenkatesh v Pandurung*
- 3 (1925) A I R 1925 Bom 325 (326) 49 Bom 583 87 Ind Cas 723, *Sundrabai Vishai v Laxman Ramachandra*
- 4 (1922) A I R 1922 Cal 235 (236) 66 Ind Cas 879, *Nagendra Nath Pal v Sarat Kamini Das*
- (1926) A I R 1926 Cal 65 (73) 89 Ind Cas 1000, *Smt Sarat Kamini Das v Nagendra Nath Pal*
- 5 (1936) A I R 1936 Mad 778 (779) 59 Mad 1020 164 Ind Cas 660 (F B), *Muthusamy Chetty v Official Assignee, Madras*

the latter, will be governed by this Article, as the mortgagor's possession is wrongful as against the mortgagee.⁶ In the undermentioned cases,⁷ however, it was held that the possession of the mortgagor was not wrongful, but the wrong amounted only to a breach of contract, and that the mortgagee's suit was really one for damages for breach of contract governed by Article 116 (under which the profits can be recovered for six years, as damages). Where the mortgagee was dispossessed by a person to whom the mortgagor had sold the mortgaged property, the mortgagee's suit for profits was held not to be one for damages for 'breach of contract' but to be one governed by this Article.⁸

7. Suits between lessor and lessee. — Where a lessee is dispossessed by the lessor, it has been held that a suit by the lessee for profits received by the lessor will be governed by this Article.¹ It has also been held that where the lessee fails to obtain possession, his suit for profits will be one for damages for breach of contract and that if the lease deed is registered, the suit will be governed by Article 116.²

8. Dispossession of plaintiff under decree or order subsequently set aside—Suit for profits. — Where the plaintiff is dispossessed by the defendant under a decree of Court and the same is subsequently set aside, the possession of the defendant pending the appeal must be considered to be wrongful and the receipt of profits by him, a wrongful receipt.³ A suit for profits in cases where

6 (1917) A I R 1917 All 294 (295) 39 All 200 39 Ind Cas 663 *Ram Sarup v Harpal*

(1900) 2 Bom L R 201 (202) *Gotsindrav v Jivanji*

7 (1915) A I R 1915 All 393 (393) 31 Ind Cas 804 (804) *Nirbhai Sinha v Tulsi Ram*

(1917) A I R 1917 All 321 (323) 34 Ind Cas 173, *Harpal v Ram Sarup* (Art 62 read with Art 116 applied — Decision not approved on appeal in A I R 1917 All 294 (295))

8 (1936) A I R 1936 Rang 80 (81) 161 Ind Cas 461 *Ma Pura Thein v Ma Me Tha*

Note 7

1 (1924) A I R 1924 Mad 224 (225) 76 Ind Cas 76 *Shanisgoya Rowther v Omandu Pillai*

2 (1917) A I R 1917 Mad 987 (987) 32 Ind Cas 245 *Raymond Sebastian Lobo v Detu Shetty*

Note 8

1 (1915) A I R 1915 Mad 1133 (1134) 28 Ind Cas 85 *Rangasamy Katundan v Alagayammal*

(1901) 25 Mad 103 (104) 11 Mad L Jour 423 (FB) *Saturumuthu v Thillu ruru Rowther*

(1866) 5 Buth W R 125 (126) 2 Moo Ind App 72 (PC) *Joy Kurun Lal v Raneer Asmudh Koor* (Defendant held liable for mesne profits which can only be if the possession is wrongful)

(1870) 2 N W P H C R 290 (291) *Mashook Ali v Jowala Buiji*

[But see (1905) 3 Cal L Jour 182 (186) *F H Holloway v Guneshwar Singh* (This has been dissented from in A I R 1918 Cal 360)]

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Note 8

such a suit lies would be governed by this Article²

Before the Civil Procedure Code of 1908 was enacted, a plaintiff who had been dispossessed *under a decree* which was subsequently set aside in appeal, could *sue* for the profits received by the defendant during the period of his possession, and the third column of the Article in the Acts of 1871 and 1877 provided a special starting point of limitation in such cases—under the Act of 1871, the date of the appellate decree, and under the Act of 1877, the date when the plaintiff recovered possession. Under the present Civil Procedure Code, Section 144, the plaintiff's *suit* in such cases is barred. He can only *apply* for restitution with mesne profits. The third column of the present Article 109 of this Act has accordingly retained only the words "when the profits were received" omitting the rest as being now unnecessary.³ But there are still cases where the plaintiff may be dispossessed under an *order* of the Court which is subsequently set aside, and a suit for mesne profits would not be barred. To such cases this Article would clearly apply.⁴ It has been observed, however, in the undermentioned cases,⁵ that possession obtained by virtue of an order of the Court is not "wrongful possession" and consequently this Article would not apply to such suits. This view has, however, not been followed⁶ and is, it is submitted, not correct.

Where the dispossession was not under a decree or order of Court but anterior to it, the possession will, of course, be wrongful within the meaning of this Article. A was dispossessed by B, and sued B to recover possession and obtained a decree for possession

2 (1915) A I R 1915 Mad 1183 (1184) 28 Ind Cas 85, *Rangasamy Kavundan v Alagayammal*

3 (1915) A I R 1915 Mad 1183 (1184) 28 Ind Cas 85, *Rangasamy Kavundan v Alagayammal*

4 (1935) A I R 1935 Mad 731 (733) 156 Ind Cas 640, *Siddalingana Goud v Bhumana Goud* (Obstruction to auction purchaser taking possession removed by order of Court and possession delivered—Suit by obstructor successful—Possession of purchaser pending suit is wrongful)

(1918) A I R 1918 Cal 360 (362) 43 Ind Cas 781, *Saraj Ranjan Chowdhury v Premchand Chowdhury* (Article 109 of Limitation Act (15 of 1877) is applicable to a suit for mesne profits where the possession of the property in suit, viz., a *patta* taluk, was obtained by the defendant under a sale held under Regulation 8 of 1819, which was subsequently set aside)

(1909) 1 Ind Cas 157 (158) 35 Cal 996, *Peary Mohun v Khelaram Sarkar* (Do)

5 (1921) A I R 1921 Nag 112 (113) 54 Ind Cas 664 17 Nag L R 62, *Ut Radha v Ut Sakhu*

(1891) 19 Cal 267 (271), *Dhunput Singh v Saraswati Mistrain*
[See also (1909) 4 Oudh Cas 355 (360), *Salik Ram v Ashik Hussain*]

6 (1915) A I R 1915 Mad 1183 (1184) 28 Ind Cas 85, *Rangasamy Kavundan v Alagayammal*

(1918) A I R 1918 Cal 360 (361) 43 Ind Cas 781, *Saraj Ranjan Chowdhury v Premchand Chowdhury*

(1909) 1 Ind Cas 157 (158) 35 Cal 996, *Peary Mohun v Khelaram Sarkar*

The decree was reversed on appeal and the appellato decree was confirmed in second appeal. On appeal to the Privy Council, the original decree was restored. *A* then filed a suit for recovery of the profits for the whole period of his dispossession. Their Lordships of the Privy Council held that as *A* was not dispossessed under the decree, the defendant's possession was 'wrongful' and consequently he could recover profits received only within three years prior to the suit.⁷

9. Suit by minor for profits.—Where a minor is dispossessed of his properties during his minority, he can, within three years after attaining majority, sue for recovery of profits received by the defendant not only within three years prior to the suit, but for the whole period of his minority.¹ The reason is that there is a fresh cause of action each time the profits are received and as the plaintiff was under a disability with respect to each of such causes of action, he is entitled to the benefit of Section 6 of the Act. But if the suit is laid more than three years after he attains majority, his claim will, under this Article, be limited to profits received by the defendant within three years before suit.² Where the *shebait* of a Hindu *math* was dispossessed of the *math* property during his minority, and he sued for possession and mesne profits within three years of his attaining majority, it was held by their Lordships of the Privy Council that he was entitled to recover possession with mesne profits.³ Their Lordships, however, disallowed the claim for mesne profits beyond three years of the suit. It is not clear from the facts reported on what grounds the claim for profits beyond three years of the suit was disallowed.

Where a minor who is dispossessed of property during his minority is one of several persons entitled to sue for mesne profits and a discharge can be given without the concurrence of such minor

7 (1884) 10 Cal 785 (791) 11 Ind App 68 4 Sar 551 8 Ind Jur 335 R & J 80 (P C) *Kishnanand v Kunwar Pratab Narain Singh*

Note 9

- 1 (1894) 1894 All W N 49 (49) *Parag Ram v Jawahar Lal*
(1907) 6 Cal L Jour 383 (391) *Harshar Pershad v Bholi Pershad*
(1867) 7 Suth W R 161 (162) *Ram Chunder Roy v Umbika Dossia*
(1906) 83 Cal 23 (28) 32 Ind App 181 2 Cal L Jour 238 15 Mad L Jour 320 7 Bom L R 904 10 Cal W N 1 2 All L Jour 810 (P C) *Basanta Kumari Debi v Kamikshya Kumari Debi* (*A* during her minority inherited her mother's *stridhan* property but *X* got the same registered in his own name in the Revenue Records by a false representation and was in possession.—After attaining majority *A* sued for possession, and mesne profits were awarded from the date of dispossession.)
- 2 See (1866) 5 Suth W R 219 (220) *Luchmun Singh v Mt Dibee Mariam*
- 3 (1904) 82 Cal 129 (142) 31 Ind App 203 6 Bom L R 65 1 All L Jour 555 8 Cal W N 809 8 Sar 693 (P C) *Jagadindra Nath Roy v Hemanta Kumari Debi*

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time will, as provided in Section 8 *ante*, run against all including the minor. The minor cannot, therefore, on attaining majority, claim the benefit of Section 6 of the Act and his claim for mesne profits beyond three years of the suit would be barred.⁴

It has been held in the undermentioned case⁵ that an alienation by the guardian of a minor is only a voidable transaction, that the possession of the alienee is not wrongful and that the alienee is therefore not liable for mesne profits until repudiation by the minor by suit. Where therefore the minor, after attaining majority, sued to recover possession of the property with mesne profits it was held that he can recover mesne profits only from the date of suit.

10. Claim for mesne profits in suits for possession.—The claim for mesne profits, in suits for recovery of possession, will be limited by this Article to the profits actually received within three years before the suit.¹ If the plaint did not ask for mesne profits in the first instance, and is subsequently amended by a prayer to that effect, all the profits which had become barred on the date of the amendment, even though within three years before the date of the plaint, will be equally barred.²

Where the plaintiff asks for profits *pendente lite*, and also future mesne profits from the date of the decree up to delivery of possession, but the Court does not grant the same, a subsequent suit for those profits is not barred on ground of *res judicata*³ and will be governed by this Article.⁴

11. Applications for ascertainment of mesne profits.—Where a decree awards mesne profits, and the plaintiff applies for ascertainment of such profits, the application is not a suit but only a proceeding in the suit, and this Article will not apply to such an application. Consequently, the claim will not be limited to the

⁴ (1909) 1 Ind Cas 670 (677) (Cal) *Banwari Lal v Sheo Sankar Misser*

⁵ (1926) A I R 1926 Mad 46 (48, 49) 88 Ind Cas 967, *Dinachula Iyengar v Naghupathi Venkatachariar*

Note 10

¹ (1919) A I R 1919 Cal 167 (167) 53 Ind Cas 124, *Jogesh Chandra Roy v Secretary of State*

² (1931) A I R 1931 Nag 74 (79) 131 Ind Cas 417 27 Nag L R 291, *Bhimrao v Mt Gangabai*

³ (1867) 6 Suth W R 78 (78) *Balram Bhutti v Bhoobun Lall*

(1868) 10 Suth W R 486 (486) 2 Beng L R (S N) 16 *Byjnath Pershad v Badhoo Singh*

(1869) 12 Suth W R 5 (6) 3 Beng L R App 81, *Pratab Chandra v Rani Sarna Ma*

er) 163 (165) (F B) *Unnoda*

is 777, *Budhial v Mokham*

Ghand

⁴ (1927) A I R 1927 All 446 (451) 49 All 565 102 Ind Cas 96, *Ram Charan Sahu v Goga*

(1932) A I R 1932 All 45 (46) 135 Ind Cas 254, *Parshotam Ram v Mangal Ram*

(1903) 32 Cal 118 (122), *G S Hays v Padmanand Singh*

profits received within three years before the date of the application, but will extend to three years before the date of suit.¹ The period of limitation for the application will commence to run only from the date of the final decree, and all the profits from three years prior to the suit up to the date of the final decree can be recovered.² In *Bhup Indar Bahadur Singh v. Bijai Bahadur Singh*,³ a decree for possession and future mesne profits for three years from the date of the decree was passed by the trial Court, and the suit was dismissed by the High Court, but the Privy Council restored the trial Court's decree. On the application of the decree holder for the ascertainment of the mesne profits from the date of the trial Court's decree onwards for a period of nine years, it was contended that he could not recover more than three years' profits from the date of the trial Court decree. Their Lordships of the Judicial Committee negatived the contention, and held that, as the application was within three years of the decision of the Privy Council restoring the trial Court's decree, he can recover the future mesne profits for the whole period and that the three years' period in the trial Court's decree should be understood as referring to the date of the order of the Privy Council.

Under Order 20 Rule 12 of the Code of Civil Procedure, a Court cannot pass a decree for future mesne profits (i.e. from the date of suit) for more than three years from the date of the decree.

Where therefore the decree grants future mesne profits, but is silent as to the period for which it can be claimed, the decree holder is entitled to mesne profits only for three years from the date of the decree, even if the delivery of possession is made after three years.⁴ In such a case the applicant should be referred to a fresh suit for the profits after three years,⁵ and such a suit will then be governed by this Article.

But where the applicant for mesne profits is wrongly referred to a fresh suit, on the ground that the profits claimed were beyond the pecuniary jurisdiction of the Court passing the decree for possession, any fresh suit for the same will be treated as a continuation of the first suit, and Article 109 will not apply to such a claim.⁶

Note 11

1 (1921) A I R 1921 Pat 430 (431) 68 Ind Cas 903 *Suraj Prasad Panday v. Somra Mahto*

2 (1922) A I R 1922 Oudh 197 (198) 68 Ind Cas 896 25 Oudh Cas 132, *Kuber Singh v. Mt. Raj Kunwar*

3 (1901) 23 All 152 (158, 159) 27 Ind App 209 2 Bom L R 978 5 Cal W N 52 10 Mad L Jour 290 7 Sar 768 (P C)

[See also (1903) 30 Cal 660 (665) 7 Cal W N 486 (F B), *Radha Nath Singh v. Chandu Charan Singh*]

4 (1900) 24 Bom 149 (153) 1 Bom L R 638, *Uttamram v. Kishordas*

5 (1915) A I R 1915 Mad 226 (226) 24 Ind Cas 484 *Venkata Kumara Mahipathi Surya Row v. Subbayamma Rao Bahadur Garu*

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13 "Profits"—The word "profits" means the advantages which land yields in the shape of rent, issues or other emoluments^{1a} It must be an excess of returns over outlay^{1b} Where the land has yielded produce or fruits, the "profits" will mean the actual price thereof less the costs of collection and the other expenses¹ Where the property is burdened with certain payments, they must also be deducted before the profits are ascertained² The term will include the value of trees cut down wrongfully by the person in possession³ But a suit for profits should be distinguished from a suit for damages to personal property, to which Article 48 or Article 49 will apply Thus a suit for compensation for loss caused by the defendant's obstructing the right of fishery of the plaintiff, is really a suit for mesne profits and not one for damages for injury to personal property⁴ But, suits for damages for trespass upon immovable property, governed by Article 39 will not be suits for profits, this distinction is important, because while the former will be within the cognizance of a Small Cause Court, the latter is not⁵

Rents or payment in money received by a trespasser from the tenant will be included in the term 'profits'.⁶ Rents received by one

1 (1936) A I R 1936 Mad 778 (779) 59 Mad 1020 164 Ind Cas 600 *Muthu
samy Chetty v Official Assignee Madras*

1a Wharton's Law Lexicon

1b Concise Oxford Dictionary

- I (1921) A I R 1921 Pat 102 (103) 61 Ind Cas 754 Damodar Narain Choudhury v S A Miller

- (1924) 1 A I R 1924 Oudh 519 (320) 78 Ind Cas 85 *Aditya Prasad v Chhotelal*
-2 (1872) 17 Suth W R 208 (209) *Thakoor Dass Acharjee v Shoshree Bhushan*
Chatterjee (Expenses incurred for keeping up worship of idols of
endowed property should be deducted)

- 3 (1901) 4 Oudh Cas 355 (362) *Salik Ram v Ashik Husain*

- 4 (1872) 17 Sath W R 360 (360) *Shaukh Elahie Buksh v Baboo Siro Narain Singh*

Singh
1970-1971 1972-1973 1974-1975 1976-1977 1978-1979 1980-1981 1982-1983 1984-1985 1986-1987 1988-1989 1990-1991 1992-1993 1994-1995 1996-1997 1998-1999 2000-2001 2002-2003 2004-2005 2006-2007 2008-2009 2010-2011 2012-2013 2014-2015 2016-2017 2018-2019 2020-2021 2022-2023 2024-2025 2026-2027 2028-2029 2030-2031 2032-2033 2034-2035 2036-2037 2038-2039 2040-2041 2042-2043 2044-2045 2046-2047 2048-2049 2050-2051 2052-2053 2054-2055 2056-2057 2058-2059 2060-2061 2062-2063 2064-2065 2066-2067 2068-2069 2070-2071 2072-2073 2074-2075 2076-2077 2078-2079 2080-2081 2082-2083 2084-2085 2086-2087 2088-2089 2090-2091 2092-2093 2094-2095 2096-2097 2098-2099 2100-2101 2102-2103 2104-2105 2106-2107 2108-2109 2110-2111 2112-2113 2114-2115 2116-2117 2118-2119 2120-2121 2122-2123 2124-2125 2126-2127 2128-2129 2130-2131 2132-2133 2134-2135 2136-2137 2138-2139 2140-2141 2142-2143 2144-2145 2146-2147 2148-2149 2150-2151 2152-2153 2154-2155 2156-2157 2158-2159 2160-2161 2162-2163 2164-2165 2166-2167 2168-2169 2170-2171 2172-2173 2174-2175 2176-2177 2178-2179 2180-2181 2182-2183 2184-2185 2186-2187 2188-2189 2190-2191 2192-2193 2194-2195 2196-2197 2198-2199 2200-2201 2202-2203 2204-2205 2206-2207 2208-2209 2210-2211 2212-2213 2214-2215 2216-2217 2218-2219 2220-2221 2222-2223 2224-2225 2226-2227 2228-2229 2230-2231 2232-2233 2234-2235 2236-2237 2238-2239 2240-2241 2242-2243 2244-2245 2246-2247 2248-2249 2250-2251 2252-2253 2254-2255 2256-2257 2258-2259 2260-2261 2262-2263 2264-2265 2266-2267 2268-2269 2270-2271 2272-2273 2274-2275 2276-2277 2278-2279 2280-2281 2282-2283 2284-2285 2286-2287 2288-2289 2290-2291 2292-2293 2294-2295 2296-2297 2298-2299 2300-2301 2302-2303 2304-2305 2306-2307 2308-2309 2310-2311 2312-2313 2314-2315 2316-2317 2318-2319 2320-2321 2322-2323 2324-2325 2326-2327 2328-2329 2330-2331 2332-2333 2334-2335 2336-2337 2338-2339 2340-2341 2342-2343 2344-2345 2346-2347 2348-2349 2350-2351 2352-2353 2354-2355 2356-2357 2358-2359 2360-2361 2362-2363 2364-2365 2366-2367 2368-2369 2370-2371 2372-2373 2374-2375 2376-2377 2378-2379 2380-2381 2382-2383 2384-2385 2386-2387 2388-2389 2390-2391 2392-2393 2394-2395 2396-2397 2398-2399 2400-2401 2402-2403 2404-2405 2406-2407 2408-2409 2410-2411 2412-2413 2414-2415 2416-2417 2418-2419 2420-2421 2422-2423 2424-2425 2426-2427 2428-2429 2430-2431 2432-2433 2434-2435 2436-2437 2438-2439 2440-2441 2442-2443 2444-2445 2446-2447 2448-2449 2450-2451 2452-2453 2454-2455 2456-2457 2458-2459 2460-2461 2462-2463 2464-2465 2466-2467 2468-2469 2470-2471 2472-2473 2474-2475 2476-2477 2478-2479 2480-2481 2482-2483 2484-2485 2486-2487 2488-2489 2490-2491 2492-2493 2494-2495 2496-2497 2498-2499 2500-2501 2502-2503 2504-2505 2506-2507 2508-2509 2510-2511 2512-2513 2514-2515 2516-2517 2518-2519 2520-2521 2522-2523 2524-2525 2526-2527 2528-2529 2530-2531 2532-2533 2534-2535 2536-2537 2538-2539 2540-2541 2542-2543 2544-2545 2546-2547 2548-2549 2550-2551 2552-2553 2554-2555 2556-2557 2558-2559 2560-2561 2562-2563 2564-2565 2566-2567 2568-2569 2570-2571 2572-2573 2574-2575 2576-2577 2578-2579 2580-2581 2582-2583 2584-2585 2586-2587 2588-2589 2590-2591 2592-2593 2594-2595 2596-2597 2598-2599 2600-2601 2602-2603 2604-2605 2606-2607 2608-2609 2610-2611 2612-2613 2614-2615 2616-2617 2618-2619 2620-2621 2622-2623 2624-2625 2626-2627 2628-2629 2630-2631 2632-2633 2634-2635 2636-2637 2638-2639 2640-2641 2642-2643 2644-2645 2646-2647 2648-2649 2650-2651 2652-2653 2654-2655 2656-2657 2658-2659 2660-2661 2662-2663 2664-2665 2666-2667 2668-2669 2670-2671 2672-2673 2674-2675 2676-2677 2678-2679 2680-2681 2682-2683 2684-2685 2686-2687 2688-2689 2690-2691 2692-2693 2694-2695 2696-2697 2698-2699 2700-2701 2702-2703 2704-2705 2706-2707 2708-2709 2710-2711 2712-2713 2714-2715 2716-2717 2718-2719 2720-2721 2722-2723 2724-2725 2726-2727 2728-2729 2730-2731 2732-2733 2734-2735 2736-2737 2738-2739 2740-2741 2742-2743 2744-2745 2746-2747 2748-2749 2750-2751 2752-2753 2754-2755 2756-2757 2758-2759 2760-2761 2762-2763 2764-2765 2766-2767 2768-2769 2770-2771 2772-2773 2774-2775 2776-2777 2778-2779 2780-2781 2782-2783 2784-2785 2786-2787

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[See also (1865) 4 Smith W. R 76 (77), *Raj Chunder Ghose v Joy Kishen Wookerjee*]

- 5 (1901) 25 Mad 103 (107) 11 Mad L Jour 428 (F B), *Saravimuthu v Athu
rusu Howthar*

- *G (1907) 11 Cal W N 862 (863) *Agandh Mahto v Khagah Ahullah*

co sharer from the tenant will, in his hands, be "profits" of the property, as regards the other co sharers.⁷ But where the defendant himself is the tenant, and the tenancy is admitted by the landlord, the suit will not be for "profits" but for arrears of rent, to which Article 110 will apply.⁸

See also the undermentioned cases.⁹

14. "Immoveable property."—The term "immoveable property" is not defined in this Act. It has therefore to be taken in the sense in which it is defined by the General Clauses Act, 1897. Under that definition, "immoveable property" includes land, benefits to arise out of land, and things attached to the earth. The office of a village Joshi in the Bombay Presidency has been held to be immovable property according to the notions of Hindu law, and a suit for profits derived from wrongfully exercising such office, governed by Article 109 of the Act.¹

15. "Belonging to the plaintiff."—The words "belonging to" must be construed as qualifying the words "immoveable property" and not as qualifying the word "profits." The cases cited in Notes 3, 4, 5 and 6 *ante* which held that the present Article will not apply to cases where the property cannot be said to belong to the plaintiff, all bear out this construction. The decision in *Gorind Rao v Jiwanti*,¹ where the Bombay High Court construed the Article as referring to "profits belonging to the plaintiff," does not seem to be correct. In that case, plaintiff was an usufructuary mortgagee, who had failed to get possession from the mortgagor. He sued for the profits received by the mortgagor, and it was contended that Article 109 would not apply to the case, as the property could not be said to belong to the plaintiff. Their Lordships negatived the contention and held that Article 109 would apply, as the words "belonging to" refer to

(1922) A I R 1922 Cal 235 (236) 66 Ind Cas 879, *Nagendranath Paul v Sarai Kamini Das*.

(1921) A I R 1921 Bom 37 (38) 64 Ind Cas 7 *Dattatraya Keshao v Lazman Chinnaji* (Rent payable to watanadar is profit).

(1923) A I R 1923 Bom 478 (479) 77 Ind Cas 146, *Dhond's Subhane v Secretary of State* (Rent assessed on watan land is profit).

⁷ (1921) A I R 1921 Cal 77 (78) 66 Ind Cas 376, *Shashimenvar Bhattacharyee v Dwarkeswar Bhattacharyee*.

(1874) 22 Suth W R 255 (255), *Juggat Chunder Bhadoory v Shiv Chunder Bhadoory*.

⁸ (1926) A I R 1926 Nag 212 (213) 90 Ind Cas 279 *Ganeshdas v Hira Lal*.

⁹ (1926) A I R 1926 All 404 (405) 92 Ind Cas 768, *Lallu Singh v Gur Narain*.

(1924) A I R 1924 All 491 (482 491) 46 All 791 84 Ind Cas 158 (F B), *Shao Ghulam v Salik Ram*.

(1929) A I R 1929 All 690 (690) 119 Ind Cas 93 *Ishri Singh v Tejbar Singh*.

Note 14

¹ (1875) 1875 Bom P J 293 *Damodar v Martand* (Right to recover profits attached to the office of village Joshi).

Note 15

¹ (1900) 2 Bom L R 201 (202).

[See also (1917) A I R 1917 All 321 (323) 34 Ind Cas 173, *Harpal v. Ram Sarup* (Disapproved on appeal in A I R 1917 All 294)].

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profits and not to property. This reasoning is unnecessary, as the same result can be arrived at by construing the word "property" as meaning the right to present possession and enjoyment as distinguished from ultimate general ownership. Thus, the right of an usufructuary mortgagee to possession of the mortgaged property² and the similar possessory right of a lessee,³ have been held to be included in the term "property" in this Article.

Though, as between joint owners of property the property can not be said to belong to each within the meaning of this Article, it must be regarded as belonging to each of them within the meaning of this Article as against a trespasser. It has been held that one co-owner alone can sue the trespasser for profits and can recover the whole of the profits, without making the other co-owners parties.⁴

The word "plaintiff" will include any person from whom a plaintiff derives the right to sue. (See Section 2 clause (8) *ante*.) Where *A*, the owner of property, which is in the wrongful possession of *X*, sells the property to *B*, in the absence of a contract to the contrary, under Section 55 clause 4 (a) of the Transfer of Property Act *A* will be entitled to the rents and profits until the ownership passes to *B*, and after the sale, *B* cannot recover the profits that accrued before the date of sale, from *X*, but even after sale, *A* will be entitled to recover from *X* those profits.⁵ This Article will apply to such a suit by *A*, after the sale to *B* as the property belonged to *A* at the time when the profits were received. Where *A* first obtains a decree for possession against *X*, and then transfers his interest to *B*, *B*'s suit for profits subsequent to the sale will not be barred, if the decree is alive on the date of suit, and *B* can recover under this Article the profits received within three years before suit.⁶

16. Starting point of limitation. — Time, under this Article, runs from the date when the profits are received.^{1a} The fact that the plaintiff could not have maintained the suit at the time of the receipt owing to existence of a decree against him, would not affect the starting point under this Article.^{1b} *A* bought certain properties

2 (1917) A I R 1917 All 294 (295) 39 All 200 39 Ind Cas 663, *Ram Sarup v Harpal*

3 (1924) A I R 1924 Mad 224 (225) 76 Ind Cas 76, *Shamsogaya Routher v Omandu Pillai*

4 (1927) A I R 1927 Nag 9 (10) 97 Ind Cas 1028 *Nago v Multanmal*

5 (1929) A I R 1929 Bom 51 (53) 114 Ind Cas 262 *Bhogilal Tarachand v Jethalal Motilal*

6 (1912) 14 Ind Cas 601 (602) (Low Bar) *Subramanian Chetty v Mg Po Thei*

Notes 16

1a (1881) 1881 All W N 13 (13) *Lachma v Jivan Sahai*

(1893) 21 Cal 157 (163) 20 Ind App 155 6 Sar 374 17 Ind Jur 481 R & J
122 (D.C. 111) 37

Abbas Ali Khan v

1b (1938) A I R 1938 Bom 158 (159) 173 Ind Cas 806 I L R (1938) Bom 107,
Dullabhabhai Hansji v Gulabhabhai Morarji

in execution of a mortgage decree on the 6th May 1913, but the sale was not confirmed till 28th January 1914, when the judgment-debtor's application to have the sale set aside was rejected. In the meantime, between the decree and sale, the judgment debtor executed some usufructuary mortgages in favour of the defendants and the mortgagees collected rents from tenants. A, then, on 16th September 1916, filed the suit for recovery of the rents and profits which fell due after the date of the sale. The Calcutta High Court rejected the plaintiff's contention that the cause of action for profits was suspended during the pendency of the petition to set aside the sale, and that the period must be deducted from the period under this Article, and held that the plaintiff could have instituted the suit for profits, even before confirmation, the certificate of the sale not being necessary for the institution of the suit for profits, the same being required only during the trial, that the Article must be strictly applied, and that the suit for profits received by the defendants beyond three years before suit was barred.¹ See also the undermentioned cases² in support of the same view.

In *Dwijendra Narain Roy v Jogesh Chandra Dey*,³ it was, however, held that the starting point under the Article must be held to be postponed till the date when the plaintiff became entitled to sue where he became so entitled after the date of the receipt of profits. In that case certain lease deeds were executed in 1913 by the defendant to the plaintiff but the defendant, having denied the execution before the Registrar, the plaintiff filed a suit for registration, and the same was decreed in 1918 and registration ordered. The plaintiff, within three years of the date of that decree, sued for profits received by the defendant from the date of the lease deed to the date of suit. It was held that the cause of action for the suit arose only on the registration of the document and that, therefore, the starting point under this Article must be postponed to that date. It is submitted that this view is not correct. For a full discussion of the question, see Note 8 to Section 9, *ante*.

The date of receipt of the profits in the case of crops will be the date when the defendant actually cut and appropriated the crops.⁴

- 1 (1926) A I R 1926 Cal 65 (66, 73) 89 Ind Cas 1000 *Sarat Kamini Das v Nagendra Nath Pal*
- 2 (1933) A I R 1933 Lah 615 (617) 146 Ind Cas 939 *Basheshar Dass v Diwan*
(1935) A I R 1935 Mad 731 (793) 156 Ind Cas 640 *Siddalingana Gowd v Bhimana Gowd*
(1920) A I R 1920 Mad 1 (7) 43 Mad 185 54 Ind Cas 66 (F B) *Muthu Korakki Chetty v Mahamad Madar Ammal*
(1938) A I R 1938 Bom 158 (159) 173 Ind Cas 606 I L R (1938) Bom 107 *Dullabhbhai Hansji v Gulabhbhai Morari*
[See also (1937) A I R 1937 All 481 (484 495) I L R (1937) All 628 170 Ind Cas 657, *Ubaid Ullah Khan v Abdul Jalil Ahan* (Limitation is not suspended once it has begun to run.)
(1903) 1 Ind Cas 157 (158) 35 Cal 996, *Peary Mohun v Ahelaram Sarkar*]
- 3 (1924) A I R 1924 Cal 600 (603) 79 Ind Cas 320
- 4 (1914) A I R 1914 Nag 65 (66) 10 Nag L R 76 24 Ind Cas 866 *Ganpatrao v Jangia*

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Where a tenant wrongfully sold the standing crops to a third person, the starting point for a suit for profits against such person is not the date of sale but the date when such person commenced cutting the crops and appropriating the same for himself ⁵

Where the defendant began to wrongfully receive the profits of certain property in 1916 and the plaintiff sued only for possession and, after obtaining a decree for possession against defendant in 1929, sued him in 1932 for mesne profits from 1916 to 1929, it was held that the suit was barred, as time ran in respect of each receipt from the date thereof and as the last receipt was beyond three years of the date of suit ⁶

17. Application for restitution. — An application for restitution is not governed by this Article which applies to suits. There is a difference of opinion as to whether Article 181 or Article 182 would apply to such applications. There is also a difference of opinion as to the period for which the profits can be granted in such applications. See Notes to Articles 181 and 182, *infra*

Article 110

**110.* For | Three years. | When the arrears
 arrears of rent. | become due.**

Synopsis

1. Legislative history.
2. Suit for rent.
3. Rent received by one co-sharer — Suit for contribution by others
4. Tenancy by sufferance — Suit for rent.
5. Suit for rent due under registered instrument.
6. Arrears of rent charged over immovable property.
7. Leases by usufructuary mortgagees — Rights of parties
8. Right to take credit for rent due, at the time of redemption as incident to tenure.
9. Suit for rent before it accrues due.
10. Claim for rent against sureties for lessee
11. Starting point.
12. Application of Section 19 to the Article.
13. Suit by minor, after attaining majority, for rent.
14. Non-payment of rent by tenant for twelve years.

* Acts of 1877 and 1871

Same as above

(1909) 3 Ind Cas 12 (15) (Cal) *Mina Kumari Bibi v Surendra Narain*
 5 (1924) A I R 1924 Nag 87 (88) 81 Ind Cas 651, *Nathulalsa v Shankerlal*
 6 (1937) A I R 1937 All 481 (484 485) 1 L R (1937) All 628 170 Ind Cas 657,
Ubaid Ullah Khan v Abdul Jahl Khan

Other Topics

Article 110 Notes 1—2

Article 116 and this Article	See Note 5
Assignee of arrears of rent	See Note 2 F N (1c)
Damages for use and occupation	See Note 2, Pt 1c Note 4 Pt 1
Rent — Examples of	See Note 2 Pts 3 to 10a
Rent — What is not — Examples	See Note 2, Pts 2a, 2b & 10b to 15
Special or local law prescribing special period of limitation	See Note 5, Pts 7, 8, Note 13, Pt 1

1. Legislative history. — Under Act 14 of 1859, the period of limitation applicable to a suit for *rent* was three years under clause 8 of Section 1¹ A suit, not for rent, but for compensation for *use and occupation of the land*, was held to be governed by the six years' period under clause 16 of Section 1²

The Article was introduced in its present form by Act 9 of 1871, and has been re enacted in the same form in the Act of 1877 and in the present Act

2. Suit for rent. — The Article applies to suits to recover arrears of *rent* A right to recover rent necessarily involves the idea that the relationship between plaintiff and the defendant is that of *landlord and tenant*^{1a} Where there is no such relationship, the suit cannot be one for *rent*^{1b} Thus, a suit for damages for use and occupation against a person who does not stand in the relationship of a tenant to the plaintiff, is not a suit for rent and is not governed by this Article^{1c}

Act of 1859, Section 1 clause 8

To all suits for the rents of any buildings or lands (other than summary suits before the Revenue Authorities under Regulation 5 of 1822 of the Madras Code)—the period of three years from the time the cause of action arose

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- 1 (1874) 7 Mad H C R 242 (244) *Lee Morris v Chinnasami Ayyan*
 (1874) 184 Bom F J 114 (114) *Mahadoo v Shrivdhar*
 (1865) 2 Suth W R Act X Rul 21 (23 25) Beng L R Sup Vol 101 (F B),
John Foulson v Modhoooodun Paul Chowdhry
 2 (1872) 18 Suth W R 132 (139) *Debnath Roy Chowdhry v Gudadhur Dey*
 (1871) 16 Suth W R 287 (287), *Mt Kushenbutty Misraim v Roberts*

Note 2

- 1a See (1880) 5 Cal L R 62 (64), *Ram Runjun Chuckerbutty v Ram Lall Mukhopadhyay*
 (1917) A I R 1917 Mad 901 (902) 39 Mad 54 33 Ind Cas 705, *Madar Sahib v Kader Moideen Sahib*
 1b (1917) A I R 1917 Mad 901 (902) 39 Mad 54 33 Ind Cas 705, *Madar Sahib v Kader Moideen Sahib* (Tenant holding over—No payment and acceptance of rent—No relationship of landlord and tenant)
 1c (1910) 6 Ind Cas 766 (769) (Mad) *Chengiah v Thimma Nayanam* (Per Munroe J — Article 115 would apply)
 (1872) 18 Suth W R 132 (139) *Debnath Roy Chowdhry v Gudadhur Dey*
 (1871) 16 Suth W R 287 (287) *Mt Kushenbutty Misraim v Roberts* (Lease in the name of X—Suit against Y who was the real owner of the lease—Suit is one for use and occupation)
 (1901) 25 Bom 556 (562) 3 Bom L R 135 *Sadashio v Ramkrishna* (No relationship of landlord and tenant held to exist in this case between superior and inferior holders of land under Government—Suit by former against latter for the amounts due held not to be for rent)

Article 110

Note 2

A relationship of landlord and tenant may and generally does arise from express or implied contract between the parties¹ But it need not *always* arise by contract or agreement alone It may arise by mere occupation of property²

Again, it is only the amount due by the tenant to the landlord under the contract of tenancy for the use of the land, that is called "rent" An amount not payable to the landlord, but to a *third person* is not rent Thus, where A the lessee contracts with B the lessor that he will pay a particular amount to B's superior holder and fails to pay it, a suit by B to recover such amount would be one not for rent but one for damages for use and occupation^{2a}

Similarly, where there is an *adjustment* between the lessor and the lessee fixing a certain amount due for rent and the lessee undertakes to pay it to a superior proprietor of the lessor, the amount ceases from the time of the adjustment to be rent, and a suit to enforce the payment under the adjustment is one for breach of contract^{2b}

The following are further examples of "rent" within the meaning of this Article —

- i The minimum royalty reserved by the landlord in the case of a mining lease, though the additional sum to be paid by the lessee on each ton of coal raised will be "commission and not rent"³

(1903) 26 Mad 730 (733) 18 Mad L Jour 248 *Kasturi Gopala Ayyangar v Anantaram Thattai* (Inamdar of Government revenue is not landlord)

(1892) 16 Mad 305 (307) *Venkataragava v District Board of Tanjore* (There is no relationship of landlord and tenant where a District Board in charge of maintaining a *chatram* sued the owners of lands for customary dues payable for the maintenance of the *chatram*)

(1896) 23 Cal 799 (804) *Robert Watson & Co v Ram Chand Dutt*

(But see (1900) 4 Cal W N 605 (606) *Mohendra Nath Kalamore v ...* SINGH 3)

1 See (1917) A I R 1917 Mad 901 (902) 39 Mad 54 33 Ind Cas 705 *Masur Sahib v Kader Moideen Sahib* (Article 110 presupposes the existence of a contract)

2 (1929) A I R 1929 Cal 90 (90) 115 Ind Cas 518 *Chiranjib Singh v Molen dra Nath*

(1909) 1 Ind Cas 312 (312) (Cal) *Abdul Hakim Shaha v Rajendra Narain*

2a (1905) 33 Cal 140 (149) 33 Ind App 30 3 Cal L Jour 7 10 Cal W N 201 1 Mad L Tim 6 (P C) *Jotindra Mohun Tagore v Jarao Kumar*

(1904) 32 Cal 169 (173) 9 Cal W N 96 *Hemendra Nath v Kumar Nath Roy*

(1884) 11 Cal 221 (225) *Rutnessur Biswas v Hurish Chunder*

(See however (1911) 10 Ind Cas 406 (409 410) (Cal) *Banku Behari Sikdar v Gopal Chandra*)

2b (1915) A I R 1915 Cal 370 (371, 372) 19 Ind Cas 752 (753) *Lachmi, Missir v Deok, Kuar*

3 (1916) A I R 1916 P C 182 (183) 44 Cal 759 44 Ind App 65 39 Ind Cas 156 (P C) *Tricomdas Coomraj Bhoja v Sri Gopinath Jiu Thakur*

- ii Jodi and road cesses payable to the zamindar by the holder of a service inam under him subject to such payment ⁴
- iii Kattubadi cess payable by the holder of a Darmilla inam under the zamindar ⁵
- iv Customary dues payable to ground landlords under *wajib ul-arz*, on the occasion of marriages ⁶
- v Cesses payable by a tenant to the proprietor under the Bengal Cess Act (9 of 1880),⁷ and the sums to be paid to the landlord by the tenant for costs levied on the landlord under the Bengal Drainage Act (6 of 1880) ⁸
- vi Share of produce to be given to the landlord ⁹
- vii Assessment levied on *tatan* property (under the Bombay Hereditary Offices Act, 2 of 1874) on alienation by the *tatandar* without sanction of the Government ¹⁰
- viii The amount payable by the defendant on settlement by auction of certain palmyra trees for taking the juice from them for a season ^{10a}

The following are not "rents" within the meaning of this Article—

- i Amount due by way of contribution to one tenant from his co tenants in respect of the rent paid by the former to the landlord ^{10b}

(1908) 12 Cal W N 724 (726) *Bhola Nath Das v Raja Durga Prosad Singh*

(1918) 19 Ind Cas 865 (869) (Cal) *Peary Lal Das v Madhaji Jiban*

[See however (1924) A I R 1924 Pat 231 (232) 81 Ind Cas 299
2 Pat 749 C J *Smith v Official Trustees of Bengal* (In this case there was no minimum reserved as the whole was only commission)]

4 (1924) A I R 1924 Mad 78 (74) 74 Ind Cas 968 *Sambasadasa Chinna Rayal Varu v Bandar Maddulappa*

5 (1936) A I R 1936 Mad 147 (148 149) 161 Ind Cas 836, *Gourachandra Dea Garu v Venkatanarayanamurthi*

6 (1927) A I R 1927 Lah 639 (640) 103 Ind Cas 624 *Bagga v Mahomed Shah*

7 (1926) A I R 1926 Cal 1069 (1069) 95 Ind Cas 843, *Satya Niranjan v Ebrahims Mandal*

(1929) A I R 1929 Pat 331 (332) 8 Pat 358 118 Ind Cas 733 *Bhunesuara Kuer v Gopal Saran*

8 (1904) 8 Cal W N 640 (641) *Mon Mohini Das v Priya Nath Basal*

(1906) 5 Cal L Jour 19 (22) 11 Cal W N 57 *Naffer Chandra Maji v Jyote Kumar Mukerjee*

9 (1932) A I R 1932 All 149 (150) 54 All 69 134 Ind Cas 457, *Indaryit Pratap v Sheelah Rai*

(1874) 21 Suth W R 174 (125) *Mohunt Jumna Doss v Gaursee Meah*

10 (1921) A I R 1921 Bom 37 (38) 64 Ind Cas 7 *Dattatraya Keshav v Larman Chinnai*

10a (1936) A I R 1936 Pat 403 (403) 15 Pat 626 166 Ind Cas 484 *Kameshwar Singh v Mahabir Passi*

10b (1907) 10 Oudh Cas 108 (110) *Mt Kanu Fizza Bibee v Sheo Narain Uisr*

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- ii Amount due to the proprietors of a canal, as water hire from the owner of land watered by that canal, according to the terms agreed between them ¹¹
- iii Customary *merais*, payable by owners of certain lands to the maintenance of a *chatram* ¹²
- iv Assessment on inam lands payable to the inamdar ¹³
- v The fee charged by a municipality under the provisions of a statute, for permission to use municipal land for temporary purposes ¹⁴
- vi Amount due by one co owner to another by way of contribution in respect of rents collected by the former from the tenants ¹⁵

3. Rent received by one co-sharer.—Suit for contribution by others.—Where rents are received by one co sharer of property from the tenant, they will cease to be "rents" in his hands, so far as the other co sharers are concerned, but will be profits received by him for the use of all the sharers. A suit, therefore, by one co sharer against another for recovering his share of the rents received by another will not be governed by this Article. The cause of action for such a suit arises only on the date the rents were received by the defendant without reference to the fact as to when the arrears of rent became due. Thus, where a *lambardar* has received rent from a tenant, a co sharer may claim contribution thereof within three years of such receipt, though the rent received by the *lambardar* related to a period beyond three years of the suit.¹

Similarly arrears of rent realized from the tenant by a person who is not entitled to it will be simply money had and received by him for the use of the person entitled to it, and they can be recovered within three years of such receipt under Article 62 In *Mahabir*

- 11 (1893) 1883 Pun Re No 171 page 533 *Ala v Sodhi Inder Singh*
 12 (1892) 16 Mad 305 (306) *Venkataramaiah v District Board of Tanjore*
 13 (1901) 25 Bom 556 (552) 3 Bom L R 135 *Sadashiv v Ramakrishna*
 (1903) 26 Mad 730 (733) 13 Mad L Jour 248 *Kasturi Gopala Ayyangar v*
Anantaram Thivara
 (1904) 6 Bom L R 423 (427) *Antaji v Kashinath*
 (1916) A I R 1916 Bom 141 (144) 38 Ind Cas 54 41 Bom 159 *Ganesh*
Pinayak v Sitabai Narayan
 (1931) A I R 1931 Oudh 92 (32) 130 Ind Cas 65 6 Luck 395 *Nilkantha v*
Suraj Prasad
 14 (1936) A I R 1936 Sind 184 (184) 30 Sind L R 146 165 Ind Cas 369
Mazand Motiram v Shikarpur Municipality
 576, *Bhubaneswar Bhattacharyya*

376, Bhubaneswar Bhattacharjee
(P C), Rante Khujooroonissa v

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Note 3

- 1 (1921) A I R 1921 AN 314 (316) 43 All 29 60 Ind Cas 643, *Chhabraji Kunwar v Ganga Singh*
(1924) A I R 1924 AN 481 (491) 84 Ind Cas 159 46 All 791 (F D) *Sheo Ghulam v Salik Ram*
(1922) A I R 1922 AN 348 (349) 64 Ind Cas 989, *Naziruddin v Acharya Begam* (Submitted incorrect)

Prasad v Mt Parsandi,² the defendant had brought a suit for arrears of rent from the tenant, which rent was in law only payable to the plaintiff, the defendant owing to his minority was able to realize the arrears of rent for a longer period than the plaintiff could have, and further on the date of the defendant's suit for arrears, the plaintiff's claim against the tenant had become barred under this Article. The Court nevertheless held that the plaintiff could recover all the arrears received by the defendant, as his cause of action only arose on the date of defendant's receipt. The liability of the lamhardar to the co sharer for rents not collected by him owing to his negligence is again not a claim for arrears of rent.³

4. Tenancy by sufferance.—Suit for rent.—Section 116 of the Transfer of Property Act provides as follows—

"If a lessee or under-lessee of property remains in possession thereof after the determination of the lease granted to the lessee, and the lessor or his legal representative accepts rent from the lessee or under-lessee, or otherwise assents to his continuing in possession, the lease is, in the absence of an agreement to the contrary, renewed from year to year, or from month to month, according to the purpose for which the property is leased as specified in Section 106."

The principle enunciated in that Section is of general applicability to all leases, whether governed by the Transfer of Property Act or not. It follows that the *mere fact* of the tenant holding over after the expiry of the term of the lease does not continue the relationship of *landlord and tenant* between the parties. A claim by the lessor against the tenant holding over would in such a case not be one for *rent* but merely one for damages for use and occupation—a suit for which is not governed by this Article.¹ But where the possession of the tenant after the expiry of the lease is *assented to* by the landlord by acceptance of rent or otherwise, the relationship between them is, by law, that of a landlord and tenant, and a suit by the former against the latter will be one for rent within the meaning of this Article.²

5. Suit for rent due under registered instrument.—Before the decision of the Privy Council in *Tricomdas Cooverji v Sri*

2 (1923) A I R 1923 All 532 (534) 45 All 410 74 Ind Cas 939

3 (1928) A I R 1928 All 762 (763) 116 Ind Cas 746, *Mt Bal Koor v Khamani Ram*

(1922) A I R 1922 Oudh 149 (150) 25 Oudh Cas 49 65 Ind Cas 739, *Surya Prasad v Debi Dayal*

(1924) A I R 1924 All 613 (614) 77 Ind Cas 1032, *Kunj Bahari Lal v Abdul Hadi*

(1926) A I R 1926 All 436 (436) 24 Ind Cas 389, *Chatur Lal v Lakhmi Chand*

Note 4

1. (1917) A I R 1917 Mad 901 (902) 33 Mad 54 33 Ind Cas 705, *Madar Sahib v Kader Moudien Sahib*

2 (1934) A I R 1934 Mad 459 (461) 59 Mad 75 155 Ind Cas 839, *Gnanadankam Pillai v Antony Benathu Boopalarayar*

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*Gopinath Jiu*¹ in the year 1916 there was a difference of opinion as to whether a suit for rent due under a registered instrument was governed by Article 116 or by this Article² The decision in *Tricomdas's case* has now set the matter at rest^{2a} Lord Sumner after tracing the history of the provision in this Article observed as follows

'Both these Acts (i.e. the Acts of 1871 and 1877) draw, as the Act of 1859 had drawn a broad distinction between unregistered and registered instruments much to the advantage of the latter. The question eventually arose whether a suit for rent on a registered contract in writing came under the longer or the shorter period. On the one hand it has been contended that the provision as to rent is plain and unambiguous and ought to be applied, and that in any case, 'compensation for the breach of a contract points rather to a claim for unliquidated damages than to a claim for payment of a sum certain. On the other hand, it has been pointed out that 'compensation is used in the Indian Contract Act in a very wide sense, and that the omission from Article 116 of the words, which occur in Article 115 'and not herein specially provided for,' is critical. Article 116 is such a special provision, and is not limited and therefore, especially in view of the distinction long established by these Acts in favour of registered instruments it must prevail. Their Lordships accept the interpretation so often and so long put upon the statute by the Courts in India and think that the decisions cannot be disturbed''

Note 5

1 (1916) A I R 1916 P C 182 (184) 44 Cal 759 44 Ind App 65 39 Ind Cas 156 (P C)

2 Article 116 applies to such cases —

(1913) 19 Ind Cas 865 (869) (Cal) *Peary Lal Daw v Madhoji Jiban*

(1896) 19 Mad 52 (53) 5 Mad L Jour 228 *Ambalavana v Vaguran*

(1910) 6 Ind Cas 766 (773) (Mad) *Chengsah v Thimma Nayanam*

(1914) A I R 1914 Mad 397 (387) 23 Ind Cas 753 *Ramanathan Pattar v Achuta Varier*

(1918) 21 Ind Cas 315 (316) 37 Bom 656 *Lalchand Nand and v Narayan Hars*

(1916) A I R 1916 Pat 304 (305) 1 Pat L Jour 37 34 Ind Cas 754 *K L Mackenzie v Rameshwar Singh*

(1922) 67 Ind Cas 939 (940) (Lah) *Abdul Samad v Municipal Committee Delhi*

Article 110 applies and not Article 116 —

(1904) 26 All 188 (189) 1903 All W N 210, *Ram Narain v Kamta Singh*

(1912) 16 Ind Cas 146 (147) 34 All 464 *Jaggi Lal v Sri Ram*

2a (1931) A I R 1931 Cal 790 (790) 133 Ind Cas 102 *Fatechand Bokaria v Nagendra Kishore Roy*

(1921) A I R 1921 Bom 252 (255) 45 Bom 955 61 Ind Cas 70 *Multanmal Jayaram v Budhumal Kevachand*

(1930) A I R 1930 All 69 (71) 123 Ind Cas 321 52 All 363 (F B) *Radha Krishna v Tej Saroop*

In *Kelu Achan v Varadaraja Iyer*,³ it was held that the liability of the assignee of the lessee to pay the annual rent to the lessor is based only on privity of estate and not on privity of contract, and consequently a suit by the lessor to recover rent from the assignee will not be governed by Article 116 but only by the present Article. This decision was, however, dissented from in a later decision of the same High Court,⁴ wherein it was held that Article 116 applied to such suits, the reason being that though the assignee's liability to pay rent to the lessor arises out of privity of estate, it is really based on the covenant to pay rent contained in the original registered lease, which in law runs with the land, and that non-payment will amount to breach of such covenant.

The contract of lease will be held to be registered within the meaning of Article 116 even if the *labuliat* or counter part of the lease is alone executed and registered and is signed by only one party, if the same is accepted by the party not signing it.⁵ Where, however, a registered patta tendered by the landlord was not accepted by the tenant, the tender of patta cannot be considered a contract, and a suit by the landlord for rent will not be governed by Article 116, but only by this Article.⁶

Where a local or special law prescribes a special period of limitation for suits for arrears of rent, that special period will, by virtue of Section 29 sub section 2 *ante*, govern the suit, even if the contract of lease is registered, and Article 116 cannot be applied to such suits so as to extend the special period of limitation. Thus, the Bengal Tenancy Act, 8 of 1885, prescribes a period of limitation of three years for suits for rent governed by that Act, and makes no distinction as to the form of the lease whether registered or not, Article 116 cannot therefore apply to suits governed by that Act, even if the lease is registered.⁷ Similarly, the Madras Estates Land Act, 1908, in Article 8 of Part A in the Schedules, provides a special period of limitation of three years for suits for rent between landlord and tenant governed by that Act, a registered lease will not bring such suits within the operation of Article 116 of the Limitation Act.⁸ But where the special Act has no application and the lease is registered Article 116 would apply.⁹

3 (1914) A I R 1914 Mad 692 (692) 24 Ind Cas 481

4 (1920) A I R 1920 Mad 380 (380) 56 Ind Cas 241 *Narayanan v Ramunni*
[See also (1910) 6 Ind Cas 766 (773) (Mad), *Chengiah v Thimma Nayanam*]

5 (1928) A I R 1928 All 313 (315) 50 All 661 109 Ind Cas 409 *Mt Parbati v Sarup Singh*

6 (1903) 13 Mad L Jour 453 (457) *Ramkrishna Chelliar v Appa Row*

7 (1891) 19 Cal 1 (4) (F B) *Mackenzie v Haji Syed Mahomed Ali Khan*

(1890) 17 Cal 469 (470) *Iswari Pershad Narain v Crowdy*

(1906) 5 Cal L Jour 19 (22-23) 11 Cal W N 57 *Naffar Chandra Maji v Jyote Kumar Mukerjee*

(1905) 4 Cal W N 553 (555), *Kali Charan v Harendra Lal Roy*

8 (1912) 14 Ind Cas 184 (187) (Mad) *Sundaram Iyer v Muthu Ganapathigal*

9 (1892) 19 Cal 489 (499) *Ranigang Coal Association Ltd v Judoonath Ghose*

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6. Arrears of rent charged over immovable property.—Most of the Tenancy Acts of the various Provinces provide a statutory charge over the tenure or holding of the tenant for arrears of rent. Thus, under Section 65 of the Bengal Tenancy Act, the landlord can bring to sale the holding in execution of a decree for rent in Revenue Courts, and the Section gives a first charge for such arrears. As that Act prescribes a special period of limitation for suits for arrears of rent, the statutory charge can be enforced only within that special period, without reference to the Limitation Act. But where a special Act gives a charge for arrears of rent, without providing a period of limitation for enforcing that charge, the question arises as to whether the suit for the arrears of rent so charged on immovable property is governed by the present Article or by Article 132. Thus, the Central Provinces Tenancy Act, 11 of 1898, as it stood before 1920, gave a charge for arrears of rent due from an absolute occupancy tenant, and made no provision for the period of limitation applicable to suits for rent. Under that Act, it was held in *Gourishankar v Laxmanprasad*,¹ by Batten, A J C, that Article 110 would govern not only the personal claim for the rent but also a suit to enforce the charge, and that under that Article the landlord could not recover more than three years' arrears. But this decision was dissented from in a later decision of the same Court in *Singai Murlidhar v Lala Prem Narain*,² in which it was held that the landlord had two remedies open to him, one personal, based on the contract of tenancy and the other, a real remedy based on the statutory charge, and that the latter was governed by Article 132 while the former, by Article 110. This conflict has been set at rest by the new Central Provinces Tenancy Act 1 of 1920, providing a special period of limitation for such suits and excluding the operation of the Limitation Act. No question as to the applicability of Article 132 of the Limitation Act therefore can now arise.³

7. Leases by usufructuary mortgagees—Rights of parties—Where a usufructuary mortgagee leases back the mortgaged property to the mortgagor himself for a certain rent, a claim for the rent is not a claim for *interest* on the mortgage and is governed only by the three years' period of limitation.¹ In *T. M. Vasudevan v Konuru-*

v Subbaraya

[But see (1916) A I R 1916 Pat 48 (49) 38 Ind Cas 102 1 Pat L Jour 506, *Gajadhar Prasad v Thakur Prasad Singh*]

Note 6

1 (1907) 3 Nag L R 81 (84)

2 (1907) 3 Nag L R 164 (170)

3 (1926) A I R 1926 Nag 212 (214) 90 Ind Cas 279 *Ganeshdas v Hiratal*

Note 7

1 (1901) 1901 All W N 109 (111), *Huhan Jahan Begam v Kedar Nath*

pellamma,² A usufructually mortgaged property X to B in 1896 and by a document of even date took back a lease of the same from B. In 1903, A further usufructually mortgaged to B property X and property Y and the document expressly made the mortgaged properties X and Y liable both for principal and interest. In 1912, B sued for the principal and interest on both the mortgages. It was held that since interest was charged on both properties X and Y, B was entitled to recover interest irrespective of the fact that X had been leased to A and that the claim to recover interest by the sale of the properties was governed by Article 132 and not by this Article.

Where a usufructuary mortgagee leased out the property to the mortgagor for a period of two years only and the lease amount was made a charge on the mortgaged property, but the mortgagor held over after the expiry of the two years, and became in law a tenant from year to year by reason of the mortgagee having accepted rent from him, it was held that the rent due under the tenancy by holding over could not be considered to be a charge on the property and that a suit for recovery of more than three years' rent was barred.³

Where a usufructuary mortgagee leases out the mortgaged property to a third party and the mortgage is subsequently redeemed by the mortgagor, the lessee's right will also cease, the reason being that a mortgagee cannot grant a title to anyone in excess of the duration of his own interest in the estate. After redemption the relation between the mortgagor and the third party is not that of landlord and tenant and a suit by the mortgagor against the third party for rent is not sustainable.⁴

8. Right to take credit for rent due, at the time of redemption as incident to tenure. — The right of a *jenmi* (landlord) under the Malabar *kanom* tenure, to deduct arrears of rent due to him from the amount payable by him on the redemption of *kanom*, is an incident of the *kanom* demise, and is not affected by the three years' period under this Article.¹

9. Suit for rent before it accrues due. — This Article cannot apply unless the rent has "become due" and has thus become "arrears." Where a tenant for a term vacates the premises before the expiry of the period and repudiates all liability to pay rent, the landlord is not bound to wait till the expiry of the term and he can immediately bring a suit for the full amount of the rent though it had not accrued due as damages for the breach by repudiation of

(1901) 23 All 333 (343) 1901 All W N 95 *Chamman Lal v Bahadur Singh*

2 (1916) A I R 1916 Mad 78 (79-80) 30 Ind Cas 818

3 (1934) A I R 1934 Mad 453 (461) 58 Mad 75 155 Ind Cas 839 *Gnanadass Ram Pillai v Antony*

4 (1870) 2 N W P H O R 199 (199) 4 *Goodhya Singh v Girdharee*

Note 8

1 (1885) 8 Mad 415 (417) *Unnan v Rama*

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the contract by the tenant¹ Such a suit is not for *arrears* of rent, falling under this Article.

10. Claim for rent against sureties for lessee. — The liability of a surety is co extensive with that of the principal debtor (see Section 128, Contract Act)

The starting point of limitation for a suit by the lessor, for arrears of rent, against the sureties for the lessee will, therefore, be the date of default of the lessee, if the sureties have joined in the execution of *kabuliyat*, and the same has been registered, the period of limitation will be six years from that date under Article 116 of the Act¹ Where the lease is for a fixed term, the surety for the lessee will not be liable for the rent accruing due after the expiry of the lease, if the lessee continues in possession thereafter²

11. Starting point. — Time, under this Article, runs from the date when the arrears "become due" Rent will become an "arrear" when it is not paid until the close of the day on which it falls due¹ Where, by the terms of the contract rent is payable in a particular month, it will not, it is conceived, become an "arrear" till the end of the month and time for recovery of the arrear will run from the end of the month²

The expression "arrears of rent" in this Article means arrears of ascertained rent which the tenant is under an obligation to pay, and which the landlord can claim, and if necessary, sue for³ Ordinarily, the date of payment fixed by contract between the parties would be the date on which the rent becomes due

But under particular enactments prevailing in the various Provinces a different date is sometimes fixed as the date on which the rent "becomes payable" In such cases time will run from such date Thus, where it is necessary under a particular Act for the landlord to take proceedings to have the proper rent ascertained and fixed, time for a suit for arrears will run from the date of such

Note 9

- 1 (1924) A I R 1924 Lah 328 (328) 71 Ind Cas 626 *Budha Mal v Shih Dayal*

Note 10

- 1 (1884) 9 Bom 320 (323) *Kesu Shivaram v Vethu Kanaji*
 2 (1901) 1901 Pun L R No 126, *Sardar Ali v Muhammad Balsh*

Note 11

- 1 (1908) 7 Cal L Jour 106 (106), *Isu ardhari Singh v Ram Brich Roy*
 (1880) 6 Cal 325 (328) 7 Cal L R 342 3 Shome L R 209 (F B) *Kashi Kant v Rohini Kant*
 (1921) A I R 1921 Cal 449 (450) 63 Ind Cas 491 *Birandra Chandra v Mofammad Suleman*
 (1905) A I R 1925 Pat 750 (752) 88 Ind Cas 485, *Suraj Narain Choudhary v Saransathi Bahuria*
 (1926) A I R 1926 Pat 549 (552) 96 Ind Cas 607, *Shama Kant Lal v Kashi Nath Singh*
 2 See (1902) 26 Mad 540 (543) *Lakshminaranappa v Raman Nair*
 3 (1904) 27 Mad 143 (151) 31 Ind App 17 6 Bom L R 241 14 Mad L Jour 1 8 Cal W N 162 8 Sar 617 (P C) *Rangayya Appa Rao v Bobba Sriramulu*

ascertainment and not from the date from the close of the year for which the rent is payable⁴ See also the undermentioned cases⁵ arising under various enactments

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Where by a long course of dealing between the parties rents were received by the landlord, not on the date mentioned in the kabuliya but on a later date, it was held that the later date was the date on which the rent became due⁶ Where there is no person in existence competent to sue for the rent, there can be no cause of action at all and consequently limitation cannot run, because there is no one against whom it can run A rent will "become due" in such a case as soon as there is some one to whom it is payable, who is capable of enforcing the obligation by suit⁷

See also the undermentioned case⁸

12. Application of Section 19 to the Article.—An acknowledgment of the liability to pay arrears of rent will, under Section 19 *ante*, extend the period of limitation by three years from the date of acknowledgment¹ As to what would constitute a valid acknowledgment, see Notes to Section 19 *ante*

- 4 (1903) 27 Mad 143 (151) 31 Ind App 17 6 Bom L R 241 14 Mad L Jour 1 8 Cal W N 162 8 Sar 617 (P C) *Rangayya Appa Row v Bobba Sriramulu*

As to when the rent can be said to be ascertained under the Madras Estates Land Act see —

- (1934) A I R 1934 Mad 224 (225) 148 Ind Cas 523 *Muthurulappa Pillai v Kamaraja Pandia Naicker*
(1910) 8 Ind Cas 1091 (1092) 36 Mad 438 *Singaram Pillai v Ghulam Ghouse*
5 (1914) A I R 1914 Mad 590 (591) 37 Mad 540 16 Ind Cas 934 *Kanthimathi Naitha Pillai v Muthusamy Pillai*
(1869) 11 Sath W R 537 (538) 3 Beng L R App 72, *Gobind Kumar Chowdhry v Hargopal Nag*
(1907) 5 Cal L Jour 19 (24) 11 Cal W N 57, *Naffar Chandra Maji v Jyote Kumar Mukerjee*
(1904) 8 Cal W N 640 (640) *Mon Mohini Dasi v Priya Nath Basal*
(1877) 9 Cal 6 (12) 2 Ind Jur 209 *Watson & Co v Dhonendra Chunder*
(1914) A I R 1914 Mad 656 (656) 23 Ind Cas 912 *Bhataraju Venkata Subba Rao v Yenumula Mallu Dora Garu*
(1900) 10 Mad L Jour 26 (27) *Rama Naidu v Sri Mahant Rama Kissara Dasayyaru*
(1912) 15 Ind Cas 893 (894) (Mad) *Satrucherla Veerabhadra Raju v Ganta Kumari Naidu*
(1903) 13 Mad L Jour 485 (487) *Ramakrishna Chettiar v Appa Row*
(1920) A I R 1920 Pat 786 (786) 59 Ind Cas 814 (315) *Madnapur Zamindari Company v Jaga Nath Sarangi*
(1906) 29 Mad 556 (557) 16 Mad L Jour 486 1 Mad L Tim 315 *Aruna chalam Chettiar v Kadir Rowthen*
6 (1925) A I R 1925 Cal 1148 (1149) 90 Ind Cas 40 *Ahmad Iar Khan v Dina Nath Sadhukhan*
7 (1923) A I R 1923 Mad 461 (462) 46 Mad 579 72 Ind Cas 5 *Nataraja Desikar v Govinda Rao*
8 (1930) A I R 1930 Pat 51 (57) 8 Pat 851 122 Ind Cas 241, *Narpat Singh v Mahidhar Jha*

Note 12

- 1 (1898) 22 Mad 32 (33), *Venkatagiri Rajah v Sheskh Dade Sahib*
(1916) A I R 1916 Mad 639 (639) 27 Ind Cas 744, *Viswanath v Ramchandra*

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- (1926) A I R 1926 Pat 549 (552) 96 Ind Cas 807, *Shama Kant Lal v Kasi Nath Singh*

- 2 See (1902) 26 Mad 540 (543), *Lakshminaranappa v Raman Nair*

- 3 (1904) 27 Mad 143 (151) 31 Ind App 17 6 Bom L R 241 14 Mad L Jour
 1 8 Cal W N 162 8 Bar 617 (P C) *Rangayya Appa Rao v Dobbu Sriramulu*

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- 4 (1903) 27 Mad 143 (151) 31 Ind App 17 6 Bom L R 241 14 Mad L Jour 1 8 Cal W N 169 8 Sar 617 (P C) *Rangayya Appa Row v Bobba Sriramulu*

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- (1934) A I R 1934 Mad 224 (225) 148 Ind Cas 523 *Muthirulappa Pillai v Kamaraja Pandia Naicker*
(1910) 8 Ind Cas 1091 (1092) 36 Mad 438 *Singaram Pillai v Ghulam Ghouse*
5 (1914) A I R 1914 Mad 580 (581) 37 Mad 540 16 Ind Cas 934 *Kanthimathi Natha Pillai v Muthusamy Pillai*
(1869) 11 Suth W R 537 (538) 3 Beng L R App 72 *Gobind Kumar Chowdhry v Hargopal Nag*
(1907) 5 Cal L Jour 19 (24) 11 Cal W N 57 *Naffar Chandra Maji v Jyoti Kumar Mukerjee*
(1904) 8 Cal W N 640 (640) *Mon Mohini Das v Priya Nath Basali*
(1877) 3 Cal 6 (12) 2 Ind Jur 209 *Watson & Co v Dhondra Chunder*
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(1900) 10 Mad L Jour 26 (27) *Rama Naidu v Sri Mahant Rama Kissari Dasayyaru*
(1912) 15 Ind Cas 393 (394) (Mad) *Satructeria Veerabhadra Raju v Ganta Kumari Naidu*
(1903) 13 Mad L Jour 485 (487) *Ramakrishna Chettiar v Appa Row*
(1920) A I R 1920 Pat 786 (786) 59 Ind Cas 314 (315) *Midnapur Zamindars Company v Jaga Nath Sarangi*
(1906) 29 Mad 556 (557) 16 Mad L Jour 486 1 Mad L Tim 315 *Aruna chalam Chettiar v Adair Rowthien*
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- 1 (1898) 22 Mad 32 (35) *Venkatagiri Rajah v Sheikh Bada Sahib*
(1916) A I R 1916 Mad 638 (638) 27 Ind Cas 744, *Fisranath v Ramchandra*

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12—14

Where however, on the date of the defendant's acknowledgment the claim for the rent had become barred under this Article, but the acknowledgment in writing contains an express promise to pay the rents, it will be a valid contract under Section 25 of the Contract Act, and the amount can be recovered on the basis of such contract²

13. Suit by minor after attaining majority, for rent.—The provisions of Section 6 *ante* with respect to minors will apply to rents accruing due during the minority of the plaintiff, and they can be recovered within three years of attaining majority. But where a special enactment like the Madras Estates Land Act, 1 of 1908, prescribes a special period of limitation for suits for rent governed by that Act, the provisions of Section 6 of the Limitation Act cannot be applied to it, and arrears of rent barred under that Act cannot be recovered even if the same had accrued due during the minority of the landlord¹

Where a minor is co owner of the property with an adult, and the latter can give a valid discharge for the rent, he can, in a suit filed by him after attaining majority for arrears of rent from the tenant, recover only arrears accruing due within three years before suit under this Article read with Section 7, *ante*³

14 Non-payment of rent by tenant for twelve years.—A mere non payment of rent for twelve years has a legal consequence different from a non payment of rent coupled with *denial of the landlord's right to get rent*. In the case of a mere non payment of rent the landlord can, by suit, recover the arrears of rent that has become due within three years of the suit¹. In *Archbold v Scully*²

2 (1899) 23 Mad 94 (98) 9 Mad L Jour 330 *Appa Row v Suryanarayana Rao*

Note 13

1 (1915) A I R 1915 Mad 1211 (1212) 39 Mad 646n 21 Ind Cas 595 *Rajah of Pattapore v Ganu Venkatasubba Row*
 2 (1893) 1893 Pun Re No 60 *Daulat Ram v Sayed Abdul Karim*

Note 14

1 (1928) A I R 1928 Pat 63 (64) 104 Ind Cas 124 *Sheo Nandan Singh v Kesho Prasad Singh*
 (1868) 5 Bom H C R A O 95 (96) *Hari Vasudev v Mahadji Apaji*
 (1918) 18 Ind Cas 243 (243 244) (Mad) *Advis Sreenmasa Pantulu Garu v Palatala Jogi*
 (1913) 19 Ind Cas 119 (120) (All) *Abdul Karim v Chunni Bibi*
 (1911) 11 Ind Cas 30 (31) (Cal) *Taran Chandra Ghosh v Ganendra Nath Roy*

ryar v Toppari Gaundan
Shaikh Janoo
Cloudury v Administrator

(1910) A I R 1916 Bom 143 (144) 30 Ind Cas 54 41 Bom 159 *Ganesh Vinayak Joshi v Sitabai Narayan Joshi*

nia v Shridhar
will bar land

2 (1861) 131 R R 233 (236) 9 H L C 660 7 Jur (N S) 1169 5 L T (N S) 160

a case decided by the House of Lords, Lord Wensleydale observed as follows

Article 110
Note 14

"The tenant, by withholding the payment of rent, and keeping it himself, cannot place himself in the situation of a third person. He merely keeps it in his own pocket, and whether he does this wilfully without excuse, or under a claim of title, it is merely the non-payment of rent so far as the Statute of Limitations is concerned, and no more."

Where the non payment of rent is coupled with a denial of right in the landlord to receive rent, the landlord cannot, more than twelve years after such denial, recover any rent from the tenant. The reason is that rent is a "periodically recurring right" within the meaning of Article 131 *infra* and where the plaintiff is refused enjoyment of the right, he will be barred after 12 years from the date of such refusal to establish such right and, as the right to receive the rent is the basis of the claim for arrears of rent, no rent can be recovered where the right itself is barred by time³.

But though a mere non payment of rent will not, as such, bar a claim for arrears falling due within three years of suit, a non-payment for a very long period may give ground for the inference that the landlord had been ousted or had transferred his right to the tenant⁴.

111.* By a	Three years	The time fixed for completing the sale, or (where the title is accepted after the time fixed for completion) the date of the acceptance
vendor of immovable property for personal payment of unpaid purchase money		

Article 111

Synopsis

1. Legislative changes.
2. Scope of the Article.
3. "Vendor."
4. "Unpaid purchase money."

* Act of 1877, Article 111

Column one was —By a vendor of immovable property to enforce his lien for unpaid purchase money. Columns two and three, same as above.

Act of 1871, Article 111

Same as that of Act of 1877

Act of 1859

No corresponding provision

3 (1937) A I R 1937 All 57 (59) 166 Ind Cas 623 I L R (1937) All 140, *Hidayat Ullah v Gokul Chand*

(18'0) 2 N W P H C R 199 (199) *Ajoodhya Singh v Gurdharee*

4 (1912) 17 Ind Cas 523 (524) (All) *Deekinandan v Dundeshwari*

Article 111
Notes
1—2

1. Legislative changes. — The corresponding Articles of the Acts of 1871 and 1877 applied to suits by the vendor "to enforce his lien for unpaid purchase money" A question arose as to whether the Article applied to cases where the lien was sought to be enforced against the property of the vendee It was held in some cases¹ that though the language was general so as to include such suits, it should be limited to suits to enforce the claim *personally* against the vendee In other cases² it was held that the Article did not apply to the *statutory charge* under Section 55 of the Transfer of Property Act which was held to be a different right from a vendor's lien, suggesting thereby that a suit to enforce the vendor's lien where that is available against the property of the vendee, may be governed by the Article

The words "to enforce his lien for unpaid purchase money" have now been substituted by the words "for *personal* payment of unpaid purchase money" and the position is thus made clear

2. Scope of the Article. — This Article applies only where there has been a *sale* of immovable property and the suit is to recover unpaid *purchase money* Where a partition is effected between joint owners of property, and, as part of the adjustment in allotting the shares, one joint owner promises to pay money to another, and the latter sues for the recovery of the amount, it cannot be said that the suit is by a *vendor* for any *purchase money*, this Article will not apply to such cases¹ Again, where A, as guardian of B, sells property to C who undertakes to keep the purchase money in trust for B to be given to B on her attaining majority, and B subsequently dies before attaining majority, leaving A as her next reversioner, and he sues for the amount, it cannot be said that the suit is by a *vendor* to recover any *purchase money* It is simply a claim to a return of the money after the trust in respect of it is exhausted and hence this Article does not apply²

A vendor's right to unpaid purchase money may arise, under an *express stipulation* to that effect in the instrument of sale, or it may arise by virtue of the statutory obligation under Section 55 sub section 5 clause (h) of the Transfer of Property Act, 1882 The right in both the above cases is a right to recover the amount *personally*

Article 111 — Note 1

- 1 (1899) 21 All 454 (458) 1899 All W N 170, *Har Lal v Muhamdi*
 (1897) 22 Bom 846 (848, 849), *Chunni Lal v Das Jethi*
 (1892) 18 Bom 48 (50), *Virchand Lalchand v. Kumari*
 2 (1908) 30 All 172 (174) 1908 All W N 71 3 Mad L Tim 374 5 All L Jour
 243 (F B), *Munir un Nissa v Akbar Khan*
 (1906) 29 Mad 805 (307) *Ramakrishna Ayyar v Subramanaya Ayyar* (Over
 ruling 24 Mad 233 and 21 Mad 141)
 (1906) 9 Oudh Cas 284 (287), *Syed Tahib Husain v Ram Charan*

Notes 2

- 1 (1928) A I R 1928 Lah 662 (663) 111 Ind Cas 29, *Gurdas Mal v Basf Nath*
 2 (1933) A I R 1933 Lah 860 (861) 15 Lah 85 147 Ind Cas 269, *Gulab v. Mi Sarwar Jan*

from the purchaser. A vendor has in addition, in the absence of a contract to the contrary, a statutory charge on the property sold for the unpaid purchase money under Section 55 sub section 4 clause (b) of the Transfer of Property Act. Suits to enforce this charge are not governed by this Article but by Article 132 *infra*, and the remedy is available even though the *personal* remedy for unpaid purchase money is barred by limitation.³

As regards a suit to enforce the *personal* remedy, if the right arises in respect of an *express stipulation* in a registered sale deed the suit will be governed by Article 116 and not by this Article. The reason is that Article 116 is a *special* Article governing all suits on *registered* contracts and in accordance with the general principles of interpretation will prevail over a general Article such as the present one.^{3a}

Illustrations

- 1 A sells property to B by a registered document with an express stipulation therein that B should pay off A's creditor C out of the consideration amount retained by him for the purpose. B fails to pay as promised and A sues to recover the amount from him. The suit is governed by Article 116 and not by this Article.⁴
- 2 A sells property to B by a registered document with *express stipulation* therein that B should pay the purchase money to A one year after the completion of the same. B fails to pay and A sues for the recovery of the amount. The suit is governed by Article 116 and not by this Article.⁵
- 3 A sells property to B by a registered document and the sale deed recites that the consideration *has been received* by A.

3 (1914) A I R 1914 All 131 (132) 25 Ind Cas 208 *Megh Raj Vaish v Abdul-lah Khan*
(1908) 30 All 172 (174) 1908 All W N 71 3 Mad L Tim 374 5 All L Jour 243 (F B) *Munir un Nissa v Akbar Khan*

4 (1931) A I R 1931 All 419 (420) 131 Ind Cas 686 *Uakund Lal v Bhola Ras*
(1935) A I R 1935 All 411 (416) 157 Ind Cas 583 57 All '37 *Babu Ram v Inam Ullah*
(1929) A I R 1929 Lah 395 (396) 118 Ind Cas 445 *Mehar Chand v Shanti Sarup*
(1930) A I R 1930 Pat 46 (50) 8 Pat 860 192 Ind Cas 244 *Ram Rakhya Singh v Raghu nath Prasad*
(1934) A I R 1934 Oudh 40 (248) 149 Ind Cas 579 *Daynath v Parameswar Dasgupta*
(1931) A I R 1931 Bom 865 (867) 133 Ind Cas 967 *Ammanidas v Anant Varayan*
5 (1934) A I R 1934 Lah 296 (296) 154 Ind Cas 432 *Gurbachan Singh v Sham Lal*
(1931) A I R 1931 Rang 139 (144) 9 Rang 56 134 Ind Cas 737 *Ram Raghu bir Lal v United Refineries (Burma) Ltd* (Confirmed on appeal in A I R 1933 P C 143)

Article 111

Notes

2—3

Really, however the consideration has not been paid and *A* sues *B* for recovery of the amount. The suit is governed by this Article and not by Article 116⁶. A single Judge of the High Court of Nagpur has, however, taken a contrary view in the undermentioned case^{6a}. This view, it is submitted, is not correct.

The reasoning of the decisions referred to in support of the above illustrations is, in many instances, not very clear but the decisions themselves can all be supported on principle. The stipulation to pay *A*'s creditor in the first illustration like the stipulation to pay the amount one year after the sale in the second illustration is a "contract to the contrary" referred to in Section 55 of the Transfer of Property Act. *A*'s right to the purchase money cannot therefore be based upon Section 55 sub-section 5 clause (b), but arises only from the breach of the contract to pay, embodied in the registered document. Article 116 will therefore apply and not this Article. In the third illustration *A*'s right to the purchase money arises not by virtue of any contract embodied in the sale deed (for there is no contract at all mentioned in the deed) but by virtue of the statutory obligation under Section 55 sub-section 5 clause (b). Article 116 has no application to such a case and the suit will be governed by this Article. In the undermentioned case⁷ Mr Justice Pandana of the Madras High Court observed that this Article "governs suits for unpaid purchase money payable to or to the order of the vendor under an agreement to sell and as the third column shows is independent of rights arising by the deed of sale. It is submitted that the observation is not correct in view of what has been stated above. The case itself was decided on the ground that the suit was one for indemnity arising out of a contract in the sale deed and so governed by Article 116 read with Article 83 of the Limitation Act.

Where in a case falling within the first illustration *B* fails to pay *C* as promised and *C* compels *A* to pay up his amount and there after *A* sues *B* for recovery of the purchase money and for damages the suit is really one on an indemnity governed by Article 83 or Article 83 read with Article 116. See Notes to Article 83 *ante*.

3 "Vendor."—The word 'vendor' would seem to include the vendor's transferee of the right to the purchase money. In the undermentioned cases¹ the suit was in each case by a transferee.

6 (1901) 24 Mad 283 (237) *Azuthala v Dayanada* (Overruled on another point in 29 Mad 305.)

(1937) A I R 1937 Pat 44 (47) 166 Ind Cas 599 15 Pat 753 *Ranparikha Pandey v Mt Ramjari Kuer*

6a (1937) A I R 1937 Nag 246 (247) 172 Ind Cas 680 I L R (1938) Nag 45 *Shankarrao v Bhujangrao*

7 (1933) A I R 1933 Mad 424 (425) 144 Ind Cas 550 56 Mad 724 *Natamam Nadar v Vedamanicka Nadar*

Note 3

1 (1929) A I R 1929 Lah 395 (396) 118 Ind Cas 445 *Melar Chand v Shanti Sarup* (Court auct on purchaser of right)

from the vendor of the right to the purchase money. The decisions
ground that the claim was on a registered contract

Article 111
Notes
3-4

ground that the claim was on a registered contract

4. "Unpaid purchase money."—Where *A* sold property to *B* with a stipulation that *B* should pay, from out of the consideration, a mortgage of *A*, it was held by the Judicial Commissioner's Court of Nagpur¹ that the money retained by *B* to pay off the mortgage was not "unpaid purchase money" within the meaning of Article 111. The suit was, however, decided on the ground that it was one for indemnity governed by Article 83 read with Article 116 of the Act. The Chief Court of Oudh has, on the other hand, held that such money is "unpaid purchase money," but the Article was not applied on other grounds.² It is submitted that the latter view is correct.

112.* For a call by a company registered under any Statute or Act.	Three years.	When the call is payable.	Article 112
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Synopsis

1. Legislative changes.
2. Scope and applicability.
3. Period and starting point.

1. Legislative changes.—Under Act 9 of 1871, time ran from the date when the call was *made*. Under the Act 15 of 1877 and the present Act, time does not run from the date when the call is made but from the date when the call is *payable*.

2. Scope and applicability.—Under the Indian Companies Act, 1913, the directors of a company may, from time to time, make "calls" upon the members in respect of any moneys unpaid on their shares subject to certain conditions, and the members shall pay the

✱	Act of 1877, Article 112 Same as above
	Act of 1871, Article 112 Columns one and two, same as above Column three was When the call is made Act of 1859 No corresponding provision

(1935) A 1 R 1935 All-411 (416) 157 Ind Cas 533 57 All 797, *Babu Ram v*
Imam Allah

Note 4

- 2 (1934) A I R 1934 Oudh 240 (241) 149 Ind Cas 523 *Bajjnath v Permeswar*, *Dyal* (Dissenting from Single Bench decision in A I R 1916 Oudh 143)

Article 112 Note 2

amount so called on their shares (see Section 17 of the Companies Act, 1913 and Article 12 of Table A of the Act) Where such a call is made and is not paid at the time it should have been paid under the Companies Act, and a suit is filed for recovering such amount, it is governed by this Article

But a shareholder is also under another liability Where the company is *wound up*, every member is under a liability to *contribute* to the assets of the company to an amount sufficient for payment of its debts, etc (see Section 156 of the Companies Act, 1913, corresponding to Section 61 of the Companies Act of 1882) This liability is a *new* liability and arises only when the Court is satisfied that the financial circumstances of the company are such that the members should be made to contribute The liability is enforceable at the instance of the liquidator A suit to enforce this liability is not governed by this Article and is not affected by the fact that a "call" had been made on the defendant before the winding up and that a suit in respect of such call is barred by limitation under this Article¹ The shareholder may also be liable under a *special contract* such as that referred to in Article 28 of Table A annexed to the Companies Act to pay the amount of any calls which are *due and owing* at the time of the forfeiture of his shares The enforcement of this liability is on a special contract and is governed by Article 115 of this Act time running from the date of forfeiture² A suit by a shareholder against the company for the *dividend* declared on his shares is not governed by this Article³

Article 112 — Note 2

- 1 (1886) 10 Bom 483 (487) *Parell Spinning & Weaving Co Ltd v Manek Haji*
- (1903) 1903 Pun L R No 160 1908 Pun Re No 70 *Harchand Rai v Rang Lal* (10 Bom 483 Followed)
- (1916) A I R 1916 All 317 (318) 35 Ind Cas 159 89 All 347, *Jagannath Prasad v U P Flour & Oil Mills Co Ltd*
- (1895) 20 Bom 654 (658) *Sorabji Jamsetji v Ishwardas Juggandas*
- (1907) 31 Mad 66 (67) 8 Mad L Tim 250 *Vaidinwara Ayyar v Sita Subramanya Mudaliar*
- (1934) A I R 1934 Lah 1015 (1015) 155 Ind Cas 16 *Pokhar Mal v Flour & Oil Mills Co Ltd*
- (1928) A I R 1928 All 272 (273) 50 All 476 113 Ind Cas 91 *In the matter of Dehra Dun Mussoorie Electric Tramway Co Ltd*
- (1931) A I R 1931 Pat 44 (48) 130 Ind Cas 534 10 Pat 249 *Prayan Prasad v Gaya Bank and Trades Association Ltd*
- 2 (1932) A I R 1932 All 342 (343) 54 All 541 140 Ind Cas 502 *Bishamber Nath v Agra Electric Stores Ltd*
- (1925) A I R 1925 Bom 321 (323) 88 Ind Cas 96 49 Bom 715 *Habib Rowja v Standard Aluminium & Brass Works Ltd*
[See also (1928) A I R 1928 Bom 252 (253) 52 Bom 477 110 Ind Cas 33, *Maneklal Mansukhbhai v Suryapur Mills Co Ltd*]
- But where the call had already become barred on the date of forfeiture the forfeiture will not give a fresh starting point
- (1933) A I R 1933 Oudh 285 (286) 146 Ind Cas 625 8 Luck 723 *Sri Mata Lakshmi Sugar Corporation Ltd v Jasjit Singh*
- 3 (1926) A I R 1926 Mad 615 (620) 91 Ind Cas 515 49 Mad 468 (F B) *Venkata Gurunadha Ram Seshayya v Tripuri Sundari Cotton Press Berwada*

3. Period and starting point.—Time runs from the date when the call is payable¹ Where the sum called is payable on allotment of shares, and by the Articles of Association the money becomes due on the inscription of the defendant's name as the holder of such shares, time will run from the date of such inscription²

**Article 112
Note 3**

113.* For specific performance of a contract.

Three years

The date fixed for the performance, or, if no such date is fixed when the plaintiff has notice that performance is refused.

Article 113

Synopsis

1. Legislative changes.
2. "Specific performance of a contract."
3. Suit for possession distinguished from suit for specific performance by giving possession
4. Suit to enforce condition subsequent.
5. Suit to enforce an award.
6. Starting point of limitation.
7. Date fixed for the performance.
8. "Performance is refused."
9. Defence to a suit for specific performance

Other Topics

Delay in filing suit	See Note 9 Pts 1 to 4
Part performance — Doctrine of	See Note 9 Pt 6
Suit for money based on award	See Note 5 F N (3)
Suit for possession based on compromise	See Note 3 Pt 9 & F N (5)
Suit for possession based on title — Article not applicable	See Note 8

* **Act of 1877, Article 113**
Same as above

Act of 1871, Article 113

Columns one and two same as above Column three was — When the plaintiff has notice that his right is denied

Act of 1859

No corresponding provision

Note 3

- 1 (1934) A I R 1934 Bom 97 (97) 150 Ind Cas 645 *Indian Co-operative Navigation & Trading Co Ltd v Padamsey*
- (1927) A I R 1927 Lah 543 (544) 102 Ind Cas 705 *Karam Chand v Jullundur Bank Ltd*
- (1937) A I R 1932 Cal 382 (382) 137 Ind Cas 380 *Pabna Dhana Bhandar Co Ltd v Promoda Chandra Roy*
- 2 (1893) 17 Bom 469 (472) *Maluchand Dharamchand v Dalsukhram Hargovindas*
- (1893) 17 Bom 472 (474), *Chhotelal Chhaganlal v Dalsukhram Hargovindas*,

Article 113

Notes

1—2

1. Legislative changes.

Act of 1859

There was no provision corresponding to the one in the present Act. For decisions that have arisen under that Act, see the undermentioned cases¹

Act of 1877

In the third column the words "The date fixed for the performance, or, if no such date is fixed," were added

2. "Specific performance of a contract." — A contract is an agreement enforceable at law, made between two or more persons, by which rights are acquired by one or more to acts or forbearances on the part of the other or others. An essential feature of a contract is a promise by one party to another, or by two parties to one another, to do or forbear from doing certain specified acts. A contract, therefore, primarily means a transaction which creates and regulates the personal obligations and duties of the promisor¹

If one of two parties to a contract breaks the obligation which the contract imposes, the party injured by the breach gets a right of action. The remedies open to the person injured are of two kinds: he may seek to obtain *damages* for the loss he has sustained or he may seek to obtain a *decree for the specific performance* of the contract. But there is this difference: every breach of contract entitles the injured party to damages, even though they may be nominal; but it is only under *certain circumstances* that specific performance can be obtained. (See Chapter II of the Specific Relief Act.)

The specific performance of a contract, then, is its actual execution according to its stipulations and terms and is contrasted with damages or compensation for the non-execution of the contract. Such actual execution is enforced under the equitable jurisdiction vested in the Courts by directing the party in default to do the very thing which he contracted to do²

Illustrations

1. A suit was brought in 1900 against the defendant for possession of villages on payment to him of such sum as might be found due. The plaintiff alleged that the villages had been purchased by the defendant in 1883 as *benamidar* for the plaintiff's father (deceased) and that in 1893 he had contracted to convey them to the plaintiff upon payment of a sum then found due. The

Article 113 — Note 1

- 1 (1869) 12 Suth " " " " " " " " " " " "
 (1867) 8 Suth
 (1865) 3 Suth
 (1874) 22 Suth

Note 2

- 1 (1918) A I R 1918 P C 85 (86) 46 Cal 173 45 Ind App 162 48 Ind Cas 262
 (P C) *Ranjit Singh v Maharaj Bahadur Singh*
 2 Fry's Specific Performance of Contracts, 3rd Edition, Section 3.

contract of 1888 was expressed to be for a "sale" of the villages to the plaintiff, and in the view of the Judicial Committee its terms were consistent only with the defendant being the legal and beneficial owner. It was held that whatever was the original nature of the purchase in 1883, the suit must be regarded as one for the specific performance of the contract of 1888³

2 A partition deed of 1914 contained a provision to the effect that if there was any inequality discovered afterwards in the shares allotted by the partition deed, which, according to the partition deed, were to be enjoyed separately thereafter, the person who had excess land in his possession was to make good the deficit in the other share by giving a sufficient portion of land from a certain field adjoining the latter's share therein. A suit was instituted for recovery of possession of about 28 cents of land on the strength of this provision. It was held that the suit was one for specific performance⁴

3 A contract to sell a village was entered into on 27th April 1908. A portion of the consideration was paid as earnest money at once and the balance was paid on 18th June 1908. The sale was not completed. It was held that the purchaser's remedy was to bring a suit for specific performance⁵

See also the undermentioned cases⁶

A suit for the specific performance of a contract is not one for compensation for the breach of the contract within the meaning of

3 (1922) A I R 1922 P C 345 (347) 49 Ind App 335 (340-341) 45 Mad 641 68 Ind Cas 173 (P C) *Subbaraya Pillai v Venkata Perumal* (A I R 1917 Mad 775, Reversed)

4 (1935) A I R 1935 Mad 559 (560) 156 Ind Cas 879, *Nataranjan v Palani and Pillai*
(1902) 5 Oudh Cas 140 (142) *Subba Singh v Hari Singh*

5 (1916) A I R 1916 All 6 (7) 82 Ind Cas 49, *Fatmatus Sughra Begam v Marjamunnissa Begam*

6 (1876) 2 Cal 923 (327) *Ahmed Mahamed v Adjein Dooply*
(1923) A I R 1923 Nag 73 (74) 84 Ind Cas 670 *Maktumbi v Anant Ram*

In the following cases it was held that the suits were not for specific performance

(1876) 1 Mad 235 (246) 4 Ind App 76 3 Suther 382 3 Sar 637 1 Ind Jur 184 (P C), *Raja Yurmah v alsa v Hari Yurmah*

(1915) A I R 1915 Cal 493 (493) 27 Ind Cas 230 *Akhil Prodhan v Mon-mothanath Kar*

(1936) A I R 1936 All 870 (873) 166 Ind Cas 908 *Ram Chander v Ram Chander* (Covenant in a sale deed to pay off prior incumbrances)

(1916) A I R 1916 Mad 1074 (1076) 29 Ind Cas 693 (699, 901), *Kalappa Kamathi v Kachur Sikkharama Rao* (Covenant to re sell)

(1921) 62 Ind Cas 953 (954) (Lab) *Tapasa Mal v Jhandoo* (Suit based on covenant in a sale deed)

(1921) A I R 1921 Sind 118 (120) 17 Sind L R 1 80 Ind Cas 962 *Khemchand Ramdas v Mohsom Shah* (Covenant to re sell)

(1914) A I R 1914 Low Bur 241 (243) 8 Low Bur Rul 64 24 Ind Cas 911, *Secretary of State v Ma Dwe* (Covenant in a lease deed to renew the lease — Cause of action arose in 1896 when renewal of lease was refused — Suit brought in 1907 held barred)

[See (1910) 6 Ind Cas 183 (186) (All) *Jhanda Singh v Wahid ud-din*, (Agreement to re sell)]

Notes
2-3

3. Suit for possession distinguished from suit for specific performance by giving possession. — A suit for the possession of property should be distinguished from a suit for the specific performance of a contract wherein possession is claimed as part of the relief of specific performance¹ The former is based on the *title* of the plaintiff in the subject matter of the suit the latter is based on an agreement whereby the defendant *agrees to complete the title* of the plaintiff in the said subject-matter, the claim for possession in such a suit being dependent on the right to specific performance² In the one case, the plaintiff comes to the Court to vindicate his right to be left undisturbed in his enjoyment of the property, a right available against all the world in the other case, he comes to the Court to enforce an *obligation embodied in an agreement* entered into between him and the defendant, a right available against the *defendant only* If, therefore, the plaintiff, instead of bringing a suit for the specific performance of the contract, were to institute a suit for possession, his suit will necessarily fail for want of title in the suit

7 (1909) 31 Mad 452 (453) 18 Mad L Jour 477 5 Mad L Tim 211 *Srinivas Raghava v Rangaswamy Iyengar* (This was a suit for the value of the lands of which the plaintiff was dispossessed — The suit was based on a covenant in an exchange deed — Held that Art 116 applied)

7 Ram
reeling
horses
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(1917) A I R 1917 Lah 164 (165) 41 Ind Cas 248 1917 Pun Re No 61
Salabat v Abdul Rahman (In this case it was held that the remedy
open to the plaintiff was to bring a suit for compensation the limita-
tion for which began from the date of dispossession)

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ait for compensa
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(1891) 1691 All W N 130 (131) Baldeo Prasad vs Jai Singh

(1891) 1691 All W N 130 (131) Baldeo Prasad v Jit Singh
(1917) A 1 R 1917 Mad 465 (466) 35 Ind Cas 254, 40 Mad 910,
Claim for
Rs 115 or

(1890) 13 All 200 (204) 1891 All W N 5 Naubal Singh v Indur Singh]

Note 3

Note 3

2 (1894) 6 All 231 (232) 1894 All W N 42 6 Ind Jur 521 *Muhammad Ali Ahmad Khan v Masjids Rasool*

property³ Where the suit is for specific performance of a contract, it is this Article that will apply even where possession is asked for as part of the specific performance⁴ The Article will not apply where the suit is merely for possession of property based on title⁵

Illustrations

- 1 Where the vendor agrees to sell and the vendee to buy immovable property, contingent on the vendor's title being declared in a pending suit, a suit by the vendee, after such title is declared, for execution of a conveyance and for possession of the property

3 (1894) 6 All 231 (232) 1894 All W N 42 8 Ind Jur 524 *Muhs ud din Ahmad Khan v Majlis Rai*

v Ibrahim
for specific
ought a suit

4 (1894) 0 All 231 (232) 1894 All W N 42 8 Ind Jur 524 *Muhs ud din Ahmad Khan v Majlis Rai*

(1921) A I R 1921 Oudh 248 (251) 66 Ind Cas 622 *Bisheshar Dayal v Mt Hurraj Kaur*

(1911) 11 Ind Cas 25 (27) (Sind) *Vasram v Bibi Sultan*

(1916) A I R 1916 Low Bur 73 (73) 32 Ind Cas 573 *Maung Ne Dun v Ma Le* (Vendee paid money and was put in possession of land—Vendee alleging that vendor promised to execute a conveyance—Denial of such allegation by vendor who claimed possession—Held by virtue of Section 54 of Transfer of Property Act vendor must do all things necessary to complete vendee a title and that suit was one for specific performance)

(1916) A I R 1916 Low Bur 104 (104) 33 Ind Cas 761 *Mya Bura v Maung Kya Zan* (It is not necessary that the vendor should agree to execute a regular conveyance. Once there is an agreement to sell immovable property and the vendee has done his part of the contract by paying the purchase money the vendor is bound to do everything necessary in order to complete the title of the vendee and where S 54 of the Transfer of Property Act applies, by a registered deed of conveyance)

(1923) A I R 1923 Lah 672 (673) 72 Ind Cas 1040, *Akushi Muhammad v Hayat*

(1932) A I R 1932 Lah 24 (25) 135 Ind Cas 203, *Makbub v Munshi* (Where under the terms of a compromise one party had agreed to give a certain extent of land out of his property to the other but the land had not been localised Held that the contract being executory a suit to enforce the same was governed by Art 113)

(1911) 11 Ind Cas 299 (300) (Lah), *Fazal Din v Amiruddin*

(See (1916) A I R 1916 All 228 (229) 35 Ind Cas 275 38 All 292, *Nihal Singh v Seeta Ram*)

5 (1874) 13 Beng L R 312 (322 373) 1 Ind App 157 3 Sar 314 (P C), *Rani Meera v Rani Hulas*

(1876) 25 Suth W R 521 (523) C G D *Detts v Muhammad Ismael Chowdhury* (A suit for recovery of possession of land based on a compromise effected in the course of the previous litigation between the parties)

(1913) 19 Ind Cas 411 (415) 1913 Pun Re No 20 *Basheshar Nath v Dets Pershad* (Where no conveyance is needed in respect of properties comprised in a compromise and the title vests in the parties from the date of compromise a suit for possession by partition of $\frac{1}{2}$ share of the property comprised in the compromise is governed by Art 114 and not by Art 113)

(1900) 10 Oudh Cas 218 (223) *Kalla Singh v Hamayat Ali* (Suit for possession by mortgagee on default of payment of interest—Suit held to be one for recovery of property on title acquired under mortgage deed)

Article 113 Note 3

is one for the specific performance of the contract, to which Article 113 will apply and not Article 144⁶

2 A suit for possession was brought by X against B. A advanced money to B, who, on 26th October 1912, agreed to convey a portion of the land, the subject of the suit, in case the decision was favourable to him. The suit for possession brought against B was finally dismissed on 21st September 1915. A brought a suit for possession against B on 23rd October 1918 basing it on the agreement. It was held that the suit was one for the specific performance of the contract and was barred by limitation⁷

3 A compromise deed stated that the parties had agreed to exchange certain properties but that the exchange would take place on a future date. A suit was brought to enforce the terms of the compromise deed. It was held that the suit was one for the specific performance of a contract to hand over the owner ship in the property and not one for possession of the property⁸

The following are illustrations of suits based on title

4 Where, under an agreement by way of compromise of disputed title to immovable estate, shares were allotted to the parties

(1899) 23 Bom 283 (286), *Shivrudrappa Krishnappa v Balappa*

(1880) 2 All 718 (720, 721) *Sheo Prasad v Uday Singh*

(1880) 1886 All W N 96 (96), *Kalu v Kishore*

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Durgapada Mandal

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[See (1908) 1908 All W N 201 (202) 5 All L Jour 534, *Ganua v Mohar
v Narain Prasad*

(1872) 18 Suth W R 38 (39) *Nobin Chunder Roy Choudhry v Radha
Pearce Debia Chaudhrai*

(1901) 23 All 285 (287) 1901 All W N 83, *Sheo Narain v Beni
Madho*]

[But see (1935) A I R 1935 All 569 (570) 156 Ind Cas 894 *Suraj
Paisah Nandan Lal v Mt. Atul Bibi* (This decision is open to
doubt)]

6 (1884) 6 All 231 (232) 1884 All W N 42 8 Ind Jur 524, *Mukhuddin Ahmed
Khan v Majlis Ras*

7 (1921) A I R 1921 Oudh 248 (251) 66 Ind Cas 622, *Bisheshwar Dayal v
Hurraj Kaur*

8 (1929) A I R 1929 Lah 672 (678) 72 Ind Cas 1040 *Khush Muhammad v
Hayat*

Article 113
Note 3

thereto, it was held by the Privy Council that the agreement gave to each party a cause of action founded¹ not merely upon contract, but upon the *title* which was acknowledged and defined by the agreement and that a suit brought to recover a share of the estate was governed by the twelve years rule of limitation²

5 A mortgage deed contained a recital that the mortgagor had received the mortgage money and put the mortgagee in possession of the property mortgaged. As a matter of fact the possession had not been given. The mortgagee sued for possession. It was held that the suit was not a suit for specific performance of a contract but was one for possession and was governed by Article 135¹⁰

6 After the sale of the plaint house by *B* to *A* under a deed dated 3rd May 1880 *B* remained in possession, promising to vacate the house within two years from the date of the sale. A suit was brought for possession by *A* against *B* in September 1893. *B* pleaded limitation under this Article. It was held that the suit was not barred, the Article applicable being 139 or 144¹¹

7 On 27th October 1865, *A* the owner of certain immovable property executed a conveyance of such property to *B*. On that date the vendor was not in possession of the property although his title to it had been adjudged by a decree. There was no express promise or undertaking in the deed on the vendor's part to put the purchaser into possession. The vendor obtained possession on 23rd August 1872. On 5th October 1877 the purchaser sued the vendor for possession of the property stating that "possession was agreed to be delivered on the receipt of possession by the vendor". It was held that the suit was not for specific performance of a contract to deliver possession, but was one to obtain possession in virtue of the right and title conveyed to the purchaser to which either Article 136 or Article 144 applied¹²

8 By an award bearing date 7th July 1893 the plaintiff acquired a title to certain immovable property. The award did not contain any conditions precedent to the plaintiff's enjoyment of the property. On 15th November 1897 he filed a suit to enforce the award. On its being contended that the suit was barred by limitation under Article 113 as being one for the specific performance of a contract it was held that the suit was not barred, the Article applicable being Article 144¹³ (See also Note 5 *infra*)

9 (1874) 13 Bng L R 312 (372-323) 1 Ind App 157 3 Sar 314 (P C) *Rani Meera v Rani Hulas*

10 (1910) 7 Ind Cas 646 (647) (All) *Ram Chand v Belara*

11 (1893) 23 Bom 253 (796) *Shirrudappa v Dalappa*

12 (1880) 2 All 18 (720-721) *Shao Prasad v Uday Singh*

13 (1900) 23 Mad 593 (595) 10 Mad L Jour 203 *Sornarath Ammal v Muthayya Sasirajal*

Article 118
Notes
3—4

As seen above, possession usually follows the title and a suit for possession based on title is not a suit for specific performance. However, the defendant may, by an express term in a contract lay himself under an obligation to deliver possession of property. And if he fails to perform this obligation, the plaintiff gets a right in such a case to its specific performance. Such a suit for possession being a suit for specific performance of a contract will be governed by this Article ¹⁴

The word 'contract' itself primarily means a transaction which creates personal obligations, but it may, though less exactly, refer to transactions which create real rights. It is in this latter sense that the word is used in Section 51 of the Bengal Chaudidari Act (6 of 1870) and the rights thereby reserved to the *putnidars* comprehensively included in the word "contract" are real rights the enforcement of which is secured not by a suit for specific performance but by a suit for possession. A suit, therefore, by a *putnidar* for possession of *chaudidari chakran* lands transferred by the Government to the zamindar is governed by Article 144 and not by this Article ¹⁵

4. Suit to enforce condition subsequent.—Under Section 119 of the Transfer of Property Act, where a party to an exchange is by reason of any defect of title of the other party, deprived of the thing or any part of the thing received by him in exchange, then the other party is liable to him under certain circumstances, for the return of the thing transferred. This is an example of a condition subsequent. An express contract may or may not be in the nature of a condition subsequent. Thus where the parties to an exchange covenant specifically that in the event of deprivation of any part of the property exchanged each should return to the other what is taken the contract is in the nature of a condition subsequent ¹. A suit to enforce a condition subsequent, whether arising under Section 119 of the Transfer of Property Act ² or under a contract ³

14 1920 A I R 1920 Mad 812 (812) 42 Mad 690 51 Ind Cas 939 *Srinivasa Iyengar v Johnsa Routhar*

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Note 4

- 1 (1920) A I R 1920 Mad 812 (812) 42 Mad 690 51 Ind Cas 939 *Srinivasa Iyengar v Johnsa Routhar*
- 2 (1906) 80 Mad 316 (317) 17 Mad L Jour 149 *Rajagopalan v Soma sundara* (Breach of covenant annexed to exchange by Section 119 of Transfer of Property Act—Article 143 applies)
- 3 (1920) A I R 1920 Mad 812 (812) 42 Mad 690 51 Ind Cas 939 *Srinivasa Iyengar v Johnsa Routhar*

is not governed by this Article but by Article 143 of the Act

In the enforcement of a condition subsequent, however, the transaction as a whole is put an end to so as to place the party enforcing it in the position he was before the exchange⁴ Where therefore a contract in a deed of exchange between A and B provides that if A is deprived of any part of the property taken by him B should make good the loss by a return of a portion of the property transferred to him equal in value to that of which A was deprived, the contract is not a condition subsequent and a suit to enforce it is one for specific performance of the contract governed by this Article⁵ and not to enforce any condition subsequent Whether in any particular case a provision is a covenant or a condition thus depends upon the intention of the parties to be ascertained from the language used by them the leaning of the Courts is against construing a provision as a condition subsequent if that construction can fairly be avoided⁶

5. Suit to enforce an award — It was held in the under-mentioned cases¹ of the Allahabad High Court that by reason of the operation of Section 30 of the Specific Relief Act (which provides that the provisions of Chapter II thereof as to contracts shall *mutatis mutandis* apply to awards) a suit for the specific performance of the terms of an award should be regarded as a suit for specific performance of a contract This view has however, not been followed even by the Allahabad High Court in other cases² All the other Courts are agreed that although an award springs from an agreement it is not itself a contract and that a suit to enforce an award is consequently not a suit for specific performance of any contract³ The latter view it is submitted is correct

4 (1893) 9 Mad L Jour 137 (138) *Veera Pillai v Ponambala Pillai*

5 (1893) 9 Mad L Jour 137 (140) *Veera Pillai v Ponambala Pillai*

(1888) 11 All 27 (30) 1889 All W N 251 (F B) *Hari Tiwari v Raghunath*

6 (1893) 9 Mad L Jour 137 (139) *Veera Pillai v Ponambala Pillai*

Notes 5

1 (1883) 5 All 263 (264) 1883 All W N 16 *Sul ho Bibi v Ram Sukh Das*

(1893) 16 All 3 (4) 1893 All W N 179 *Raghubar Dial v Madan Mohan Lal*

(1904) 26 All 497 (500) 1904 All W N 72 *Talewar Singh v Balori Singh*

2 (1911) 11 Ind Cas 705 (707) 34 All 43 *Kuldip Dube v Mahant Dube*

(1901) 23 All 255 (28) 1901 All W N 83 *Shoo Narain v Beni Madho* (It cannot be held that every suit on the basis of an award is a suit upon a contract or one for the specific performance of a contract)

Singh v Umrao

award declared

that a certain person had a possessory charge on certain property, a suit to recover possession on payment of the sum made payable by the award is not a suit for specific performance)

Article 113
Note 6

6. Starting point of Limitation.—Under the third column of the Act of 1871, time ran from the date *when the plaintiff had notice that his right was denied*. There has since been an addition in that column, and under the present Article, where a date is fixed for the performance of a contract, the time begins to run, under the

- (1921) A I R 1921 Bom 399 (400) 45 Bom 318 59 Ind Cas 189, *Erachshaw Dosabhai v Mt Dandi* (A suit on an award to recover a certain sum of money allowed by the arbitrator is not a suit for the specific performance of the award, but a suit for the recovery of money and for relief incidental thereto)
- (1921) A I R 1921 Bom 389 (390) 45 Bom 239 59 Ind Cas 755, *Rajmal Gardharilal v Maruti Shikram* (A suit to enforce an award is a suit not provided by any other Article of the Limitation Act. The time is six years under Article 120)
- (1925) A I R 1925 Bom 519 (519) 49 Bom 693 91 Ind Cas 1032, *Nanalal Lallubhai v Chhotalal Narsidas* (A suit to enforce an award comes under Article 120)
- (1928) A I R 1928 Bom 264 (264) 111 Ind Cas 881, *Ishram Govind v Trim-bak Ganpat*
- (1934) A I R 1934 Bom 140 (144, 145) 151 Ind Cas 156, *Govindlal Maneklal v Manekchowk Spinning and Weaving Mills Co*
- (1906) 83 Cal 881 (885, 886) 4 Cal L Jour 162, *Bhagahari Saha Banikya v Behary Lal Basak* (Section 80 does not place awards on the same footing as contracts for the purposes of the law of limitation)
- (1919) A I R 1919 Cal 459 (457) 51 Ind Cas 999, *T O Tweedie v Jogesh Chandra Roy* (The word "contract" in Article 113 of the Limitation Act does not include an "award")
- (1916) A I R 1916 Lah 163 (164) 1915 Pun Re No 102 82 Ind Cas 89, *Harbhaj Mal v Dwan Chand* (In this case even though the award was signed by the parties, still it was held that the suit to enforce the award would be governed by Article 120 and not by Article 115)
- (1912) 18 Ind Cas 604 (806) 1913 Pun Re No 82, *Hardhian Singh v Delhi Cloth and General Mills Co Ltd* (It is possible that if the parties sign an arbitrator's award in token of their acceptance and thus merge the award into a new contract between themselves, the claim might be regarded as one for compensation for breach of contract within the meaning of Articles 115 and 116)
- (1900) 23 Mad 593 (596) 10 Mad L Jour 208, *Sornalalli Ammal v Muthayya Sastrigal*
- (1902) 12 Mad L Jour 34 (35) (Jour) Critical Note on 23 All 285, *Sheo Narain v Beni Madho* (The award of an arbitrator is of the nature of a decision by a tribunal constituted by the parties and the enforcement of that decision is not a specific performance of a contract, at all events within the language of this Article)
- (1916) A I R 1916 Mad 832 (833) 31 Ind Cas 816, *Somasundaram Chetty & Co v Pangaswamy Iyengar* (Article 120 applies)
- (1924)
- (1917) A I R. - - - - - the
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relief)
- (1904) 7 Oudh Cas 369 (370) *Thakur Sheo Narain Singh v Thakur Distanath Singh* (Held, that a suit to enforce an award cannot be treated as a suit for specific performance of a contract within the meaning of Article 113)
- (1897-1901) 2 Upp Bur Rnl 293 (293), *Ma Hla Hla v Maung Shwe Lan*

first portion of the third column, from such date. If a case falls within the first clause of the third column, the second clause should not be resorted to.¹

See also Notes 7 and 8 below.

7. Date fixed for the performance. — Limitation, under the first part of the third column, begins to run from the date fixed for the performance of the contract.¹ The "date fixed" means —

1. the date fixed expressly by the parties,² or
2. where time under the contract is extended, the new date substituted,³ or
3. the date that can be fixed with reference to a future event which is certain to happen, on the principle *certum est quod certum reddi potest* (that is, certain which can be rendered certain).⁴

Where the vendor agrees to sell and the vendee agrees to buy immovable property contingent on the vendor's title being declared

- (1919) A I R 1919 Upp Bur 25 (25) 49 Ind Cas 62 3 Upp Bur Rul 109, *Maung Po Tok v Ma Sze Ma*
[See (1909) 4 Ind Cas 821 (822) (1907 09) Upp Bur Rul 2nd Quarter Lam p 9 *Ma Le Dyu v Nga Chit Pu*
(1923) A I R 1923 Rang 108 (109) 4 Upp Bur Rul 124 70 Ind Cas 517, *Maung Ne Dun v Maung Cho* (Limitation for a suit to enforce an award depends on the nature of the relief sought)
(1929) A I R 1929 Sind 168 (169) 23 Sind L R 417 117 Ind Cas 153, *Khubchand Dhulchond v Jethanand Santidas* (Limitation for a suit to enforce an award is that provided by Articles 120 and not Article 113)
(1920) A I R 1920 Sind 53 (54) 60 Ind Cas 971 14 Sind L R 219, *Tulsidas Dulomal v Wadero Allah Buz Khan* (A suit for recovery of money due under an award is not a suit for specific performance of a contract or for compensation for breach of a contract within the meaning of Articles 113, 115 and 116)
(1913) 19 Ind Cas 876 (877) 6 Sind L R 148, *Somjimal Tellumal v Tolomal Jethanand*)]

Note 6

- 1 (1930) A I R 1930 Lah 1020 (1021) 130 Ind Cas 59 *Lakha Singh v Ghulam Mahomed*

Note 7

- 1 (1918) A I R 1918 Pat 630 (631) 44 Ind Cas 244 *Mt Batulan v Nirmal Das*
(1923) 71 Ind Cas 968 (971) (Pesh), *Sikandar Shah v Bhas Ram Chand Sant Ram*
2 (1933) A I R 1933 All 410 (411) 145 Ind Cas 586, *Kashi Prasad v Chhabri Lal*
3. (1922) A I R 1922 P C 178 (180) 48 Ind App 175 43 All 257 63 Ind Cas 589 (P C), *Muhammad Habibullah v Dird & Co*
4 (1918) A I R 1918 Mad 492 (493) 41 Mad 18 41 Ind Cas 607, *Venkatanna v Venkatakrishnayya*
(1930) A I R 1930 Lah 34 (36) 119 Ind Cas 431 11 Lah 69, *Waryam Singh v Gopi Chand*

Article 113
Notes
7—8

in a pending suit, limitation for a suit by the vendee for the execution of a conveyance and for possession of the property runs from the date of the final decree or order in the pending suit on which the contract was contingent⁵

A suit for specific performance instituted more than three years after the date fixed is barred⁶

The maxim *certum est quod certum reddi potest* may rightly be applied fully between the actual parties to the contract. But in cases where a person is entitled to bring a suit on the contract who may not and need not be aware of the date becoming fixed, the maxim will not apply⁷. See also the undermentioned cases⁸.

8. "Performance is refused." — As has been seen in Note 6 under the Act of 1871 limitation for a suit for specific performance began to run from the date when the plaintiff had notice that his right was denied. Thus, where certain shares were allotted to A on the understanding that they should be transferred to the plaintiff on his paying up the full amount, which he did in 1862 and thenceforth received the dividends in respect thereof, but the shares were not transferred to his name, and in 1874 the plaintiff brought the suit against the executor of A to compel registration of the shares in his name, it was held under the Act of 1871 that the suit was not barred because neither A nor his executor had denied the right of the plaintiff till just before the suit¹. Under the present Act, this decision would not be correct, for the time fixed for the performance of the contract was when the shares were paid, which was in 1862, and time would run from that date.

Where there is no date fixed for the performance of the contract, time will run against the plaintiff either from the date of the refusal

(1911) 9 Ind Cas 243 (245) (Oudh) *Gajadhar Singh v Kandhaya Bulhsh* (Agreement to convey property in future entered into in 1837—Pro-
perty was to be conveyed on the happening of death of a certain
person—Person died in 1903—Suit brought in 1907—Held the date
fixed was the death of person viz 1903.)

5 (1884) C All 231 (233) 1884 All W N 42 8 Ind Jur 524 *Mohi ud din-
Ahmed Khan v Mayas Rao*

(1923) A I R 1923 Nag 47 (48) 71 Ind Cas 40 *Shriram v Babaji*

(1901) A I R 1921 Oudh 248 (251) 66 Ind Cas 622 *Bisheshwar Dajal v Hur
Raj Kaur*

6 (1933) A I R 1933 P C 29 (32) 141 Ind Cas 209 60 Cal 980 60 Ind App
297 (P C) *Currimbhoy & Co Ltd v L A Cress*

(1895) 6 Mad L Jour 33 (35) *Pangutchand v Parameswara Pattar*
[See (1907) 10 Oudh Cas 173 (176) *Kuar Ram Ghulam Singh v Kuar
Pratap Singh*]

7 (1918) A I R 1918 Mad 492 (493) 41 Ind Cas 807 41 Mad 18, *Venkhanna v
Venkatarishnayya*

8 (1930) A I R 1930 Lah 34 (36) 11 Lah 69, 119 Ind Cas 491, *Waryam Singh
v Gopichand*

(1938) A I R 1938 Lah 23 (26) *Alopi Parshad v Court of Wards*

Note 8

1 (1876) 2 Cal 323 (326) *Ahmed Mohamed v Adjein Dooply*
[Compare (1896) 19 Mad 391 (394) *Chinnathambi Goundan v Chin-
nana Goundan*]

Article 113
Note 8

of a demand by the plaintiff for performance² or when the plaintiff has notice that performance is refused³ Where there is no actual notice, the refusal may be gathered from the circumstances of the case⁴ The refusal must be unconditional,⁵ to the knowledge of

- 2 (1911) 17 Ind Cas 399 (400) (Mad), *Abdul Khadir v Nagasapur*
 (1924) A I R 1924 Mad 680 (682) 80 Ind Cas 653 47 Mad 692, *Narayana Chetty v Muthiah Chetty* (Where a contract for the sale of immovable property provides for the execution of sale deed "on demand" from the vendee, the cause of action for a suit for specific performance arises only after request and refusal)
 (1916) A I R 1916 Mad 1074 (1076) 29 Ind Cas 898 (901), *Kalappa Kamtha v Kachur Sakha Rama Rao*
 (1933) A I R 1933 Cal 641 (643) 60 Cal 761 146 Ind Cas 863, *Chand Bibi v Santoshkumar Pal*
 (1916) A I R 1916 Cal 136 (148) 43 Cal 790 35 Ind Cas 805, *Mathura Mohan Saha v Ramkumar Saha & Chittagong District Board*.
 (1909) 1 Ind Cas 626 (637) 36 Cal 675, *Mathewson v Sivasram Kanar Singh*
 (1920) A I R 1920 Pat 822 (823) 52 Ind Cas 452 4 Pat L Jour 447, *Satya Kinkar v Shiba Prasad*
 (1923) A I R 1923 Rang 44 (44) 79 Ind Cas 278, *Ma Ma Gyi v Ma Nyo Po*
 (1916) A I R 1916 Low Bur 104 (104) 33 Ind Cas 761, *Mya Buin v Maung Kya Zan*

than three years after decree but within three years of refusal to perform the contract is in time, as no date for specific performance was fixed and the second part of Article 113 applied)

- 3 (1921) A I R 1921 Bom 409 (411) 45 Bom 434 59 Ind Cas 581, *Lazman v Bhagwan Singh*
 (1878) 5 Cal 175 (182) 2 Cal L R 268 4 Ind Jur 570, *New Deerbhoom Coal Co v Bulooram Mahala*
 (1932) A I R 1932 Lah 24 (25) 135 Ind Cas 203, *Mahbub v Munshi*
 (1930) A I R 1930 Lah 1020 (1022) 130 Ind Cas 52, *Lakha Singh v Ghulam Muhammad*
 (1932) A I R 1932 Lah 36 (37) 133 Ind Cas 121, *Lal Singh v Hari Singh*
 (1928) A I R 1928 Nag 211 (212) 107 Ind Cas 905 *Sherkh Ahmad v Amir Khan* (Under Article 113 the date for commencement of limitation against the defendant would be when he learnt that performance of the contract was refused)
 (1927) A I R 1927 Nag 353 (354) 102 Ind Cas 805, *Rao Sahab v Umrao*
 (1923) A I R 1923 Rang 125 (126) 72 Ind Cas 6 11 Low Bur Rul 462, *My Shree Hmon v My Tha Hyaw* (Where in pursuance of a contract to sell the vendor gives the vendee possession of the property, limitation against the vendee will only commence to run from the date when the vendee became aware that the vendor refused to complete the contract)
 (1916) A I R 1916 Low Bur 78 (74) 32 Ind Cas 573, *Maung Ne Dun v Ma Le*

- (1911) 11 Ind Cas 25 (27) (Sind), *Isiram v Bibi Sultan*
 4 (1916) A I R 1916 All 6 (7) 32 Ind Cas 49, *Fatmatus Sughra Begam v Mariamunissa Begam*
 (1928) A I R 1928 Cal 754 (755) 116 Ind Cas 370, *Hemeswar Barua v Poal Chandra*
 (1921) 12 Ind Cas 953 (954) (Lah), *Topass Mal v Jhandoo*
 5 (1932) A I R 1932 Lah 36 (37) 133 Ind Cas 121, *Lal Singh v Hari Singh*

Article 113
Notes
8—9

the plaintiff⁶ and not evasive⁷ Where there is an agreement by the vendee to re convey the property to the vendor, and on the vendors demanding re sale of the property the vendee denies the agreement, his denial will amount to a refusal to perform the agreement⁸

Illustration

A contracted in 1903 to sell to B three out of twelve sites for oil wells which she expected to be allotted to her by the Government for that year In 1904 four of those sites were allotted by the Government, but A did not obtain all the twelve till 1912 There was nothing to show that the allocation of the total of twelve sites was a condition precedent to the grant of the three B instituted in 1913 a suit for specific performance of the agreement to sell the three wells It was held by the Privy Council that the refusal took place in 1905, and that such a long lapse of time was fatal to the action⁹

9. Defences to a suit for specific performance. — Of the various defences that can be raised to a suit brought for specific performance of a contract, those that are intimately connected with the question of limitation only may be here noticed

I Delay of the plaintiff in filing the suit

The remedy of the specific performance of a contract is an equitable remedy, the granting of which depends on the discretion of the Court¹ While granting a decree for specific performance in favour of the plaintiff, the Court has to take into consideration, among other factors, the delay of the plaintiff in instituting the suit The defendant is, therefore entitled to raise the plea of delay as a defence to the suit brought by the plaintiff And where delay, *not amounting to a bar by the statute of limitation*, is pleaded as a defence, the validity of such defence must be tested on principles substantially equitable In *Kissen Gopal v Kally Prosonno*,² Woodroffe, J, observed "In my opinion delay is not material so long as matters remain

6 (1930) A I R 1930 Lah 34 (36) 119 Ind Cas 491 11 Lah 69 *Waryam Singh v Gopichand*

7 (1914) A I R 1914 Cal 155 (157) 23 Ind Cas 360 *Kali Das v Giribala Das*

8 (1934) A I R 1934 Bom 171 (175) 151 Ind Cas 536, *Harkisandas Bhuguan das v Bai Dhanoo*

(1880) 3 Mad 87 (89 91) 5 Ind Jur 239 *Virasami Mudali v Ramasamy Mudali*

9 (1922) A I R 1922 P C 249 (251) 48 Ind App 214 48 Cal 832 4 Upp Bur Rul 30 63 Ind Cas 914 (P C), *Ma Shree Mya v Maung Mo Hnaung*

Note 9

1 See Specific Relief Act Section 22

[See also (1915) A I R 1915 Lah 124 (125) 27 Ind Cas 481, *Maharaj Das v Gian Singh*

(1926) A I R 1926 Cal 181 (184) 88 Ind Cas 737, *Sree Lal Chamarra v Hariram Goenka*

(1920) A I R 1920 Nag 173 (174) 58 Ind Cas 23, *Munir Moh ammad v Rama*]

2 (1905) 33 Cal 633 (636)

in statu quo, and it does not mislead the defendant or amount to acquiescence. It must be shown that delay has prejudiced the defendant. To operate as a bar to relief, the delay should be such as to amount to a waiver of the plaintiff's right by acquiescence, or where by his conduct or neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him, if the remedy were afterwards to be asserted. When such is not the case, any lapse of time short of the period allowed under the Limitation Act should not disentitle the claimant to relief to which he is otherwise entitled."³ Thus, even though a mere delay in filing a suit is not fatal to the suit, the delay taken with other circumstances of the case will prove a successful defence to the suit for specific performance.⁴

Article 113
Note 9

3 See also the following cases to the same effect

- (1930) A I R 1930 P C 165 (169) 123 Ind Cas 712 (P C), *Rustomji Ardeshr v Annasaheb Narandas*
- (1922) A I R 1922 Lah 461 (465, 466) 3 Lah 376 67 Ind Cas 700, *Jaugal Singh v Ghulam Muhammad*
- (1923) A I R 1923 Lah 694 (694) 75 Ind Cas 743, *Gopal Ram v Dewah Ram*
- (1920) A I R 1920 Lah 670 (680) 117 Ind Cas 225, *Allah Ditta v. Jamna Das*
- (1919) A I R 1919 Cal 837 (839) 50 Ind Cas 177, *Kasla Chandra v. Bejoy Kania*
- (1932) A I R 1932 Cal 493 (496) 138 Ind Cas 493, *Jadu Nath v Chandra Bhawan*
- (1921) A I R 1921 Cal 179 (180), *Maharajah Bahadur v Suresh Chandra* (Plaintiff's conduct amounted to an abandonment of the contract—Specific performance refused)
- (1912) 18 Ind Cas 879 (880) (Cal) *Kedar Nath Samanta v Manu Bibi*
- (1928) A I R 1923 Mad 284 (287) 46 Mad 148 72 Ind Cas 868, *Abdul Shaker v Abdul Rahman* (Defendant not prejudiced—Delay was excused)
- (1914) A I R 1914 Mad 462 (463) 23 Ind Cas 560, *Suryaprahasarayadu v Lakshminarasimhacharyulu*
- (1911) 17 Ind Cas 399 (400) (Mad), *Abdul Khadir v Nagasarupu* (No prejudice to the defendant—No question of delay)
- (1918) A I R 1918 Pat 630 (631) 44 Ind Cas 241, *Mt Batulan v Nirmal Das*
- (1923) A I R 1923 Sind 50 (52) 77 Ind Cas 897 16 Sind L R 278, *Begraj v Alisher*
- (1921) A I R 1921 Sind 197 (199) 15 Sind L R 21, *Narooshankar Pranshankar v Rajumal Bhagwandas*
- (1915) A I R 1915 Mad 546 (547) 26 Ind Cas 121, *Veerayya v Sivayya*
- 4 (1914) A I R 1914 Cal 137 (140) 41 Cal 652 23 Ind Cas 214, *Haradhan Deb Nath v Bhagabati Das* (In this case a collection of English decisions on the point will be found)
- (1902) 30 Cal 265 (277, 278) 7 Cal W N 229 *Mohendra Nath v Kali Prasad* (Specific performance refused though time was not of essence of contract)
- (1867) 8 Suth W R 280 (281), *Pureaj Singh v Kheer Singh* (Delay amounting to negligence)
- (1929) A I R 1929 Lah 249 (251) 113 Ind Cas 140 *Lekh Singh v Drarka Nath* (Delay coupled with change of conditions—Specific performance should be refused)
- (1919) A I R 1919 Lah 393 (395) 1919 Pnn Re No 57 51 Ind Cas 704, *Lachman Das v Kharak Singh* (Where a person allows a period of

Article 113
Note 9

As to the defence that time was of the essence of the contract see the undermentioned decisions ⁵

II Part performance

In those cases to which Section 53 A of the Transfer of Property Act applies, the defendant is entitled to take the plea of part performance even though his remedy of specific performance is barred at the date the plaintiff brought his suit. Thus where a person enters into possession of property under a written contract of sale, he can set up his rights under the contract in defence to a suit for possession against him, although a suit for the specific performance of the contract may be barred by limitation ⁶

more than three years to elapse from the failure of the defendant to complete a contract of sale before bringing a suit for specific performance of the contract the inordinate delay is sufficient to disentitle him to any relief)

non

- (1925) A I R 1925 All 595 (601) 47 All 784 89 Ind Cas 27 *Swarath Ban Ram Saran v Ram Ballabh* (Delay amounting to abandonment of claim)
- (1913) 21 Ind Cas 35 (35) (All) *Abdul Aziz v Narain Das*
- (1917) A I R 1917 Mad 8 (9) 87 Ind Cas 776 *Marudanayagam Pillai v Menuswamy Pillai* (27 All 678 Followed)
- (1924) A I R 1924 Bom 282 (286) 85 Ind Cas 491 *Karsandas v Gopaldas*
- ⁵ (1915) A I R 1915 P O 83 (85) 40 Bom 289 49 Ind App 26 32 Ind Cas 246 (P O) *Jamshed Khodaram v Burjorji Dhunjabhai*
- (1925) A I R 1925 Mad 965 (966) 87 Ind Cas 552 *Dhakshinamurthy v Dhanakola Ammal*
- (1919) A I R 1919 Mad 544 (544) 42 Mad 802 52 Ind Cas 590 *Samarapur Chettiar v Sutharsana Chettiar*
- (1929) A I R 1929 Nag 164 (168) 116 Ind Cas 651 25 Nag L R 110 *Rama Krishna v Laxminarain*
- ⁶ These cases were decided prior to the enactment of Section 53 A, Transfer of Property Act and are still good law
- (1918) A I R 1918 All 211 (213 215) 48 Ind Cas 645 40 All 187 *Salamai ur amoni Begam v Masaka Allah Khan*
- (1924) A I R 1924 Mad 271 (273) 46 Mad 919 76 Ind Cas 886 (F B) *Fisagapatam Sugar Development Co Ltd v Muthuramareddi*
- (1925) A I R 1925 Mad 763 (764) 88 Ind Cas 903 *Avugaddi Jogamma v Lalam Pothanna*
- (1930) A I R 1930 Mad 1071 (1021) 129 Ind Cas 59 *Naganna v Appalaraju*
- (1922) A I R 1922 Bom 9 (11) 46 Bom 722 66 Ind Cas 868 *Venkaatesh v Mallappa*
- (1923) A I R 1923 Bom 473 (478) 47 Bom 621 75 Ind Cas 118 *Sandu Valji v Dikhal and Surajji al*
- (1928) A I R 1928 Bom 150 (152) 52 Bom 307 109 Ind Cas 532 *Ramappa Siamnaji v Yellappa Balaji*
- (1921) A I R 1921 Upp Bur 10 (12) 4 Upp Bur Rul 179 76 Ind Cas 141 *Maung Pa Tla v Maung Ba Din*
- (1923) A I R 1923 Rang 125 (126) 11 Low Bur Rul 462 72 Ind Cas 6 *Maung Shue Hmon v Maung Tla Dyaow*
- [See also (1924) A I R 1924 Cal 489 (494) 76 Ind Cas 365 *Pitambar Gain v Pamelaaran Moral*]

III *Equity in Walsh v Lonsdale*⁷Article 113
Note 9

Section 53 A of the Transfer of Property Act applies only when the contract of transfer is in *writing* signed by the transferor it does not apply to an *oral* contract. In such cases the defendant's rights under the contract are, to a limited extent, protected by the equitable principle stated in *Walsh v Lonsdale*⁷. That principle may be stated thus: Where the transferor agrees to transfer land, and the transferee goes into possession, and the agreement is one of which specific performance would be granted, the parties to the agreement have the same legal rights as between themselves and are subject to the same legal liabilities as if the transfer has been completed in the eye of law.⁸ In *Ariff v Jadunath*⁹ the Privy Council has laid down that this principle has no application where the defendant's right to sue for specific performance of the contract was barred at the date of the plaintiff's suit to evict him.

Illustration

In 1913, *A* orally agreed to grant a permanent lease of land to *B*. *B* entered into possession of the land and erected structures thereon to the knowledge of *A*. No lease deed was executed. To a request from *B*, *A*, in 1918 refused to grant him the lease. Not having sued for the specific performance, *B*'s right to sue became barred in 1921. In 1923 *A* brought a suit for possession. It was held by the Privy Council that the principle of *Walsh v Lonsdale*⁷ did not protect *B* and that *A* was entitled to a decree.¹⁰

114.* For the rescission of a contract.

Three years

When the facts entitling the plaintiff to have the contract rescinded first become known to him

Article 114

* Act of 1877, Article 114
Same as above

- 7 (1892) 62 L J Ch 2 (4) L R 21 Ch D 9 31 W R (Eng) 109 46 L T 659
8 See Mulla's Transfer of Property Act 1933 Edition Pages 242 246
9 (1931) A I R 1931 P C 79 (82) 59 Ind App 91 58 Cal 1235 131 Ind Cas 762 (P C)
10 (1931) A I R 1931 P C 79 (82) 131 Ind Cas 762 59 Ind App 91 58 Cal 1235 (P C) *Ariff v Jadunath*
(1932) A I R 1932 Sind 42 (46 48) 189 Ind Cas 358 25 Sind L R 433
Muhammad Tahir v Mian Pirdar
[See (1933) A I R 1933 P C 29 (32) 141 Ind Cas 209 60 Cal 950 60 Ind App 297 (P C) *Currambhoy & Co v L. A. Creel*]
[See also the following cases

Bhagat v Sukan
(1934) A I R 1934 Rang 214 (216) 2 Rang 255 51 Ind Cas 657 (F B) *Mawng Ngat Tha Zan v Ma Dun*]

Article 114
Note 1

Synopsis

1. Scope of the Article.

2. Starting point.

1. **Scope of the Article.** — This Article refers to suits under Section 35 of the Specific Relief Act, 1877, which provides that any person interested in a contract may sue to have it rescinded, and such rescission may be adjudged by the Court in any of the following cases, namely —

- 1 Where the contract is voidable or terminable by the plaintiff,
- 2 Where the contract is unlawful for causes not apparent on its face, and the defendant is more to blame than the plaintiff,
- 3 Where a decree for specific performance of a contract of sale, or of a contract to take a lease, has been made, and the purchaser or lessee makes default in payment of the purchase money or other sums which the Court has ordered him to pay

A rescission of a contract implies that the contract has not yet been performed¹ Further, a rescission of a contract can only be as between the *promisor* and the *promisee* A suit by a third party *C* therefore to have an instrument between *A* and *B* cancelled or set aside is not one for the rescission of any contract and is not governed by this Article²

A suit for the dissolution of a partnership³ or a suit by a reversioner for recovery of property from the alienee from a widow⁴ is not one for the rescission of any contract and is not within this Article

✱ Act of 1871, Article 114

Columns one and two, same as above

Column three was When the contract is executed by the plaintiff

Act of 1859

No corresponding provision

Article 114 — Note 1

1 See Section 64 of the Contract Act

2 (1881) 3 All 816 (849) 1881 All W N 95, *Dhawan Prasad v Dusheshar Prasad*

(1919) A I R 1919 Low Bur 53 (54) 50 Ind Cas 324 9 Low Bur Rul No 186, *Ma Nya Ma v Aung Myat*

3 (1928) A I R 1928 Rang 160 (162) 110 Ind Cas 349 6 Rang 198, *A Kho rany v C Acha*

4 (1882) 1882 Pun Re No 141, *Budda v Khan*

Similarly, where a gift is resumable on failure of the donee to fulfil certain conditions and on failure of such conditions the donor sues for recovery of the property, it has been held that this Article does not apply.¹

2 Starting point — Under Article 111 of the Act of 1871 time ran from the date when the contract was executed by the plaintiff. Under Article 114 of the Act of 1877 as well as under this Article time runs from the date when the facts entitling the plaintiff to have the contract rescinded first become known to him. Where in a suit for rescission of contract of insurance on the ground of fraudulent misrepresentation it was found that the plaintiff knew all the facts which would entitle him to sue for rescission earlier than the time when he actually ascertained their proper construction it was held that time ran from the earlier date when he knew the facts and not from the later date when he actually ascertained their proper construction.¹

115.* For compensation for the breach of any contract, express or implied, not in writing registered and not herein specially provided for	Three years	When the contract is broken, or (where there are successive breaches) when the breach in respect of which the suit is instituted occurs, or (where the breach is continuing) when it ceases	Article 115
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* Act of 1877, Article 115

Same as above

Act of 1871, Article 115

115 — For the breach of any contract express or implied not in writing registered and not herein specially provided for	Three years	When the contract is broken or (where there are successive breaches) when the breach sued for occurs or (where the breach is continuing) when it ceases
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Act of 1859 Section 1 clause 9

For the breach of any contract—the period of three years from the time when the breach of contract in respect of which the suit is brought first took place unless there is a contract in writing signed by the party to be bound thereby or by his duly authorized agent

5 (1932) Ind Rnl 1932 Lah 645 (646) *Budhu v Mt Hanjro* (Article 113 was held to apply)

Note 2

1 (1905 06) 54 W R (Eng) Digest page 86 (8) 94 L T 756 22 T L R
Molloy v Mutual Reserve Life Insurance Co

Article 118
Note 1

Synopsis

1. Scope and applicability of the Article.
2. "Not in writing registered."
3. "Compensation for the breach of any contract."
4. Implied contract.
 5. Suit to recover arrears of malikana.
 6. Suit by judgment-debtor for compensation against the decree-holder for failure to certify payment made out of Court.
 7. Suit for compensation for wrongful dismissal from service.
 8. Claim by liquidator against the directors of a limited company under Section 235 of the Companies Act, 1913.
 9. Suit for commission by a broker.
 10. Suit for recovery of money against a *del credere* agent.
 11. Suit based upon an award by arbitrators.
 12. Suit based upon a compromise decree.
 13. Claim for use and occupation.
 14. Claim for interest by way of compensation.
 18. Other suits falling under this Article.
16. Starting point of limitation—General.
17. Continuing breach.
18. Successive breaches of contract.

Other Topics

Adjustment of accounts—Suit on	See Note 3, Pts 4, 5, Note 1, F N (11)
Article 116 and this Article—Difference	See Note 1, Pts 2, 3, 10
Conditions for applicability of the Article	See Note 1
Doctor's fee—Suit for recovery of	See Note 4, Pt 1
Suit against surety	See Note 3, Pt 3

1. Scope and applicability of the Article. — This is a residuary Article applying to all actions *ex contractu* not specially provided for otherwise¹ The difference between Article 116 and this Article is that the former applies only to contracts in *writing registered*, whereas this Article applies to *oral contracts*² as also

Article 116 — Note 1

- 1 (1922) A I R 1922 Lah 193 (200) 2 Lah 376 66 Ind Cas 490 (F B), *Mahomed Ghanla v Srafi Ud Din*
- (1930) A I R 1930 Oudh 393 (397) 126 Ind Cas 632 6 Luck 80, *Chaturgun v Shahsadi*
- 2 (1884) 10 Cal 1033 (1035) *Rameshwar Mandal v Ram Chand Roy* (Loan on a verbal contract to repay)
- (1883) 1893 Pun Re No 20 (page 61) *Baldeo Singh v Shedan* (Suit for a sum of money alleged to be due on an oral agreement entered into by the parties after accounts had been stated)

contracts which are in writing but not registered³

In order that this Article may apply the following conditions must be fulfilled

Article 115
Note 1

1 The suit must be founded upon contract

Where the suit is not founded upon contract between the parties but upon *torit* such as a suit to recover damages for the wrongful use of water from a tank belonging to the plaintiff⁴ this Article has no application

In *Rama Seshayya v Cotton Press*⁵ the question arose as to whether a suit for recovery of dividend which had accrued in favour of a share holder in a limited company was a suit for the breach of a contract within the meaning of this Article. C.J. G. J. who delivered the leading judgment of the Full Bench in that case observed as follows

We think that this debt created by the declaration whether in certain circumstances and for certain purposes it might be regarded as a contract is *not a contract such as was contemplated and envisaged by Article 115 of the Limitation Act*

It seems to me clumsy beyond anything that is legitimate to allow the claims of a share holder for his dividend to be regarded as aptly described compensation for breach of contract express or implied

In other words this Article presupposes the existence of a contract⁶ and where the suit is not one seeking to enforce a contractual liability or obligation but a *statutory liability* the Article has no application. Thus a suit to recover the license fees assessed by the Municipal Committee under Section 180 of the Bihar Municipal Act 7 of 1922 in respect of a platform erected by the defendant for his holding is a suit to enforce the obligation imposed by the Act and does not fall within the purview of this Article but falls under Article 120⁷

3 (1902) 25 Mad 55 (59) 11 Mad L Jour 318 *Seshachala Nair v Varada Chariar*
 (1902) 1 Cal L Jour 211 (218) *Mati Lal Bosa v Amin Chand*
 (1932) A I R 1932 Cal 85 (86) 59 Cal 930 133 Ind Cas 179 *Ajt Kumar Basu v Chairman of the Commissioners of Dacca Municipalty*
 (1870) 5 Mad 11 C R 68 (69) *Venkatachalam v Mala Kas gadu*

[See also (1938) A I R 1938 B nd 48 (49) 13 Ind Cas 678 *Larkana Municipalty v Kalamal Panooal* (A suit for recovery of termal tax is governed by Article 120 and not by Article 115)]

arising out of breach of the contract of agency¹¹ or to a suit for compensation against a carrier for non delivery of goods,¹² because Articles 89 and 31 respectively are specific provisions for such suits. Where, however, the other Articles do not specifically apply, this Article being a residuary Article will apply. On this principle, a suit against the carrier for *mis delivery* of goods as distinguished from non delivery provided for by Article 31,¹³ or a suit against the carrier claiming damages where the carrier company has *delivered* the goods to the consignee but realised from him the value of the goods delivered because of his failure to produce the bill of lading in time,¹⁴ have been held to be suits falling under this Article.

Article 115
Notes
1—3

2. "Not in writing registered." — In the case cited below,¹ it was observed by Marten, C J., of the High Court of Bombay, that this Article does not apply to a case where the contract is *partly* in writing which is registered and partly in writing which is not registered.

3. "Compensation for the breach of any contract." — The term "compensation" used in this Article does not connote a claim to

11 (1925) A I R 1925 Pat 491 (493) 89 Ind Cas 275 4 Pat 289 *Jogindra Narayan v Chinai Muhammad Sarcar*

(1916) A I R 1916 Cal 680 (682) 30 Ind Cas 697 43 Cal 248 *Madhusudhan Sen v Rakhal Chandra Das*

36 Cal 226 30 Ind Cas 697 43 Cal 248 *Madhusudhan Sen v Rakhal Chandra Das*
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(1922) A I R 1922 Cal 353 (356) 49 Cal 250 63 Ind Cas 562, *Pran Ram Mookerjee v Jagdish Nath Ray*

(1919) A I R 1919 Cal 458 (460) 53 Ind Cas 675 *Bhabalaram Debi v Sheikh Bahadur Sarkar*

(1916) A I R 1916 Mad 291 (293) 30 Mad 376 26 Ind Cas 740, *Venkata challam Chetty v Narayanan Chetty*

(See however (1917) A I R 1917 Cal 156 (158) 40 Ind Cas 339 *Kesho Prasad Singh v Sarwan Lal* (Suit for recovery of money found due on adjustment of accounts by agent is governed by Article 64 or Article 115))

12 (1902) 26 Bom 562 (570) 4 Bom L R 447 *Hajee Ajam v Bombay & Persia Steam Navigation Co*

(1909) 3 Ind Cas 469 (469) (Cal) *Indian General Navigation and Railway Co Ltd v Nanda Lal Banik* (In view of the amendment of Article 31 by Act 10 of 1899 this Article has no application)

(1925) A I R 1925 Pat 727 (728) 5 Pat 106 90 Ind Cas 374 *B N Ry Co Ltd v Hamir Mull Chagan Mull*

(1925) A I R 1925 Pat 611 (612) 4 Pat 482 89 Ind Cas 672, *E I Ry Co v Sagar Mull*

See also Note 7 to Article 31

13 (1918) 19 Ind Cas 477 (478) (Lah) *Fakir Chand v Secretary of State*

14 (1910) 8 Ind Cas 882 (882) (Mad) *Kothandarama Chetty v British India Steam Navigation Co Ltd*

Note 2

1 (1930) A I R 1930 Bom 572 (584) 54 Bom 226 127 Ind Cas 305 *Gound Narayan v Ranganath Gopal*

(See also (1937) A I R 1937 Pat 293 (301) 168 Ind Cas 786 *Peninsular Locomotive Co Ltd v H Langham Reed etc* (Following A I R 1930 Bom 572))

Article 116
Note 3

unliquidated damages, but includes a claim for the recovery of a sum certain¹ (For a full discussion as regards the meaning of the term "compensation," see Note 6 to Article 116 *infra*)

The following suits for the recovery of a sum certain have been held to be suits for compensation for the breach of a contract within the meaning of this Article —

- 1 A suit to enforce the liability of a surety who has guaranteed the payment of the amount borrowed by a debtor *e g* under a promissory note² The fact that the contract between the debtor and the creditor is in writing registered does not make Article 116 applicable where the contract of suretyship is in writing but not registered The liability of the surety though arising on the same transaction is a distinct and separate liability, there being two different contracts³
- 2 A suit on a *hatchilla* stamped and signed by the debtor containing a statement of adjustment of accounts and consisting in itself an unqualified promise to pay the amount found due on the adjustment⁴
- 3 A suit on adjusted accounts of a partnership which entitles the plaintiff to claim that sum by virtue of that adjustment⁵
- 4 A suit to enforce a contract embodying a promise to pay a time barred debt⁶
- 5 A contracted with B to supply goods and render other catering services for payment After the contract was broken by A, C purchased in court sale the debt due by B to A on account of

Note 3

- 1 (1922) A I R 1922 Lah 198 (200) 66 Ind Cas 490 2 Lah 876 (F B) *Mahomed Ghasita v Shiraz ud din*
(1910) 8 Ind Cas 788 (789) (Cal) *Nistarini Debi v Chandu Das Debi*
(1917) A I R 1917 Cal 154 (156) 39 Ind Cas 205 *Shree Nath Roy v Peary Mohan*
[See also (1936) A I R 1936 Mad 785 (788) 165 Ind Cas 301 (F B) *Official Assignee v V A Kuppasamy Naidu* (Original debt payable by instalments—Debt subsequently comprised in promissory note payable on demand—Suit on promissory note time barred—Plaint held can be amended so as to base claim on basis of original debt—Suit brought within three years of last payment of instalment it is in time)]
- 2 (1931) A I R 1931 Lah 691 (693) 132 Ind Cas 590 13 Lah 240 *Diyalu Mal v Nandu Shah Dev Raj* (Letter of guarantee executed by surety)
(1918) A I R 1918 Cal 707 (709 711) 44 Cal 978 39 Ind Cas 705 *Brijendro Kishore Roy v Hindusthan Co operative Insurance Society Ltd*
- 3 (1919) A I R 1919 Cal 636 (637) 53 I C 999 *Oluru Chandra v Faithful*
- 4 (1923) A I R 1923 Cal 578 (579) 76 Ind Cas 603 *Sarifun Mandalin v Feradoul Khatun*
- 5 (1933) A I R 1933 Sind 324 (325) 27 Sind L R 308 147 Ind Cas 433
in a new cause of
itullah
- 6 (1932) A I R 1932 Lah 212 (214) 13 Lah 448 135 Ind Cas 678 *Dharat National Bank Ltd v Bishan Lal*

the goods supplied and services rendered by the latter. A suit for recovery of the debt by C was held to fall under this Article⁷

- 6 A suit by the liquidator of a limited company against a shareholder for recovery of money due in respect of certain calls on shares not fully paid up. Limitation has been held to start in such a case not from date of default in paying the calls, but from the date of the forfeiture of the shares by the directors of the company, on the ground that, upon forfeiture, the shareholder ceases to be a member of the company but with reference to the unpaid calls he becomes a debtor to the company, and the company gets a fresh cause of action to sue for the debt from the date of forfeiture⁸
- 7 A suit to recover advance paid by the plaintiff to the defendant on the latter's promise to execute a lease, the defendant having resiled from his promise.⁹
- 8 A suit by the lessor against the lessee for breach of contract on the part of the latter in not paying a portion of the rent to the superior landlord¹⁰ or to the creditor of the lessor¹¹ as undertaken
- 9 A suit to recover a sum of money paid as advance rent for a certain mouza, which had been farmed out to the plaintiff but of which the plaintiff could not get possession¹²
- 10 A suit to recover the amount payable by the defendant for breach of an agreement under which he was bound to pay a share of the produce to the plaintiff annually¹³
- 11 A suit to recover the difference in value between the sums alleged to have been advanced on a written contract for the supply of *kanlar* and the value of *kanlar* alleged to have been delivered¹⁴
- 12 A suit to recover moneys invested on "thavanas" transactions, common among the Nattukottai Chetties of Madras Presidency,

7 (1935) A I R 1935 Lah 222 (224) *Mahomed Bakhsh Hafiz Qudrat Ullah & Sons v Rawalpindi Club Ltd* (Limitation starts from date when A ceased to perform his contract by leaving the services of B)

8 (1932) A I R 1932 All 342 (343) 54 All 541 140 Ind Cas 502 *Bishambar Nath v Agra Electric Stores Ltd* (Following A I R 1925 Bom 321)
(1928) A I R 1928 Bom 252 (253 255 257) 110 Ind Cas 83 52 Bom 477, *Maneklal Mansukhbhai v Suryapur Mills Co Ltd*

9 (1935) A I R 1935 All 759 (760) 155 Ind Cas 1092 *Abdul Shakur Khan v Rajendra Kishore*

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11 (1868) 22 All 100 (101) 22 All 100 (101) 22 All 100 (101)

12 (1873) 10 Suth W R 244 (245) *Brooke v Gibbon*

13 (1924) A I R 1924 Lah 149 (151) 72 Ind Cas 480, *Walls v Khuda Bakhsh*

14 (1883) 1883 Pun Re No 22 p 64 (67) *Seth Edukji Byramjee v Arjan Das*.

Article 115
Notes
3—4

where the sum is payable without demand after the expiry of a fixed period ¹⁵

4. Implied contract. — The Article contemplates suits founded upon a breach of an express as well as an *implied* contract. The following are instances of suits based upon implied contract falling under this Article

- 1 A suit by a medical practitioner for the recovery of fees due to him for attendance on the patient. In such a case, there is an implied contract to pay the fee on each day of the visit by the practitioner, and there is a breach of the contract by reason of non payment. If the practitioner demands the fee and the patient promises to pay the same promptly and fails to do so, there is a breach at least on the last date of the attendance ¹
- 2 A suit to recover, by way of compensation, the sums expended by the family of the plaintiff on the occasion of the marriage of the plaintiff's deceased brother, from the defendant who had re married the widow of the deceased brother, basing the claim upon a custom prevailing among the *Jats*, to which the parties belonged. It was held that there being an implied obligation in the nature of a contract on the part of the defendant to recoup the first marriage expenses, the suit was governed by this Article ²
- 3 A suit to recover the charges for repairs done by the plaintiff to the defendant's hungalow at the latter's direction without an express agreement as to payment ³
- 4 A suit by the owner of certain lands against the Municipal Committee claiming compensation for the use of his lands by the Municipality for cattle fair. There is an implied contract on the part of the Municipal Committee to pay compensation to the owner ⁴

15 (1917) A I R 1917 Mad 1 (2) 43 Ind Cas 972, *Muthiah Chettiar v Eamanathan Chettiar*

(1919) A I R 1919 Mad 146 (149, 150) 52 Ind Cas 456 *Annamalai Chetty v Annamalai Chetty*

(1917) A I R 1917 Mad 1006 (1007) 42 Ind Cas 573, *Vellayappa Chettiar v Unnamalas Achi*

[But see (1917) A I R 1917 Low Bur 109 (110) 8 Low Bur Rul 576 36 Ind Cas 497, *Annamalai Chetty v Lutchman Chetty* (Held that Article 57 and not Articles 60 and 115 applies to a suit brought on *thavanas* account)]

Note 4

- 1 (1931) A I R 1931 All 752 (753) 193 Ind Cas 537, *Baroda Kant Sen v Court of Wards*
(1870) 18 Suth W R 96 (97), *Huris Chunder Surmah v Brojonath Chucker butty*
- 2 (1881) 3 All 385 (387) 1881 All W N 7, *Madda v Sheo Balhsh*
- 3 (1872) 9 Bom II C R 280 (281) *Naro Ganesh Datar v Muhammad Khan*
- 4 (1938) A I R 1938 Lah 267 (268) *Municipal Committee Amritsar v Kanahi Ram* (Held limitation had not commenced to run because the committee had not refused compensation to the defendant but were still considering the question)

5 *A* and *B* are jointly interested in redeeming a mortgage *A* alone files a suit for redemption and redeems the mortgage *A* sues by *A* against *B* for the recovery of the costs of litigation and the redemption money is one governed by this Article as being based upon an implied contract ⁵

6 A suit claiming compensation for the *subsidence* of a tank It has been held that the action is one based on the implied covenant running with the land that the surface owner has got the inherent right of support for the underground water, that it is not a wrong which is independent of contract and therefore governed by this Article ⁶

7 In the undermentioned cases⁷ it was held that a suit by the principal against the heirs of the deceased agent for recovery of sums due by the agent was governed by this Article on the ground that the liability of the heirs arose out of an implied obligation to pay the sums due to the principal from out of the estate of the deceased agent to their hands

For other instances of suits based upon an implied contract, see the undermentioned cases ⁸

5 Suit to recover arrears of *malikana* — A suit for the recovery of arrears of *malikana*, where the plaintiff does not seek to enforce the charge on the land, is governed by this Article The claim for *malikana* is one arising out of a *quasi* contract and is within the purview of this Article ¹

6 Suit by judgment-debtor for compensation against the decree-holder for failure to certify payment made out of Court — Where a decree holder fails to give credit to a payment made by the judgment debtor towards the decree out of Court a suit

5 (1922) A I R 1922 Cal 79 (80) 70 Ind Cas 289 *Shank Jamal v Shaikh Chand* (Limitation starts from date of payment for the mortgage)

6 (1929) A I R 1929 Pat 245 (246 247) 8 Pat 776 120 Ind Cas 626 *Jagan Nath Marwari v Kali Das Raha* (Held also that the period of three years commenced from the date when the injury was caused)

7 (1912) 16 Ind Cas 414 (416) (Cal) *Jhapayhannessa Bibee v Bama Sundari Choudhuran*

(1912) 16 Ind Cas 742 (744 745) (Cal) *Kumeda Charan Bala v Asutosh Chattopadhyay*

(1923) A I R 1923 Pat 259 (264) 71 Ind Cas 916 *Rameshwar Singh v Narendranath Das*

8 (1919) A I R 1919 Pat 395 (396) 51 Ind Cas 733 *Anantaram Bohidar v Ganeshran Bohidar* (A suit by some of the proprietors of a village for profits against the *landdardar* and account of the village is governed by Article 115)

(1910) 6 Ind Cas 290 (290) (Mad) *Kutti Ali v Elychan* (Held a suit for a breach of the covenant for quiet enjoyment should be brought within three years of the breach under Article 115)

(1864 65) 2 Mad H C R 21 (22) *Penuballi Subharama Reddi v Bhimaraju Ramayya* (Money received by *vakil*—Payment of same to agent of client — Non payment of money by agent to client — Payment over again by *vakil* to client under order of Court—Suit by *vakil* to recover amount paid)

Note 5

1 (1906) 33 Cal 928 (1000) *Kallar Roy v Ganga Pershad Singh*

Article 115
Notes
6—7

by the judgment debtor for recovery of that amount is a suit for compensation for the breach of the implied promise on the part of the decree-holder to certify the payment to the Court. Such a suit is governed by this Article¹. The *starting point* of limitation in such suits is the date of the filing of the execution petition by the decree holder without giving credit to the payment². In the case cited below,³ it has been held by the High Court of Madras that every successive execution application by the decree holder without regard to the payment for the decree amounts to a *successive breach*, and each application gives rise to a fresh cause of action for the judgment debtor to file the suit.

7. Suit for compensation for wrongful dismissal from service. — A suit claiming compensation by a person alleging to be wrongfully dismissed either from Government service¹ or municipal service,² falls under this Article, as the wrongful dismissal amounts to the breach of contract of service. The *starting point* of limitation for such a suit is the date of dismissal from service³.

(1912) 15 Ind Cas 911 (918) (Cal) *Mohamaya Prosad Singh v Ram Khelo wan Singh* (Plaintiffs are entitled to damages upon each annual sum in arrear only for three years antecedent to the suit)

Note 6

- 1 (1882) 5 Mad 397 (400) 6 Ind Jur 633 (F B), *Viraraghava Reddi v Subbalakka*
(1892) 1892 Pun Re No 79 page 231 (233), *Ganpat v Kripa Ram*

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- (1913) 21 Ind Cas 557 (558) (Lab) *Mt Jamna v Beli Ram*

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- 3 (1919) A I R 1919 Mad 773 (775) 48 Ind Cas 810 *Gopalaswami Naidu v Annaiyalar Natch* (Payment in 1907—First execution petition by decree holder in 1910 and second execution petition in 1913—Held limitation starts from date of second execution petition)

Note 7

- 1 (1927) A I R 1927 F 1030 200 50 10 1927 *Girdhari Lal v Secre who was dismissed for*

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- 3 (1934) A I R 1934 Rang 111 (112) 12 Rang 124 151 Ind Cas 6-6, 11 *Pasat v Secretary of State*

8. Claim by a liquidator against the directors of a limited company under Section 235 of the Companies Act, 1913. — See Note 6 to Article 36, *ante*

9. Suit for commission by a broker. — A suit for commission by a broker is one for compensation for breach of a contract within the meaning of this Article. The addition of a prayer for an account in such a suit does not alter its character as the account is merely ancillary to the main relief of compensation¹

10. Suit for recovery of money against a *del credere* agent. — A suit against a *del credere* agent for recovery of the price of goods sold by him and not paid by the purchasers, was held by the Judicial Committee not to be a suit for recovery of debt but one for compensation for a breach of contract¹. It was observed by their Lordships that

The real debtors for the price of the goods sold are the purchasers of the goods, and the broker is only sued upon his collateral undertaking that in consideration of the commission paid to him, he will pay the price of the goods if the purchaser fails to do so. An action on such an undertaking is an action on an express contract, and the sums which can be recovered under it are damages for breach of contract.

11. Suit based upon an award by arbitrators — An award of arbitrators does not ordinarily evidence a contract between the parties, and a suit to enforce a term of the award is governed by Article 120, and not by this Article¹. Where however the award was signed by the parties making the reference it was held in the undermentioned case² that the award became merged into a new contract between the parties and the claim based upon such an award was held to be governed by this Article. A contrary view has been held in the cases noted below³.

(1937) A I R 1937 Lah 296 (228) 159 Ind Cas 1107 *Gardhar Lal v Secretary of State*

Note 9

1 (1917) A I R 1917 All 466 (468) 86 Ind Cas 371 39 All 81 *Sushil Chandra Das v Gauri Shankar*

(1917) A I R 1917 Lah 22 (23) 42 Ind Cas 2 *Uttam Singh v Firm Ram Kanwar*

(See also (1921) 60 Ind Cas 727 (728) (Lah) *Kishen Chand v Khuda Bakhsh*)

Note 10

1 (1871) 10 C L R 285 20 11 M T 24 12 10 15 2 Sar

c v Woon

Note 11

1 (1929) A I R 1929 Sind 168 (169) 117 Ind Cas 153 23 Sind L R 417 *Khubchand Bhatnagar v Jethanand Santidas*

2 (1912) 16 Ind Cas 801 (806) 1913 Pun Re No 39 *Hardyan Singh v Delhi Cloth and General Mills Co Ltd*

3 (1916) A I R 1916 Lah 163 (164) 32 Ind Cas 68 1915 Pun Re No 102 *Harbhaj Mal v Dusan Chand*

Article 115
Notes
12—14

12. Suit based upon a compromise decree. — Where a suit is filed to enforce a term in an unregistered deed of compromise entered into between the parties, which has been subsequently embodied in a decree of Court, the question arises as to whether the suit is one for breach of a contract between the parties, or for breach of a term imposed by a decree of Court. The High Court of Patna¹ applying the maxim laid down by Sir Lawrence Jenkins, C J, in *Kusadhaj Bhakta v Broja Mohan*,^{1a} that "a contract of parties is nonetheless a contract because there is superadded to it the command of the Judge," has held that such a suit is governed by this Article. The High Court of Calcutta² has also held on the same principle that a suit by a widow to recover arrears of maintenance under a compromise decree is governed by this Article, as being a claim based upon contract. In the case cited below,³ the High Court of Madras has however held that this Article does not apply to a suit based upon a compromise decree. But in that case there was a variance between the terms of the compromise between the parties and the decree of Court, and it was held that it was the decree which governed the relations between the parties. Further, the observations of Srinivasa Aiyangar, J, that "No doubt a compromise decree has got the features and characteristics both of a compromise and a decree, and the question really is whether the suit is based on the declarations contained in a previous decree and should therefore appropriately be called a suit upon a decree, or a suit on the contract contained in the compromise," appear to contemplate a suit based upon the compromise apart from one founded upon the decree.

13. Claim for use and occupation. — A claim for use and occupation has been held to fall under this Article as amounting to the breach of an implied contract.¹

See also Notes to Article 120, *infra*

14. Claim for interest by way of compensation. — Where one of several co mortgagors redeems the property mortgaged and files a suit for contribution of the amount paid for redemption claiming also interest, it has been held that the claim for interest is sustainable as being one for compensation for breach of the implied

(1929) A I R 1929 Sind 168 (169) 117 Ind Cas 153 23 Sind L R 417, *Akhbar Chand Bhikchand v Jethanand Santdas*

Note 12

1 (1924) A I R 1924 Pat 231 (232) 81 Ind Cas 298 2 Pat 749, *Smith v. Official Trustees of Bengal* (Suit to recover royalty payable under compromise decree)

(1934) A I R 1934 Pat 7 (9) 12 Pat 792 148 Ind Cas 375, *Gopal Saran Narain Singh v Chhakaurs Lall*

1a (1916) A I R 1916 Cal 816 (817) 43 Cal 217 31 Ind Cas 13

2 (1915) A I R 1915 Cal 550 (552) 26 Ind Cas 939, *Narendra Chandra Lahiri v Nalini Sundari Debi*.

3 (1925) A I R 1925 Mad 1260 (1262, 1264) 91 Ind Cas 939, *Arunachalam Chelliar v Raja Rajenwara Sethupathi*

Note 13

1 (1910) C Ind Cas 766 (769) (Mad), *Chengiah v Thimmia Nayana*

contract on the part of the co mortgagors to recoup the money paid for the mortgage including all loss and damage. The claim for interest has been held to be governed by this Article.¹

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Notes
14—18

15. Other suits falling under this Article. — The following suits have also been held to be governed by this Article

1. Suit based upon an unregistered *sharnamah*, by which the defendant was to admit the plaintiff, his uterine brother, to a share of his adoptive father's property in consideration of an undertaking by the plaintiff (subsequently carried out) to admit the defendant to a share in his natural father's estate.¹
2. Suit by plaintiffs, proprietors of a canal, claiming water-rate from the defendants, whose lands were watered by the canal, basing the claim upon an agreement by the defendant to pay water-rate at a specified amount per annum.²
3. Suit to recover balance of one-third share of cost of construction of a building, based upon an agreement between the parties to pay such share.³
4. Suit by a building contractor seeking to recover a sum of money as the value of building work done to the defendant, where the defendant had, even before the completion of the building work by the plaintiff, given the contract to another.⁴
5. Suit by municipality for recovery of balance due from the defendant, to whom the right to collect the tolls in the market was settled for a particular period and for a particular sum.⁵
6. Suit to recover the cultivator's share of the produce in pursuance of an agreement.⁶

Note 14

- 1 (1925) A I R 1925 Oudh 613 (614) 92 Ind Cas 559, *Jahan Begam v Munney Mirza*
[See also (1933) A I R 1933 Oudh 518 (519) 9 Luck 189 145 Ind Cas 1001, *Hooloway v Holland*]

Note 15

- 1 (1869) 12 Suth W R 22 (23), *Mohadeo Lall v Nundun Lall* (Held, however, that the defendant was in a position to fulfil that contract on the death of his adoptive parents and that the plaintiff's suit not having been brought within three years of the dates of those deaths was barred by limitation)
- 2 (1883) 1883 Pun Re No 171, p 533 (534), *Ala v Sodhi Inder Singh*
- 3 (1928) A I R 1928 Lah 442 (443) 107 Ind Cas 493, *Saudagarmal Lachman Das v Bahadur Chand Hari Chand*
- 4 (1934) A I R 1934 Lah 475 (475) 155 Ind Cas 233, *Sita Ram v Mt Mah mudi Begam*
[See also (1930) 121 Ind Cas 394 (397) (All), *Nadiv Shah v Municipal Board, Cawnpore*]
- 5 (1937) A I R 1937 Pat 860 (362) 16 Pat 302 169 Ind Cas 364, *Chasbassa Municipality v Gobind Sao*
[See also (1908) 31 Mad 54 (58) 17 Mad L Jour 537 2 Mad L Tim 461, *Taluq Board, Kundapur v Lakshmi Narayana Kamphs*]

Article 115
Notes
15-16

7. Suit by pledgor against pledgee to get back the properties pledged or their full value, where the pledgee took over the properties himself, as if upon sale, without the authority of the pledgor⁷
8. Suit by plaintiff claiming charges for repair and also interest by way of damages, where the defendant, who had borrowed the plaintiff's motor car for private use, damaged the same in an accident⁸

16. Starting point of limitation—General.—The starting point of limitation for suits governed by this Article is the *date of the breach of the contract*¹. If the breach is a continuing one limitation starts from the date on which the breach ceases and where there are successive breaches, the starting point is the date of that breach upon which the suit is founded. The breach of the contract *per se* gives a cause of action for suits contemplated by this Article, and limitation starts from the date of the breach, and *not from the date on which the plaintiff actually suffers loss on account of the breach*². Nor does limitation under this Article commence to run from the date of the *knowledge of the breach*, no matter whether the breach is patent and discoverable or whether it is concealed and undiscoverable³. It follows from what has been said above that limitation does not start earlier than the date of the breach of the contract. Thus, in a suit for compensation for breach of a contract where the parties had settled and fixed the amount of damages payable on breach by either of them even in advance before the date fixed for performance of the contract limitation was held to commence only from the date fixed for performance and not from the date of fixing the liquidated damages⁴. The question as to when a breach of the contract occurs depends upon the terms express or

of contract)

Note 16

- 1 (1918) A I R 1918 Mad 917 (918) 40 Ind Cas 235, *Soori Asyangar v Subba rayar*

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(1880-1881) 2 F R 1-12-1880

- 2 (1936) A I R 1936 Rang 510 (513-514) 166 Ind Cas 48 *V M Ganay v Leong Chye*
- 3 (1865) 38 South W R Sm C C 9 (10) *Rajah Indooji coosun Deb Poy v Thomas J Kenny*
- 4 (1927) A I R 1927 Lah 122 (123) 99 Ind Cas 591 *Firm Nani Lal Iaffa Pat v Firm Ramji Das D: arka Das*

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implied in the contract itself⁶. The following broad principles can however be gathered from the decided cases

- I Normally, the breach of a contract occurs when either party to the contract *repudiates* his liability under the contract and declines performance⁶

Illustrations

- 1 In a suit for damages for breach of contract to give a girl in marriage, limitation starts from the date on which the girl is betrothed to a third person in contravention of the contract with the plaintiff, and not from the date of the betrothal to the plaintiff, because the contract is repudiated only on the former date⁷
- 2 A falsely pretends himself to be the agent of his father, and as agent mortgages the lands of the father to B. The father subsequently repudiates the transaction, files a suit against B, and gets a decree for possession. A suit for compensation by B against A must be brought within three years from the date of decree for possession in favour of the father, on which date there has been a repudiation of the contract⁸
- 3 In the case of an *alternative contract* to sell land or pay compensation and keep the land *limitation* for a suit claiming compensation starts from the date on which the vendor elects to adopt one of the courses open to him⁹

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- 5 (1910) 9 Ind Cas 482 (483) (All) *Mahabir Prashad v Durbhaya Bai*
 (1938) A I R 1938 Lah 277 (280) *Goenka Cotton Spinning and Weaving Mills Ltd v Duncan Stratton & Co* (Order for machinery single and indivisible though delivered in parts — Held the clause about payment conclusively showed that the order was regarded as a single whole and the time began to run from the date of the last delivery — The suit therefore was within time)
- 6 (1923) A I R 1923 Bom 113 (117) 77 Ind Cas 943 *Najan Ahmed Haji Ali v Sale Mahomed Peer Mahomed*
 (1874) 6 N W P H C R 95 (97) *Syed Mahomed Hadees v Sheo Setuk Doobey*
 (1928) A I R 1928 Cal 74 (83) 107 Ind Cas 360 54 Cal 969 *Kessoram Poddar & Co v Secretary of State*

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broken within three years of suit)

- 8 (1934) A I R 1934 Pesh 49 (50) 151 Ind Cas 58 *Maya Ram v Mahomed Umar* (The date from which limitation starts is the date on which the plaintiff has notice that the implied agency did not exist but it must be an effective notice)
 (See also (1915) A I R 1915 Mad 889 (891) 21 Ind Cas 65 38 Mad 275 *Vaivatan Chelthar v Aricha Chelthar* (A suit for compensation against a person under Section 235 of the Contract Act for untrue representing himself to be the authorized agent of another and thereby inducing the plaintiff to deal with him as such agent is governed by Article 115))
- 9 (1931) A I R 1931 Lah 657 (661) 132 Ind Cas 489 *Abdur Rahman v Nasir Ali Khan*

Article 115
Note 16

II. The repudiation of the contract may be express or implied from the conduct of the parties.

Illustration.

A, a contractor, took on lease certain tolls auctioned by the District Board, for the period from 1-4-1921 to 31-3-1922. A, however, committed default in payment of his dues in October 1921. The District Board thereupon exercised the option of re-sale, which was posted to 26-10-1921, but the sale did not take place on that date as there were no bidders. The re-sale was held on a subsequent date and the District Board sued A for compensation for the loss sustained in the re-sale, and the suit was filed on 12-11-1924. Held that the suit was barred by limitation as the District Board had repudiated and put an end to A's contract by the first attempt to re-sell on 26-10-1921, and limitation had commenced to run from that date.¹⁰

III. Where the contract is to be performed at a future time and a date is fixed for such performance in the contract itself, limitation starts from the date fixed for performance.¹¹

10 (1933) A I R 1933 Mad 701 (709) 145 Ind Cas 476, *Gopalan Nair v District Board of Malabar*

11. (1936) A I R 1936 Rang 338 (340) 164 Ind Cas 412, *Seema v Banerjee* (Deposit for a fixed period—Limitation for recovery of deposit starts from date of expiry of the period)

(1914) A I R 1914 Mad 4 (6) 92 Ind Cas 60 *Balakrishnudu v Narayan swami Chetty* (Money deposited on condition of its return on happening of future contingent event—Suit for recovery brought after event is suit for compensation within Article 115)

(1915) A I R 1915 Mad 717 (719) 25 Ind Cas 812, *Srinivasa Aiyangar v Rangasami Aiyangar* (Deposit of money by intended lessees with the lessor repayable in certain event—Failure to return)

(1892) 15 Mad 380 (381) 2 Mad L Jour 42, *Ramasami v Aluthusami*

entitled to it, a suit to recover the money instituted within three years from the date of decision is within time)

Bank

*Illustration*Article 115
Note 16

In May 1905, the plaintiff gave the defendant 30,000 burnt tiles on a contract that the latter should return the same number, and of a similar quality to be approved by certain *panchayatdars*, on demand after 20 1-1906. Plaintiff's suit for compensation brought after the expiry of three years from 20 1 1906 was held to be barred.¹²

IV The time fixed for the performance of the contract need not be express, it may be implied from the terms of the contract

Illustrations

1 The defendant had entered into an agreement with the plaintiff promising to pay plaintiff the costs of a litigation then going on between him and a third party. In a suit by the plaintiff, claiming compensation for the breach of the contract by the defendant, it was held that limitation started from the date of the termination of the litigation referred to in the agreement, as on that date alone it would be possible for the plaintiff to ascertain the total amount of the costs.¹³

2 A and B, who were jointly interested in redeeming a mortgage, entered into an agreement by way of compromise, whereunder one of them, viz B alone had to pay and redeem the entire mortgage. B committed default and A paid for the mortgage and filed a suit for compensation. Held, limitation started from the date of A's payment for the mortgage.¹⁴

3 A owed money to B and for discharging the same A executed a *hundi* in favour of B, drawn upon C. C accepted the *hundi* and obtained a discharge subsequently from B by executing a document in his favour. C then sued A for compensation. Held, limitation for the suit commenced from the date on which C obtained discharge from B by executing a document and thereby accepting his sole liability.¹⁵

V Where the contract is to be performed at a future date and no time is fixed for the performance by the parties either expressly

[See also (1927) A I R 1927 Lah 90 (93) 91 Ind Cas 609 *Amba Prasad Gopi Nath v Jawala Das Ram Kanwar* (Contract for the supply of several lots of goods an entire and not an instalment contract — Limitation in respect of all lots would run from the date when the last lot was due to arrive)]

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12 (1916) A I R 1916 Mad 486 (487) 31 Ind Cas 335 *Surayya v Dapsaras*

13 (1918) 21 Ind Cas 442 (443) (Mad) *Sivasubramania v Somasundaram*

14 (1935) A I R 1935 Lah 307 (310 311) 156 Ind Cas 836, *Aijas Hussain v Magbul Hussain*

15 (1936) A I R 1936 Lah 669 (669) 163 Ind Cas 923, *Boda Ram v Devi Das Hari Chand*

or by necessary implication, the law presumes that the contract should be performed within a *reasonable time*, and limitation in such cases starts from the date of the expiry of the reasonable time¹⁶ What is reasonable time is a question of fact depending on the facts and circumstances of each case¹⁷

On 24th October 1924, the plaintiff had handed over to the defendant certain jewels for temporary use on the occasion of religious procession to be held the next day. The defendant had lost the jewels and the plaintiff filed the suit for compensation on 5th May 1928. *Held* that the defendant was bound under the implied contract to return the jewels within a reasonable time and that in this case the reasonable time had expired on 27th October 1924 when the lender asked for the jewels and the defendant had also complained to the police of the loss. The fact that the defendant did not all along deny or repudiate his liability had not the effect of saving the suit from the bar of limitation.¹⁸

VI Where, although the contract between the parties does not fix a date for performance either expressly or by necessary implication still if the intention of the parties, as can be gathered from the terms of the contract, is that there should be a demand for the performance of the contract, the date of demand will be the starting point ¹⁰

1 Where the defendant undertook to pay the plaintiff, his son in law, a particular sum for the purpose of purchasing ornaments for the latter's wife and no time was fixed for performance, and it was found on a construction of the contract that the intention of the parties was that the payment should not be made until the plaintiff was prepared to purchase ornaments and demanded it for that purpose, *held*, the contract was not broken until the plaintiff demanded the money and the date of demand would be the starting point ²⁰

- 16 (1899) 23 Mad 441 (444) *Dorasinga Tevar v Arunachalam Chetty*
 - - - - - masuam; Sasirigal
 - - - - - oki Kuar
 - - - - - 6 Luck 80 Chaturgun
 - - - - - of bailment)
 - - - - - Maramayyar v Muni
- 44111
- (1891) 3 Mad 87 (91) 5 Ind Jur 239 *Virasami Mudali v Ramasami Mudali*, (Where a person is bound by an agreement to buy his coparcener's share on his refusing to sell his own share on demand to such coparcener the demand is a condition precedent to enforcing the agreement)
- (18'0) 14 Suth W R 87 (90) *Bibee Heerun v Bibee Mariun*
 (1920) 14 Suth W R 87 (90) *Bibee Heerun v Bibee Mariun*

2 In 1904, the plaintiff made over to the defendant, a goldsmith, certain gold ornaments to be melted and made into new ornaments without fixing any time within which the work was to be finished by the defendant. The defendant neglected to carry out his work and ultimately on 24th March 1914 the plaintiff pressed the defendant for the ornaments he promised to make, and demanded delivery of the same within a fortnight. *Held*, in a suit by the plaintiff claiming compensation, that limitation started from 8th April 1914, the date fixed for performance in the demand made by the plaintiff, there being no case by the defence that there was an earlier demand than in March 1914 followed by a refusal on the part of the defendant.²¹

VII Where there is a *novation* of the contract, and the parties enter into a new contract, the rights of the parties are governed by the new contract and limitation starts from the date of the breach of the fresh contract.²²

Illustration

A owed B several sums of money in respect of dealings in accounts prior to 1921. A entered into a new contract on 1st November 1921 promising to pay B the sum found due on the accounts within a month. *Held*, in a suit by B to recover the amount from A, that there was a novation of the old contract and that B had a fresh and independent cause of action to sue, and that limitation commenced from 1st December 1921.²³

17. Continuing breach — See Notes 5 to 11 to Section 23 *ante*

18. Successive breaches of contract — See Note 19 to Section 23, *ante*

Cases of successive breaches may occur when a party to a contract agrees to do or forbear from doing two or more different things, in such cases the contracting party may commit several breaches by not doing those things which he has contracted to do or by doing those things which he has contracted not to do.¹ In suits

21 (1916) A I R 1916 Cal 869 (870) 34 Ind Cas 959, *Ganga Hari v Nabin Chandra*

22 (1911) 11 Ind Cas 540 (542) (Cal) *Jasram Singh v Choonee Lal*

(1933) A I R 1933 Sind 924 (925) 27 Sind L R 303 147 Ind Cas 432, *Madhowdas Ram Das v Santramdas Dharmadas*

liquidated in the agreed manner a fresh cause of action accrues to enforce that claim when it so became impossible.)]

[See also (1935) 156 Ind Cas 964 (964) (All) *Jugal Kishore v P K Banerji*]

23 (1925) A I R 1925 Oudh 632 (632) 86 Ind Cas 330 *Mendi Lal v Ram Chander*

Note 18

1 (1888) 10 All 85 (91) 1887 All W N 292, *Mansab Ali v Gulab Chand*

Article 115
Note 18

for the breach of a contract which has to be performed at different times, limitation must be calculated from each breach as it occurs² For instances of successive breaches of a contract, see also Note 6 *ante*, and the undermentioned case³

Part VII — Six years.

Article 116

116. For compensation for the breach of a contract in writing registered.	Six years.	When the period of limitation would begin to run against a suit brought on a similar contract not registered.
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Synopsis

1. Scope and applicability of the Article.
2. Suit to enforce a contract, whether lies by a third party to the contract.
3. "Contract in writing."
4. Implied contract.
5. "Registered."
6. "Compensation for the breach of a contract."
7. Suits for recovery of money on simple bonds registered.
8. Suits for recovery of rents and profits.
9. Suit for recovery of royalty under a registered deed.
10. Other suits based upon covenants in registered lease deeds.
11. Partnership suits.
12. Suits for account based upon registered contract of agency.

* Act of 1877, Article 116
Same as above

Act of 1871, Article 117

117.—On a promise or contract in writing registered	Six years	When the period of limitation would begin to run against a suit brought on a similar promise or contract not registered
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2 (1866) 6 Suth W R Act N Rul 61 (63), *Mohes Sahu v A J. Forbes*
3 (1910) 5 Ind Cas 186 (187) (Cal), *Eann Sarcar v Barada Kishore Acharya Chowdhury* (Where the contract was to render accounts year by year and there had been successive demands and breaches at the end of every year, and plaintiff brought a suit for accounts within three years of the last breach, held, whether Article 89 or Article 115 applied, he was entitled to accounts for one year only)

13. Suit for recovery of dower under a registered deed.
14. Suit based upon award.
15. Suit based upon covenants in registered sale deeds.
 16. Suit by vendee for breach of covenant to put him in possession.
 17. Suit by vendee claiming compensation under Section 65 of the Contract Act.
18. Suit upon covenant contained in a registered deed of exchange.
19. Claim for personal decree arising on registered mortgage deeds.
 20. Starting point of limitation in claims for personal relief on the basis of mortgage deeds.
 21. Claim for personal relief in mortgage deeds not validly registered.
 22. Other suits based on covenants contained in registered mortgage deeds.
23. Personal decree in suit to enforce vendor's lien for unpaid purchase money.
24. Other suits falling under this Article.
25. Claim for interest by way of damages.

Other Topics

Breach of statutory obligation—Suit based on—Article not applicable ...

See Note 1, Pts 5, 6

Conditions for applicability of Article See note 1

Contract — Whether to be signed by parties See Note 3, Pts 1 to 7

Instalment bonds See Note 7 F-N (2)

Suit by vendee for breach of covenant of title See Note 15, Pts 12 to 21

Suit by vendor on vendee's failure to make payments as undertaken See Note 15, Pts 1 to 11a

Suit for possession of immovable property—Article not applicable See Note 1, Pt 10

Suit to enforce covenant of indemnity in sale deed by vendor See Note 15, Pt 25

1. Scope and applicability of the Article.—This Article is a special provision in favour of registered instruments. In *Tristram v Cooper v Sri Gopinath Jiu Thakur*,¹ the Judicial Committee observed as follows

Act of 1859 — Section 1 clause 10

cases in which
engagement or
relation in force
res years from
the action is
brought first took place, unless such engagement or contract shall have been
registered within six months from the date thereof

Article 118 — Note 1

1 (1916) A I R 1916 P C 182 (184) 44 Cal 759 44 Ind App 65 39 Ind Cas 156 (P C)

13. Suit for recovery of dower under a registered deed.
14. Suits based upon award.
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 21. Claim for personal relief in mortgage deeds not validly registered.
 22. Other suits based on covenants contained in registered mortgage deeds.
23. Personal decree in suit to enforce vendor's lien for unpaid purchase money.
24. Other suits falling under this Article.
25. Claim for interest by way of damages.

Article 116
Note 1

Other Topics

Breach of statutory obligation—Suit based on—Article not applicable . .	See Note 1, Pts 5, 6
Conditions for applicability of Article	See note 1
Contract — Whether to be signed by parties	See Note 3, Pts 1 to 7
Instalment bonds	See Note 7 F N (2)
Suit by vendee for breach of covenant of title	See Note 15, Pts 12 to 21
Suit by vendor on vendee's failure to make payments as undertaken	See Note 15, Pts 1 to 11a
Suit for possession of immovable property—Article not applicable	See Note 1, Pt 10
Suit to enforce covenant of indemnity in sale deed by vendor	See Note 15, Pt 25

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Act of 1859 — Section 1 clause 10

<p>brought first took place unless such engagement or contract shall have been registered within six months from the date thereof</p>	<p>cases in which engagement or relation in force for years from the action is</p>
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Article 116 — Note 1

1 (1916) A I R 1916 P C 182 (184) 44 Cal 759 44 Ind App 65 39 Ind Cas 166 (P C)

Article 116
Note 1

'The omission from Article 116 of the words which occur in Article 115, 'and not herein specially provided for' is critical Article 116 is such a special provision, and is not limited, and therefore, especially in view of the distinction long established by these Acts in favour of registered instruments, it must prevail'

The decision is of far reaching importance and establishes the position that where a suit is in substance one based on a registered document and can be regarded as a suit for compensation for breach of a contract, this Article will apply *although such a suit may fall under some other Article also*² Thus, a suit for recovery of rent due under a registered lease deed is governed by this Article notwithstanding the specific provisions in Article 110 for suits for arrears of rent³ In order that this Article may apply, the following conditions must be fulfilled

1 *The suit must be founded upon a breach of contract*⁴

Where the obligation does not arise from a contract between the parties, but is imposed by *statute*, there is no breach of any contract by the parties, and consequently the present Article has no application to suits founded upon a breach of such a statutory obligation⁵ Thus, a suit by a landlord against the tenant for recovery of drainage charges payable by the latter to the former under the Bengal Drainage Act, 1880, is a suit to enforce a statutory liability and not a liability arising under a contract and is therefore not governed by the period of limitation prescribed by this Article⁶ Similarly, where the *suit is not founded upon contract but upon tort or other misfeasance not arising out of contract*, this Article has no application⁷ It is not enough for the applicability of the Article that the suit is founded upon contract it is further necessary that it should be

2 (1920) A I R 1929 Pat 383 (390) 8 Pat 432 117 Ind Cas 651 *Mt Lakshmi Kuer v Durga Prasad*

(1890) 18 Cal 508 (509) *Din Dugal Singh v Gopal Saran Narayan Singh*
(1905) 9 Cal W N 679 (683 684) *Rama Nath Das v Mohesh Chunder Pal*
(1876) 1876 Pun Re No 13 *Pandit Kashi Nath v Panjab Sing*

3 (1916) A I R 1916 P O 182 (184) 44 Cal 759 44 Ind App 65 39 Ind Cas 156 (P C) *Tricomdas Cooverji Dhoja v Sri Gopinath Jiu Thakur*
See also cases cited in Note 8 Foot Note (1)

4 (1935) A I R 1935 Oudh 37e (380) 155 I O 299 *Shambhu v Ram Bikksh*

5 (1907) 5 Cal L Jour 19 (23) 11 Cal W N 57 *Nasser Chandra Maji v Jyoti Kumar Mukerjee*

6 (1907) 5 Cal L Jour 19 (23) 11 Cal W N 57, *Nasser Chandra Maji v Jyoti Kumar Mukerjee*

7 (1930) A I R 1930 Bom 572 (584) 54 Bom 220 127 Ind Cas 305 *Gourind Narayan v Rangnath Gopal*

- *Lakshmanayan v Sura-*
d by the defendant was in
475 which sum is the
that the document could

founded on a *breach* of such contract ^{7a} Thus, a suit by a mortgagee claiming refund of the mortgage money, not on the ground that the defendant has committed a breach of any covenant contained in the mortgage deed, but on the ground that he has been defrauded by the defendant and made to enter into that transaction, is not a suit falling within this Article ⁸ Similarly, where in a sale deed the vendee covenants to pay the purchase money before the Sub Registrar and in accordance therewith the vendee actually tenders the money before the Sub Registrar which is however refused by the vendor, a suit by the vendor for recovery of the purchase money has been held to be not governed by this Article for the reason that there has been no *breach* of any contract ⁹

3 Such contract must be in writing and registered

As regards the meaning of the term "in writing registered," see Notes 3 to 5 *infra* and also the case cited below ^{10a}

3 The relief claimed in the suit must be compensation

The Article has no application to suits claiming to recover possession of immovable property ¹⁰ or to suits seeking to enforce a charge against the properties by sale thereof ¹¹ although such reliefs may be founded upon a breach of a contract in writing registered On this principle the High Court of Madras in *Annu v Somasundara*, ¹² has held that a suit for accounts by the principal against the agent, though arising on a registered contract of agency, is not a suit for compensation It was also pointed out that a suit for accounts stands on an entirely

7a (1915) A I R 1915 All 339 (340) 30 Ind Cas 410 *Janak Singh v Walidad Khan*

8 (1933) A I R 1933 Lah 581 (582) 145 Ind Cas 186 *Milha Singh v Fasal Din*

9 (1910) 8 Ind Cas 804 (805) (Mad) *Vythinatha Iyer v Dheemachariar*

10a (1934) A I R 1934 Pat 244 (245) 146 Ind Cas 1033 *Rajmani Bibi v Baldeo Das* (Suit to recover arrears of maintenance not based upon any registered deed)

For cases under Act 14 of 1859 with regard to registered documents see the following cases

(1868) 5 Bom H C R O C J 16 (21) *Umedchand Hakumchand v Sha Bulaki das Lalchand*

(1871) 15 Suth W R O C 1 (4 5) 6 Beng L R 668 *Leslie v Panchanan Mitter*

(1867) 7 Suth W R 354 (355) *John Lyster v Ko Malone* (A suit to recover the balance due on account of principal and interest on an unregistered bond with lien on immovable property is governed by Clause 10 Section 1 Act 14 of 1859)

(1874) 21 Suth W R 47 (48) *R P Brooke v T W Gibbon* (If a suit is brought on the registered contract by an assignee of the original creditor it is apparently no objection to the applicability of Article 116 that the assignment is not registered)

10 (1874) 13 Beng L R 312 (322 323) 1 Ind App 157 3 Sar 314 (P C) *Rani Mewa Kuwar v Rani Hulas Kuwar*

11 (1921) A I R 1921 Mad 514 (516) 66 Ind Cas 554 *Ramasami Iyengar v Kuppusami Iyer*

12 (1931) A I R 1931 Mad 185 (187 192) 54 Mad 654 131 Ind Cas 165

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different footing from a suit for compensation because in the former case the defendant can claim a decree in his favour if the accounting turns out to be in his favour, and such a thing is never possible in a suit for compensation

2. Suit to enforce a contract, whether lies by a third party to the contract. — The suits contemplated by this Article must be suits by the *parties to the contract*, or their representatives in interest, and not suits by third parties to the contract. Thus, where *A* executes a sale deed in favour of *B* and directs *B* to pay his (i.e. *A*'s) debt to *C*, it is not open to *C* to sue *B* on the basis of the covenant to pay contained in the sale deed, and claim to recover the debt from *B* by reason of the said covenant¹ In the case cited below,² where a suit was brought by a mortgagee to enforce against a purchaser of the mortgaged properties an undertaking to pay the mortgage amount, disclosed in the sale deed, it was observed by Lord Macnaghten in delivering the judgment of the Board that

"The mortgagee has no right to avail himself of that. He was no party to the sale. The purchaser entered into no contract with him and the purchaser is not personally bound to pay this mortgage debt."

3. "Contract in writing." — The Article refers to the contract being in writing but does not say that it should be signed by the parties to it. Consequently, the question has arisen as to whether the contract contemplated by this Article should be signed by the parties to the same. The High Courts of Allahabad,¹ Calcutta,² Madras³ and Rangoon⁴ and the Chief Courts of Punjab⁵ and Oudh⁶ are all agreed in holding that it is not necessary that the contract should

Note 2

1 (1930) A I R 1930 Mad 382 (389) 53 Mad 270 124 Ind Cas 55 (F B) *Sitbbu Chetti v Arunachalam Chettiar*

(1911) 9 Ind Cas 988 (989) (Cal), *Deb Narain Dutt v Ram Sadhan Mandal*

2 (1912) 13 Ind Cas 304 (304) 39 Ind App 7 34 All 63 (P C) *Jamna Das v Pam Autar Pande*

Note 3

1 (1928) A I R 1928 All 313 (315) 50 All 661 100 Ind Cas 409 *Mt. Parbati v Sarup Singh*

2 (1916) A I R 1916 Cal 771 (773) 31 Ind Cas 394, *Bouwang Raja Chellappa v Banga Behari*

(1908) 35 Cal 683 (688 689) 12 Cal W N 628 9 Cal L Jour 1 1 Ind Cas 438 *Girish Chandra Das Mazumdar v Kunjo Belari Malo*

3 (1896) 19 Mad 52 (53) 5 Mad L Jour 228, *Ambalarana Pandaram v Vaguran*

(1901) 11 Mad L Jour 125 (126), *Sauney Kotappa v Venkata Narasimham Naidu*

(But see (1891) 1 Mad L Jour 737 (739) *Ramasami Chetti v Sankanda Chetti*)

4 (1931) A I R 1931 Rang 189 (144) 9 Rang 56 134 Ind Cas 737, *Ram Raghunir v United Refineries Burma Ltd*

5 (1875) 185 Pun Re No 6 *Sher Mahomed v O De G Bertola*

(1877) 1877 Pun Re No 60 *Sheo Vall v Umrdin*

6 (1929) A I R 1929 Oudh 311 (313) 5 Luck 166 118 Ind Cas 417, *Narsingh Pratap v Mammam Jan*

be signed by both the parties, and that, provided there is a valid contract evidenced by a registered document which though signed by only one party is complete as having been accepted and acted upon by the other, a suit for compensation for breach of any such contract is within the scope of this Article. The High Court of Bombay⁷ has however taken a contrary view and has held that the contract should be signed by both the parties. It has also held in *Gorind v Rangnath*,⁸ that this Article is inapplicable to a case where the whole of the contract is not in writing and registered. Thus, a claim by the liquidator against the directors of a limited company under Section 235 of the Companies Act, 1913, was held to be not governed by this Article because the whole of the contract was not in writing registered. The High Court of Patna has followed this view in a recent decision.⁹

4 Implied contract—The word 'contract' used in this Article will include an implied contract also. Thus, in a contract of sale which is in writing and registered, all the terms which the law implies or reads as part of the contract, as for instance the implied covenant for title under Section 55, clause 2 of the Transfer of Property Act, must also be regarded as part of the registered writing. Although the sale deed does not expressly mention the implied statutory covenant, such a term should be read as if it is embodied in the sale.¹ It is however open to the parties to a sale to exclude the implied covenant for title by means of an express condition to the

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7 (1901) 3 Bom L R 667 (672) *Apaji v Nilkantha*

8 (1930) A I R 1930 Bom 572 (533 534) 54 Bom 226 127 Ind Cas 305

9 (1937) A I R 1937 Pat 293 (301) 168 Ind Cas 786 *Peninsular Locomotive Co Ltd v H Langham Reed*

Note 4

1 (1893) 21 Mad 8 (9) *Krishnan Nambiar v Kannan*

(1915) A I R 1915 Mad 742 (743) 25 Ind Cas 618 38 Mad 1171 *Aruna chela Iyer v Ramaswami Iyer*

(1926) A I R 1926 Mad 255 (256) 91 Ind Cas 514 *Sigamani v Munibadra*

(1929) A I R 1929 Mad 775 (776) *Krishna v Govinda*

(1905) 15 Mad L Jour 396 (396) *Chidambaram Pillai v Sivathasamy Thevar*

(1891) 1 Mad L Jour 473 (480) *Narayana Reddi v Peda Rama Reddi*

(1891) 1 Mad L Jour 162 (163) *Kasturi Naicken v Venkatasubba Mudaly*

(1929) A I R 1929 All 293 (295) 51 All 651 119 Ind Cas 243 *Hanwant Rai v Chand Prasad*

(1930) A I R 1930 All 785 (785) 128 Ind Cas 767 *Bageswar Tewari v Bikramj Singh*

(1930) A I R 1930 All 771 (775) 124 Ind Cas 185 52 All 604 *Md Siddiq v Md Nuh*

(1911) 11 Ind Cas 337 (338) (Mad) *Nageswara Row v Sambasiva Row*

(1925) A I R 1925 Bom 440 (442) 49 Bom 596 89 Ind Cas 59 *Ganappa Putta v Hammad Saiba*

(1924) A I R 1924 Cal 148 (150) 80 Ind Cas 623 *Injad Ali v. Mohini Chandra Adhikari*

(1919) A I R 1919 Cal 404 (404 405) 52 Ind Cas 269 *Kanok Dan v Srihari Goswami*

(1932) A I R 1932 Nag 5 (8) 29 Nag L R 31 136 Ind Cas 225 (F B) *Kashi Rao v Zabu*

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contrary, and in such a case there can be no breach of any implied contract so as to make this Article applicable²

5. "Registered." — The term "registered" has not been defined in the Act and consequently the General Clauses Act, 1897, has to be referred to for its definition. Section 3, clause 45 of that Act defines the term as follows —

"Registered used with reference to a document shall mean registered in British India under the law for the time being in force for the registration of documents"

In *Ripon Press v Nama Venkatarama*,¹ Wallis, C J, held that "the law for the time being in force" did not mean the Indian Registration Act alone, but included registration under the Companies Act which provides for the registration of the Memorandum and the Articles of Association which are documents, and also registration under other special laws such as the Copyright Act. This view has been followed by the High Courts of Allahabad³ and Bombay.⁴ But the view of Wallis, C J, has been expressly dissented from and overruled in a later Full Bench decision of the Madras High Court.⁵ Coutts Trotter, C J, in delivering the opinion of the Full Bench observed as follows

"Article 116 of course speaks of registered contracts and there is no doubt that the learned Judges (referring to *Ripon Press case*) held not merely that registration of a contract, in the ordinary sense was covered by the Article, but the deposit of the Memorandum and Articles of Association of a limited company with the Registrar of Joint Stock Companies under the direction of the Act. That seems to us to be putting an intolerable strain upon the word 'registered' and one which the draftsmen of this statute could not possibly be thought to have contemplated. Of course, the decision amounts to this and we find ourselves unfortunately in disagreement with it."

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- (1906) 2 Nag L R 174 (177, 178) *Bahadur Lal v Jadhao*
 (See also (1927) A I R 1927 Lah 1 (5) 7 Lah 423 99 Ind Cas 594,
Obedur Rahman v Darbari Lal]
 [See however (1910) 7 Ind Cas 399 (400) 34 Mad 167, *Kandasami Pillai v Atayambal*]
 2 (1930) A I R 1930 Cal 568 (572) 57 Cal 683 123 Ind Cas 183 *Bukhu Bhusan v Umesh Chandra* (Sale under express covenant to pay a prior mortgagor. Held there is no implied covenant to pay for any portion of the mortgage)

Notes 5

- 1 (1919) A I R 1919 Mad 646 (646) 42 Mad 33 48 Ind Cas 903
 2 (1923) A I R 1925 All 519 (533) 47 All 669 88 Ind Cas 785 *Union Bank of Allahabad In re*
 3 (1930) A I R 1930 Bom 572 (581) 54 Bom 226 127 Ind Cas 305 *Gopinath Narayan v Rangnath Gopal*
 (1929) A I R 1928 Bom 252 (256 258) 52 Bom 477 110 Ind Cas 33, *Manel Lal Vansukhbhai v. Suryapur Mills Co*
 [See also (1895) 9 Bom 320 (323), *Kesu Shriram v Yitlu Kanaji*]
 4 (1926) A I R 1926 Mad 615 (620) 91 Ind Cas 515 49 Mad 469 (F B), *Peri Kala Gurunadha Rama Sethayya v Tripurasundari Cotton Press, Peracada*

The Judicial Commissioner's Court of Sind⁵ has followed the Full Bench decision of the Madras High Court and held that the officer under the Companies Act is primarily a Registrar not of documents but of companies, and that the law with reference to registration of documents has been consolidated and is to be found only in the Registration Act, 16 of 1908

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The mere attestation of a deed before a *laxee* does not amount to registration within the meaning of this Article⁶

6. "Compensation for the breach of a contract." — In *Md Mozaharal Ahmad v Md Asimaddin*,¹ Mookerjee, J, observed as follows

'The term used in Article 115 and Article 116 is not damages but compensation which also occurs in Section 73 of the Indian Contract Act. As Lord Esher observed in *Dixon v Calcraft*,^{1a} the expression 'compensation' is not ordinarily used as an equivalent to damages, although as remarked by Fry, L J, in *Skinner's Co v Knight*,^{1b} compensation may often have to be measured by the same rule as damages in an action for the breach. The term 'compensation' as pointed out in the Oxford Dictionary signifies that which is given in recompense an equivalent rendered. Damages, on the other hand, constitute the sum of money claimed or adjudged to be paid in compensation for loss or injury sustained, the value estimated in money, of something lost or withheld. The term compensation etymologically suggests the image of balancing one thing against another, its primary signification is equivalence, and the secondary and more common meaning is something given or obtained as an equivalent

In *Husain Ali Khan v Hafiz Ali Khan*,² Straight, J of the Allahabad High Court, observed as follows

Nor upon consideration does it appear to me that the expression compensation is so wholly inapplicable or inappropriate to suits in respect of bonds and promissory notes, as might at first sight seem to be the case. Every bond and promissory note is a contract by which the obligor or promisor agrees to pay money either upon a particular date or upon demand, and such contract can be performed either upon the specified date or when the demand is made. If payment is

5 (1933) A I R 1933 Sind 103 (108) 143 Ind Cas 713 *Karachi Bank Ltd v Shewaram*

6 (1864) 1 Suth W R 89 (89) *Doya Moyes Dabee v Nobones Dabee*

Note 6

1 (1923) A I R 1923 Cal 507 (511 512) 78 Ind Cas 17

1a (1892) 61 L J Q B 529 (529 539) L R (1892) 1 Q B 458 66 L T 554 40 W R (Eng) 593 7 Asp M C 161 56 J P 393

1b (1891) 60 L J Q B 629 (630 631) L R (1891) 2 Q B 542 65 L T 240 40 W R (Eng) 57 56 J P 36

2 (1881) 8 All 600 (609 610) 1881 All W N 33 6 Ind Jnr 142 (F B)

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refused or is not forthcoming then there is a breach, and the suit against the defaulting obligor or promisor is not to make him do something in furtherance of the contract, for, the time for its performance is passed, but is in reality one for damages for the breach of it, the measure of which will be the amount of the debt with interest "

The High Court of Calcutta in *Harender Kishore v. Administrator General of Bengal*³ has held that the word "compensation" has been used in this Article in the sense in which it appears in Section 73 of the Contract Act and therefore whenever a suit for such compensation is brought for a breach of a contract in writing registered *whether such compensation be for liquidated or unliquidated damages* the limitation applicable is that prescribed by this Article. Similarly the High Court of Madras in *Vythilinga v. Thetchanamurthi*⁴ pointed out that "compensation" is the general term used also in the Indian Contract Act Section 73 to denote the payment which a party is entitled to claim on account of loss or damage arising from breach of contract, the effect in this place being to exclude suits for specific performance. Applying these principles it was held in a number of cases⁵ that a suit for money due upon a registered bond was a suit for compensation for breach of contract within the meaning of this Article. The point came up for final decision before the Judicial Committee in *Tricomdas Cooverji Bhoja v. Gopinath Jiu Thakur*⁶. In that case a suit was filed for the recovery of mining royalties on the basis of a registered *labuliyat*, and Lord Sumner, who delivered the judgment of the Board, while holding that the suit, though for recovery of rent, was nevertheless a suit for compensation for breach of contract within the meaning of this Article, observed

"On the one hand it has been contended that the provision as to rent is plain and unambiguous, and ought to be applied and that in any case 'compensation for the breach of a contract' points rather to a claim for unliquidated damages than to a claim for payment of a sum certain. On the other hand it has been pointed out that 'compensation' is used in the Indian Contract Act in a very wide sense, and that the omission from Article 116 of the words which occur in Article 115, 'and not herein specially provided for' is critical. There is a series of Indian decisions on the point, several of them in suits for rent, though most of them are in suits on bonds. They begin in 1880, and are to be found in all the Indian High Courts where the terms of a statute or ordinance are clear, their Lordships have

3 (1886) 12 Cal 357 (363)

4 (1891) 3 Mad 76 (77) 5 Ind Jur 76

5 (1914) A I R 1914 Bom 141 (141) 38 Bom 177 23 Ind Cas 353, *Dinker Hari v. Chhaganlal Narandas*

See also cases cited in Note 7 Foot Note (1), *infra*

6 (1916) A I R 1916 P C 192 (194) 44 Cal 759 44 Ind App 65 39 Ind Cas 156 (P C)

decided that even a long and uniform course of judicial interpretation of it may be overruled if it is contrary to the meaning of the enactment *Pate v Pate*^{6a} Such is not the case here. However arguable the construction of Act 15 of 1877 may have been when the matter was one of first impression, it certainly cannot be said that the construction for which the appellant argues, was ever clearly right. On the contrary their Lordships accept the interpretation so often and so long put upon the statute by the Courts in India, and think that the decisions cannot now be disturbed.

The effect of the decision of the Judicial Committee in other words is that the term "compensation" is not necessarily restricted to a claim for unliquidated damages but includes also a claim for a sum certain.⁷

7. Suits for recovery of money on simple bonds registered.—A suit to recover money lent and due upon a registered bond is a suit for compensation for breach of a contract in writing registered within the meaning of this Article and governed by the six years' period prescribed herein.¹ With regard to the starting point of limitation in suits upon instalment bonds, see Notes to Article 75 and

6a (1915) 84 L J P C 234 (238) (1915) A C 1100 31 T L R 590

7 (1925) A I R 1925 Bom 440 (442) 49 Bom 596 89 Ind Cas 59 *Ganappa v Hammad*.

(1931) A I R 1931 Rang 199 (144) 9 Rang 56 134 Ind Cas 787, *Ram Raghu bhar Lal v United Refineries (Burma) Ltd*

Note 7

1 (1891) 3 All 600 (603 610) 1891 All W N 83 6 Ind Jur 142 (F B) *Husain Ali Khan v Hafiz Ali Khan*

Ali Ahmed

Iryao Singh

(1892) 14 All 162 (164) 1892 All W N 27 *Collector of Etawah v Bets Maharani*

(1909) 1 Ind Cas 570 (571) (All) *Kamla Parshad v Mt Mun Bibi*

(1882) 1882 All W N 11 (11) *Gokal v Raghu*

(1891) 6 Bom 75 (76) *Ganesh Krishna v Madhavrao Rauji*

(1914) A I R 1914 Bom 141 (142) 33 Bom 177 93 Ind Cas 353, *Dinkar Hari v Chhaganlal Narasdas*

(1881) 6 Cal 94 (95) 6 Cal L R 579 *Nobo Coomar v Siru Mullick*

(1891) 18 Cal 506 (507) *Din Doyal Singh v Gopal Saran Narain Singh*

(1894) 21 Cal 872 (882) *Sham Charan Mal v Chowdhry Dehya Singh* (Registered bond executed by a minor for necessities)

(1909) 4 Ind Cas 17 (17) (Cal) *Abinash Chandra v Bama Bewa* (Instalment bond)

(1912) 13 Ind Cas 440 (443) (Cal) *Ram Varan Singh v Odindra Nath*

(1916) A I R 1916 Cal 771 (773) 31 Ind Cas 394, *Bouwang Raja Challa-phroo v Banga Behari*

(1892) 11 Cal L R 861 (862) *Kalut Ram v Lala Dhanukdhar Sahas*

(1869) 17 Sath W R 345 (345) *Nirban Singh v Kamla Sahoy*

(1891) 1891 Pun Re No 86 (p 187 188) *Ram Baksh v Maghar Singh*

(1875) 1875 Pun Re No 79 *Sher Jang v Partab Singh*

(1880) 1880 Pun Re No 51 p 112 (113) *Turkha Ram v Puran*

(1880) 1880 Pun Re No 110 p 273 (273) *Rama Mal v Saida*

sarpeshgi lease deed which is duly registered,² are governed by this Article. So also is a suit for recovery of the profits of certain lands by virtue of a registered agreement, whereby the plaintiff is given a right to sue the defendant for his share of the profits in the lands which is collected by the defendant and not paid by him to the plaintiff.³ Where, however, the suit is not based upon a registered contract of lease, this Article will not apply. Thus, this Article has no application to a suit for recovery of rent against a tenant holding over after the expiry of the registered lease deed for the period of holding over.⁴

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- (1932) A I R 1932 Cal 85 (86) 53 Cal 930 133 Ind Cas 179, *Ajithkumar Basu Thalur v Chairman of the Commissioners of Dacca Municipality*
- (1865) 3 Suth W R S C C Ref 9 (9) *Rajah Indoochoosun Deb Roy v Thomas J Kenny* (Suit against lessee for cutting trees contrary to the terms of the lease deed—Limitation for a suit for compensation runs from date of cutting of the trees)
- (1922) 67 Ind Cas 939 (940) (Lab), *Abdul Samad v Municipal Committee, Delhi*
- (1914) A I R 1914 Mad 387 (387) 23 Ind Cas 753 *Ramanathan Pattar v Achuta Variar*
- (1917) A I R 1917 Mad 987 (987) 32 Ind Cas 245, *Rymond Sebastian Lobo v Dezu Shetty*
- (1906) 19 Mad 52 (53) 5 Mad L Jour 228 *Ambalavana Pandaram v Faguran*
- (1881) 8 Mad 76 (77) 5 Ind Jur 76 *Pythilinga Pillai v Thelchanamurthi Pillai*
- (1910) 6 Ind Cas 766 (773) (Mad) *Chengisah v Thimma Nayanam Bahadur*.
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- (1916) A I R 1918 Pat 804 (805) 34 Ind Cas 754 1 Pat L Jour 87, *Mac kenzie v Ravishwar Singh*
- (1936) A I R 1936 Rang 80 (80) 161 Ind Cas 461, *Ma Pua Thein v Ma Me Tha*
[See also (1917) A I R 1917 Cal 568 (569) 34 Ind Cas 51 *Taran Krishna v Samuruddin* (Discussing as to when the breach of contract occurs and as to when limitation starts)]
- (See however (1904) 26 All 198 (140) 1903 All W N 210 *Ramnaram v Kamta Sing* (Submitted not good law in view of A I R 1916 P C 182)
- (1912) 16 Ind Cas 146 (147) 34 All 464, *Jaggi Lal v Sri Ram (Do)*
- (1903) 13 Mad L Jour 485 (487), *Rama Krishna Chettyar v Appa Rao (Do)*
- 2 (1918) A I R 1918 Pat 885 (386) 44 Ind Cas 153, *Muhammad Hanif v Moorat Mahton*
- (1917) A I R 1917 Pat 14 (15) 40 Ind Cas 594 *Barham Deo v Ramanand*
- 3 (1935) A I R 1935 All 945 (946) 159 Ind Cas 446, *Girwar Singh v Pam Sarup*
- 4 (1912) 16 Ind Cas 560 (560) (Mad) *Mamambath Pettiyeth v Cleria Uthamma*
- (1910) 6 Ind Cas 754 (754) (Mad), *Sydarakath Kakkachi v Muhamad Kutti*
- (1934) A I R 1934 Mad 458 (461) 58 Mad 75 155 Ind Cas 839, *Gnanaden Ram Pillai v Antony*

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The Bengal Tenancy Act, 8 of 1885,⁵ the C P Tenancy Act, 1 of 1920,⁶ as also the Madras Estates Land Act, 1 of 1908,⁷ prescribe a special period of limitation for certain suits for rents and consequently suits for recovery of rent under those Acts are governed by the special period of limitation prescribed by those Acts and do not fall under this Article, although the lease deeds are registered. See Notes to Section 29, *ante*.

9. Suit for recovery of royalty under a registered deed.— A suit for recovery of *royalty* due under a registered deed is governed by this Article ¹

10. Other suits based upon covenants in registered lease deeds.— A suit by a lessee for compensation either for breach of the express term of the contract to put the lessee in possession of the properties leased,¹ or for breach of the implied obligation on the part of the lessor to put the lessee in possession, which is deemed to be part of every contract of lease,² is a suit falling within the scope of this Article. In such cases limitation starts from the date when

- (1936) A I R 1936 Pat 362 (369, 370) 163 Ind Cas 525, *Bengal and North Western Ry Co Ltd v Janki Prasad*
 5 (1892) 19 Cal 1 (4) (F B) *Mackenzie v Haji Syed Mahomed Ali Khan*
 (1890) 17 Cal 469 (472) *Iswari Pershad Narain Sahi v Crowdy*
 (1916) A I R 1916 Cal 609 (611) 29 Ind Cas 791, *Rash Behari Lal Mandal v Tilukdhari Lal*
 (1919) A I R 1919 Cal 144 (146) 50 Ind Cas 862, *Sarajubala Devi Chowdhurani v Saradanath Battacharjee*
 (1916) A I R 1916 Pat 48 (49) 38 Ind Cas 102 1 Pat L Jour 506, *Gajadhar Prasad v Thakur Prasad Singh*
 6 (1936) A I R 1936 Nag 180 (181) 1 L R 1936 Nag 5 165 Ind Cas 122 *Baburao v Sandhu*
 7 (1927) A I R 1927 Mad 439 (440) 100 Ind Cas 241, *Kalida Sahib v Persa Thambiah Pillai*
 (1916) A I R 1916 Mad 607 (610) 18 Ind Cas 64 38 Mad 101, *Ramkrishna Chetty v Subbaraya Iyer* (Held the Act has no retrospective effect)
 (1912) 14 Ind Cas 184 (187) (Mad), *Sundaram Iyer v Muthuganapattigal*
 [See also (1918) A I R 1918 Mad 928 (931) 40 Ind Cas 590 *Eapiraju v Narayanaswami Naidu* (Case under Madras Rent Recovery Act, 8 of 1865)]

Note 9

- 1 (1916) A I R 1916 P O 182 (184) 44 Cal 759 44 Ind App 65 39 Ind Cas 186 (P C) *Tricomdas Cooteji Bhoja v Sri Gopinath Jiu Thakur*
 (1913) 19 Ind Cas 865 (869) (Cal), *Peary Lal Daw v Madhoji Jiban*
 (1908) 12 Cal W N 724 (726) *Bhola Nath Das v Raja Durga Prasad Singh*

Note 10

- 1 (1902) 25 Mad 587 (596 598) 12 Mad L Jour 249, *Zemindar of Vinanagaram v Behara Suryanarayana Patrule*
 (1934) A I R 1934 Pat 148 (149) 150 Ind Cas 075 13 Pat 192 *Lalji Singh v Ramrup Singh*
 2 (1927) A I R 1927 Pat 248 (250) 101 Ind Cas 707 6 Pat 600, *Nabin Chandra Ganguli v Munshi Mander*
 (1927) A I R 1927 Lah 1 (5) 7 Lah 423 93 Ind Cas 584 *Obedur Rahman v Darbari Lal*

the lessee would be entitled to be put in possession under the lease and when the lessor fails to do so.³ As pointed out by their Lordships of the High Court of Madras in the case cited below,⁴ there is no *continuing breach* in such cases, and the covenant, whether express or implied, to place the transferee in possession operates *in presenti* and that obligation is broken and broken once for all as soon as the transferor declined or is unable to place the transferee in possession. Similarly, where the lessee is dispossessed by a third party before the expiry of the period of lease owing to the lessor's title being defective the lessee is entitled to sue for compensation within the period prescribed by this Article. The starting point of limitation in such a case is the *date of dispossession* of the lessee.⁵

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Notes
10—12

11. Partnership suits. — A suit for taking the *accounts* of a partnership is not a suit for compensation for breach of contract although the deed of partnership may be a registered instrument.¹ As observed by Ramesam, J. in *Kothandapani v Sreemanatedan*²

"It is very difficult to say in such a case that any one of the parties has broken any particular term of the contract. Even if some specific breaches of some clauses in the deed are alleged, in the main the suit is one for taking the accounts. In the course of taking such accounts, results of breaches made by particular partners may have to be considered, but the main characteristic of the suit is not altered."

12. Suits for account based upon registered contract of agency. — See Note 4 to Article 89 and also the cases cited below.¹

- 3 (1932) A I R 1932 Mad 225 (225-226) 138 Ind Cas 119 *Appaswami Iyengar v Krishnaswami Padayachi* (Suit to recover advance paid by the lessee—Held suit after six years from the date of lease is barred.)
4 (1917) A I R 1917 Mad 465 (467-469) 35 Ind Cas 254 40 Mad 910 *Secy of State v Venkayya Garu* (A portion of the leased properties not put in possession of the lessee.)
5 (1924) A I R 1924 Nag 220 (221) 78 Ind Cas 248, *Seth Lazmi Chand v Bajji Rao*
(1936) A I R 1936 Pat 462 (465) 164 Ind Cas 277 *Rajendra Narayan v Lalmoohan* (Grant of lease under registered document on consideration of certain premium—Subsequent finding as to lessor's incapacity to make such grant—Lease is void and lessee is entitled to refund of money.)

Note 11

- 1 (1934) A I R 1934 Mad 169 (165-169) 57 Mad 378 151 Ind Cas 81, *Kothandapani Chetti v Sreemanatedan Raja*
(1899) 22 Mad 14 (14) 8 Mad L Jour 151 *Vairavan Asari v Ponnayya*
(1933) A I R 1933 Nag 127 (130) 141 Ind Cas 277, *Binjray v Kisanlal*
[But see (1897) 14 Mad 465 (466) 1 Mad L Jour 432 *Runga Reddi v Chenna Reddi*.]
2 (1934) A I R 1934 Mad 162 (165) 57 Mad 378 151 Ind Cas 81

Note 12

v Baroda Kishore Acharyya
—Article 116 applies if the

Bani Pershad Koer (Do—12)

Starting point of limitation for such suits In *Raghubur Rao v Jay Rao*² it was held by the High Court of Allahabad that if the sale deed fixes no time for payment of the debts time runs from the date of the sale deed. This view was not however followed by the same High Court in later decisions³ and by the High Courts of Bombay,⁴ Calcutta,⁵ Lahore,⁶ Madras⁷ and the Judicial Commissioner's Court of Nagpur,⁸ and the Chief Court of Oudh.⁹ According to these decisions time runs not from the date of the sale deed, but from the date when the vendor is actually damaged and suffers loss by being himself obliged to pay the creditors who are to be paid under the sale deed. The

- (1926) A I R 1926 Nag 429 (431) 97 Ind Cas 185 *Vinayakrao v Shripatrao* (Defendant undertaking by registered contract to pay plaintiff's mortgage and redeem the mortgage — Failure of defendant to pay — Mortgagee obtaining decree against plaintiff and plaintiff renewing the mortgage — Suit for compensation for breach of contract against defendant falls under Article 116.)
- (1930) A I R 1930 Pat 46 (50) 8 Pat 860 122 Ind Cas 244 *Ram Rachhya Singh v Raghunath Prasad*
- (1907) 8 Cal L Jour 398 (400) *Daswant Singh v Syed Shah Ramjan Ali*
- 2 (1912) 14 Ind Cas 244 (246) 34 All 429
[See also (1925) A I R 1925 All 498 (490) 87 Ind Cas 804 *Ram Narain v Nehal Singh* (Following 34 All 429)]
(1929) A I R 1929 All 121 (123) 107 Ind Cas 679 *Kallu v Ram Das*]
- 8 (1927) A I R 1927 All 435 (436) 49 All 603 101 Ind Cas 691 *Ram Ratan Lal v Abdul Wahid Khan*
- (1926) A I R 1926 All 605 (609) 95 Ind Cas 913 *Kedar Nath v Har Govind*
(1922) A I R 1922 All 409 (409) 70 Ind Cas 582 *Brikant Pande v Jamna Dhar Dube*
- (1935) A I R 1935 All 463 (464) 154 Ind Cas 305 *Abdul Wahid Khan v Sher Muhammad Khan*
- (1936) A I R 1936 All 870 (873) 166 Ind Cas 907 *Ram Chander v Ram Chander*
[See also (1932) A I R 1932 All 454 (457) 142 Ind Cas 83 *Mahtab Singh v Collector of Saharanpur*]
- 4 (1931) A I R 1931 Bom 365 (367) 183 Ind Cas 267 *Amman Bai v Anant Narayan*
- 5 (1912) 16 Ind Cas 73 (75) (Cal) *Ra v Bara Singh v Mohendra Parsad Singh*
(1933) A I R 1933 Cal 641 (643) 60 Cal 761 146 Ind Cas 863 *Cl and Bibi v Saratbikumar Pal* (The cause of action for a suit by the vendor on such covenant arises either on the date when such payment is to be made or at least not later than the date when the vendor calls upon the purchaser to do so.)
- 6 (1933) A I R 1933 Lah 109 (111) 14 Lah 350 141 Ind Cas 435 *Gulsara Mal v Maghi Mal*
- (1933) A I R 1933 Lah 793 (794) 144 Ind Cas 362 14 Lah 646 *Abdul Qadir v Mt Bilas Kaur*
- 7 (1933) A I R 1933 Mad 424 (427) 56 Mad 724 144 Ind Cas 550 *Nataram Nadar v Vedaman aka Nadar*
- (1918) A I R 1918 Mad 1135 (1136) 83 Ind Cas 168 *Kaliyammal v Kolandavela Gounder*
- 8 (1933) A I R 1933 Nag 379 (389) 29 Nag L R 298 149 Ind Cas 1200 *Bhanji v Govind*
- 9 (1927) A I R 1927 Oudh 455 (456) 2 Luck 31 104 Ind Cas 824 *Malomed Ainul Huq v Abdullah Khan*

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Note 15

High Court of Patna¹⁰ has also held that the starting point of limitation is not the date of the sale deed, but the date when either there is a repudiation of the liability under the sale deed by the vendee, or when the contract had been rendered impossible of performance on account of the vendor's debt having been satisfied.

Where the vendor leaves in the hands of the vendee a certain amount to pay off a mortgage debt stipulating that the surplus remaining after payment to the mortgagee should be returned to the vendor, a suit for recovery of such surplus falls under this Article. Limitation starts in such a case from the date when it is found that there is a surplus¹¹.

A suit by the vendor to recover *peishkush* paid by him after the execution of the sale deed under which the vendee is bound to pay the same, is a suit for compensation falling under this Article^{11a}.

(b) Suits by vendee

Where owing to a defect in the title of the vendor the vendee is deprived of the whole or part of the property purchased a suit by the vendee against the vendor for compensation for the breach of the covenant of title arising either upon an express covenant in the sale deed¹² or by reason of the implied covenant for title which is deemed to be a part of the contract between

10 (1930) A I R 1930 Pat 46 (52) 8 Pat 860 122 Ind Cas 244 *Ram Rachhya Singh v Raghunath Prasad Misser*

[See however (1938) A I R 1938 Pat 275 (278) *Keshwar Sao v Guni Singh*]

11 (1934) A I R 1934 Oudh 240 (243) 149 Ind Cas 529 10 Luck 26 *Bisjanath*

Li Jour 563 *Arund*

11 490 Muf Kunwar

v Chatter Singh

(1923) A I R 1923 Lah 23 (24) 72 Ind Cas 897 *Rukan Din v Hassan Din*

(1929) A I R 1929 Lah 388 (390) 120 Ind Cas 424 *Wangladka Ram v Ganda Maf* (Suit for damages based on a clause of indemnity or on a covenant for title and quiet possession contained in a registered sale deed is governed by Article 116)

(1923) A I R 1923 Mad 28 (29 29) 68 Ind Cas 190 *Subbayya v Pitchanna* (The provision in a sale deed by which the vendor undertook in case of dispute to settle it out of his own expense and carry out the sale without obstruction amounts to a covenant for quiet enjoyment or at least a covenant for title)

(1929) A I R 1929 Mad 775 (776) *Krishna Bhatta v Govinda Bhatta*

(1933) A I R 1933 Mad 382 (383) 144 Ind Cas 726 *Sadasua Suryo narayana Rao v Rajalingam*

(1916) A I R 1916 Oudh 210 (211) 38 Ind Cas 746 *Mt Nanhi Kharam v Mt Masuman*

(1924) A I R 1924 Pat 321 (322) 72 Ind Cas 653 *Jhigur Gha v Mejh Nath Pandey* (Sale of *jaymaika* brit which is unsalable—Sale for refund of purchase money falls under this Article)

(1930) A I R 1930 Sind 66 (70) 126 Ind Cas 737, *Sorabji v Tarachand*

the parties to every sale deed¹³ is governed by this Article. As to when limitation commences and when the cause of action for compensation arises in such suits the cases may be classified and considered under three heads viz —

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Note 15

- (i) Where from the inception of the sale the vendor has no title to convey and the vendee who is entitled to be put in possession on the date of sale has not been put in possession of the properties
- (ii) Where the sale is only voidable on the objection of the third parties and possession is taken by the vendee under the voidable sale
- (iii) Where the title is known to be imperfect and the contract is in part carried out by giving possession of the properties to the vendee¹⁴

In the first class of cases where the sale is void from its inception and no possession is given to the vendee the starting point of limitation is *the date of the sale deed*. The covenant for title is not a continuing covenant capable of a continuing breach¹⁵. In the second class of cases the cause of action for a suit for compensation arises only when it is found that the vendor has no good title and so long as the vendee remains in possession without his title being

- (1930) A I R 1930 Sind 12 (14) 118 Ind Cas 203 24 Sind L R 172 *Abdul Rahim v Kadu*
[See also (1919) A I R 1919 Mad 37 (38) 50 Ind Cas 815 *Aramamuda Chariar v Aramamasa Krishna Iyer*]
- 18 (1926) A I R 1926 Mad 255 (255) 91 Ind Cas 514 *Sigamani v Munibadra*
(1898) 21 Mad 8 (9) *Krishna Nambiar v Kannan*
(1919) A I R 1919 Mad 757 (757) 50 Ind Cas 673 *Venkalachallam Pillai v Krishnaswami Pathan*
(1911) 11 Ind Cas 337 (839) (Mad) *Nageswara Row v Sambasiva Row*
(1891) 1 Mad L Jour 479 (480) *Narayana Reddi v Peda Rama Reddi*
[See also (1867) 2 Agra 199 (199) *Dwarka Dass v Rutun Singh*]
See also cases cited in Note 4 Foot-Note (1) *supra*
- 14 (1915) A I R 1915 Mad 708 (710) 38 Mad 887 23 Ind Cas 570 *Subbaraya Reddiar v Rajagopala Reddiar*
- 15 (1923) A I R 1923 Mad 892 (895 896) 74 Ind Cas 416 *Gopala Iyengar v Mummachi Reddiar*
(1927) A I R 1927 Mad 278 (276 277) 100 Ind Cas 40 *Patrachariar v Alamelumangai Ammal* (A I R 1915 Mad 708 Followed)
(1919) A I R 1919 Mad 757 (757) 50 Ind Cas 673 *Venkalachallam Pillai v Krishnaswami Pathan*
(1915) A I R 1915 Mad 766 (66 69) 21 Ind Cas 740 *Ramanatha Aiyar v Raman Nambudripad* (31 Mer J Dissenting)
(1925) A I R 1925 Bom 440 (442) 49 Bom 596 89 Ind Cas 59 *Ganappa v Hammad*
(1918) A I R 1918 Nag 264 (268) 47 Ind Cas 886 *Dharamchand v Gorelal Mukandlal*
(1926) A I R 1926 Nag 109 (115) 88 Ind Cas 699 22 Nag L R 49 *Ramadhan v Purushottam*
(1937) A I R 1937 Rang 39 (41) 167 Ind Cas 809 *P L A T N K Chettyar Firm v Adinamalai*
[See also (1916) A I R 1916 Mad 480 (481) 31 Ind Cas 179 *Samu Pathan v Chidambara Odayan*
(1915) A I R 1915 Nag 46 (47) 31 Ind Cas 877 11 Nag L R 186 *Pirbhu v Mt Wazirbi*]

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Note 16

questioned or affected, he is not damnified¹⁶ Normally, the date of the dispossession of the vendee at the instance of the third party having superior title will be the starting point in such cases¹⁷ Where however, the title of the third party is put forward and agitated in a Court of law in a suit to which the vendee is also a party, the *date of the decree of the first Court* which upholds the title of the third party will be the starting point,¹⁸ but not the date of the appellate Court's decree confirming that of the trial Court¹⁹ In the last mentioned class of cases it has been held that the fact that the vendee managed to remain in possession even after the decree of the first Court negating the title of his vendor, will not

- 16 (1935) A I R 1935 Mad 636 (637) 156 Ind Cas 843, *Alagarappa Reddiar v Alagirisami Naick*
(1915) A I R 1915 Mad 708 (710) 38 Mad 887 23 Ind Cas 570 *Subbaraya v Rajagopala*
(1920) A I R 1920 Mad 634 (637) 60 Ind Cas 235, *Mahomed Ali Sherif Sahab v Venkatapathi Raju*
(1932) A I R 1932 Nag 3 (4) 137 Ind Cas 61, *Bhawani Singh v Girdhari*
(1934) A I R 1934 Nag 16 (17) 148 Ind Cas 480 30 Nag L R 198 *Ambadar v Wamanrao*
(1916) A I R 1916 Oudh 240 (241) 33 Ind Cas 746, *Mt Nanhi Khanam v Mt Masuman*
(1929) A I R 1929 Pat 388 (390 391) 8 Pat 432 117 Ind Cas 654 *Mt Lakshmi Kuer v Durga Prasad*
(1924) A I R 1924 Pat 321 (322) 72 Ind Cas 653, *Jhingu Ojha v Meghnath Pandey*
[See also (1936) A I R 1936 Oudh 141 (143) 160 Ind Cas 454 *Bhagwati Prasad v. Badri Prasad*]
17 (1929) A I R 1929 All 293 (295) 51 All 651 110 Ind Cas 243, *Hannant Bai v Chand Prasad*
(1915) A I R 1915 Mad 766 (767) 21 Ind Cas 740, *Ramanatha Iyer v Raman Nambudripad*
(1935) A I R 1935 Mad 636 (637) 156 Ind Cas 843, *Alagarappa v Alagirisami*
(1931) A I R 1931 Sind 141 (142) 25 Sind L R 173 133 Ind Cas 76 *Chandrawati Bai v Valabdas*
18 (1919) A I R 1919 Mad 849 (850) 47 Ind Cas 924 *Venkata Ramayya v Ramabrahman*
(1933) A I R 1933 Mad 126 (128) 140 Ind Cas 805, *Thillaiakannu Achi v Abdul Kadir Rowther*
(1923) A I R 1923 Mad 392 (395) 74 Ind Cas 416, *Gopala Iyengar v Mummach Reddiar*
(1923) A I R 1923 Mad 28 (29) 68 Ind Cas 190 *Subdayya v Pichanna*
(1921) A I R 1921 Bom 252 (254, 255) 45 Bom 955 61 Ind Cas 70, *Mulani Jeyaram v Budhumal Kevatchand*
(1924) A I R 1924 Pat 321 (322) 72 Ind Cas 653 *Jhingu Ojha v Meghnath Pandey*
(1932) A I R 1932 Nag 3 (4) 137 Ind Cas 61, *Bhawani Singh v Girdhari*
(1934) A I R 1934 Nag 16 (17) 30 Nag L R 198 148 Ind Cas 480, *Ambadar Das v Waman Rao*
(1931) A I R 1931 Sind 141 (142) 25 Sind L R 173 133 Ind Cas 76, *Chandrawati Bai v Valabdas*
19 (1926) A I R 1926 Mad 255 (255) 51 Ind Cas 514, *Singamoni Pandi Bai v. Munibadri Nainar*
(1920) A I R 1920 Mad 634 (636) 60 Ind Cas 235, *Mahomed Ali v Venkatapathi Raju*
(1933) A I R 1933 Mad 382 (383) 144 Ind Cas 726, *Saishira Suryanarayana Rao v Rajalingam*

stop the running of limitation. In other words, in such cases the date of the decree and not the date of dispossession in pursuance of the decree will be the starting point²⁰

With regard to the third class of cases, where the sale is void *ab initio*, but in pursuance of the sale the purchaser is put in possession of the property sold, limitation starts from the date on which the vendee is dispossessed by the rightful owner, and not from the date of the sale deed²¹

A suit by the vendee against the vendor to recover the *value of deficiency* in the property comprised in the sale deed in pursuance of a covenant in the sale deed to the effect that if there should be "any deficiency or defect in the quantity sold, the vendor shall stand responsible for the same and in case of there being deficiency in the share sold, the vendor shall pay the vendee the value thereof with costs," is a suit falling within the purview of this Article²² So also is a suit for compensation for breach of a covenant in the sale deed by which it is stipulated that if at the time of the purchaser's taking possession of the properties the profits from the same are found to be less than a stated amount, the vendor should make good the deficiency²³ In the case cited below,²⁴ there was a direction in the sale deed that the vendee should pay a particular sum for a mortgage debt due by the vendor over the properties and there was a stipulation that in the event of the mortgage amount being in excess of the amount quoted the vendor is to be liable for such excess and a suit by the vendee for breach of the covenant was held to be governed by Article 83 read with this Article

In a suit to enforce a *covenant of indemnity* in a sale deed whereby the vendor who purports to convey the property free of encumbrance promises to indemnify the vendee and make good the loss from out of his estate together with the damages and costs in

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- (1935) A I R 1935 All 786 (787, 789) 156 Ind Cas 177 *Jawahar Ram v Jhinguri Lal*
 (1921) A I R 1921 Bom 252 (254, 255) 45 Bom 955 61 Ind Cas 70 *Multan mal Jayaram v Budhumal Keralchand*
 (1927) A I R 1927 Lah 734 (734) 100 Ind Cas 19 *Pir Balhsh v Chanan Din*
 (1934) A I R 1934 Lah 305 (307) 148 Ind Cas 825 *Chuni Lal v Hari Chand*
 20 (1935) A I R 1935 All 786 (787, 789) 156 Ind Cas 177 *Jawahar Ram v Jhinguri Lal*
 (1929) A I R 1929 Bom 361 (364, 365) 119 Ind Cas 659 *Dapu v Kashiram*
 21 (1932) A I R 1932 Nag 5 (9, 10) 28 Nag L R 31 136 Ind Cas 275 (F B), *Kashiram v Zabu*
 (1915) A I R 1915 Mad 709 (710) 38 Mad 837 23 Ind Cas 570 *Subbaraya v Rajagopala*
 22 (1891) 8 All 712 (717) 1891 All W N 67 6 Ind Jur 106 *Kishen Lal v Kinlock*
 [See also (1910) 8 Ind Cas 1087 (1088) 35 Mad 39 *Banciredy v Naganna*]
 23 (1896) 18 All 160 (162) 1896 All W N 15 *Amanat Bibi v Ajudhia*
 24 (1921) A I R 1921 Lah 260 (261) 2 Lah 316 64 Ind Cas 431, *Abdul Anir Khan v Muhammad Balhsh*

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case there should be an encumbrance, limitation starts from the date when the vendee is damaged by being compelled to pay the mortgage not disclosed in the sale deed²⁵

16. Suit by vendee for breach of covenant to put him in possession.—A sale deed contained a covenant by the vendors, who were themselves purchasers at a Court sale, to the following effect: "We shall put in an application for delivery and give delivery to you. Afterwards we shall bring from the Court the said receipt for delivery and the certificate, and give the same to you. You will have to bear the charges for the said delivery." It was held that a suit filed by the vendee claiming refund of the purchase money as compensation for the breach of that covenant fell within this Article. No time being fixed within which delivery was to be given it was held that time began to run only from the time when the vendors had become incapable of carrying out their undertaking and that before that occasion arose the vendee could not sue alleging a breach and ask for the return of the purchase money¹.

17. Suit by vendee claiming compensation under Section 65 of the Contract Act.—In *Harnath Kuar v Indar Bahadur*,¹ a sale deed was executed during the lifetime of a Hindu widow, by the next reversioner, of the properties comprised in the estate of the last male owner who died issueless leaving only the widow. After the death of the widow, the vendee sued for possession of the properties conveyed to him or in the alternative a refund of the purchase money. Their Lordships of the Privy Council held that the claim for possession under the sale was unsustainable, because on the date of the transfer the reversioner had no interest capable of transfer but had merely an *expectancy*. But with regard to the alternative prayer in the plaint for refund of the purchase money, their Lordships held that the claim thereto was covered by Section 65 of the Contract Act, and observed as follows:

"An agreement, therefore, discovered to be void is one discovered to be not enforceable by law, and on the language of the Section would include an agreement that was void in that sense from its inception as distinct from a contract that becomes void.

'The agreement here was manifestly void from its inception, and it was void because its subject matter was incapable of being bound in the manner stipulated.

25 (1918) A I R 1918 All 219 (221) 40 All 605 49 Ind Cas 18 *Ram Dulare v Hardwar Lal*

Note 16

1 (1933) A I R 1933 Mad 153 (156) 143 Ind Cas 501 *Satyannarayan Rao v Venkataswami* (Limitation reckoned from date when Court sale became absolute)

Note 17

1 (1922) A I R 1922 P C 403 (405) 71 Ind Cas 629 50 Ind App 69 45 All 179 26 Oudh Cas 223 (P C)

"Though this aspect of the case has not been satisfactorily presented or developed in the pleadings and the proceedings before the lower Courts, their Lordships think there are materials on the record from which it may be fairly inferred in the peculiar circumstances of this case that there was a misapprehension as to the private rights of Indar Singh (the vendor) in the villages which he purported to sell by the instrument of the 2nd January 1890, and that *the true nature of those rights was not discovered by the plaintiff or Raehpal Singh earlier than the time at which his demand for possession was resisted*, and that was well within the period of limitation "

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18. Suit upon covenant contained in a registered deed of exchange.—A suit to enforce a covenant of indemnity contained in a registered deed of exchange falls under this Article *A* and *B* exchanged lands under a registered deed of exchange which contained a provision to the following effect "There is no dispute in respect of the lands. If disputes should so arise, the respective party should be answerable to the extent of his private property." *A* was subsequently deprived of a portion of the properties he got by exchange by reason of the defective title of *B*. *A* sued *B* for the value of the lands of which he was thus deprived. It was held that the suit would be governed by this Article, and that the *starting point* of limitation would be the date on which *A* was deprived of the portion of the properties, which was the date of the breach of the covenant.¹

19. Claim for personal decree arising on registered mortgage deeds.—It is well settled that in the case of a registered deed of mortgage, the fact that the payment of an amount is collaterally secured by the mortgage does not destroy the personal liability on the part of the mortgagor to repay the mortgage amount arising by virtue of the covenant to repay the loan contained in the deed of the mortgage. The latter obligation has an existence independent of the mortgage.¹ In considering the question of personal liability arising under a mortgage deed as pointed out by the Judicial Committee in *Ramnarain v Adhindranath*,² "it must be borne in mind (1) that a loan *prima facie* involves such a personal liability (2) that such a liability is not displaced by the mere fact that security is given for the repayment of the loan with interest but (3) that the nature and terms of such security may negative any personal liability on the part

Note 18

- 1 (1908) 31 Mad 452 (453) 4 Ind Cas 1121 *Srinivasa Paghara v Rangasami Iyengar*

Note 19

- 1 (1906) 4 Cal L Jour 510 (515) *Ellal Georgina Kerr v Clara B Ruxton*

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this case there was no covenant to pay)

- 2 (1916) A 1 R 1916 P C 119 (120 121) 44 Cal 389 44 Ind App 87 38 Ind Cas 932 (P C)

only a personal decree⁵ either because the hypotheca is not saleable⁶ or because the mortgage deed cannot be enforced as a mortgage because it is not validly attested as required by Section 59 of the Transfer of Property Act,⁷ have been held to be governed by this Article. Similarly, in the case of a mortgage deed executed by the father or manager of a joint Hindu family, where the mortgage is not binding on the interest of the sons or the junior members, a simple money decree can be passed on the footing of the covenant to pay contained in the deed, and limitation for such a suit is one prescribed by this Article.⁸

In *Ganeshlal Pandit v Khetra Mohan Mahapatra*,⁹ a case decided by the Judicial Committee in 1926, there is, however, an observation which seems to throw some doubt as to the applicability of this Article to claims to enforce the personal relief on the basis of registered mortgage deeds. The said observation is as follows:

"The cause of action for the personal covenant accrued to Bebari Lal Pandit when Suryamani failed to pay the mortgage debt, viz. within six months from the date of the mortgage. And the claim had become barred under Article 66 long before the execution of the *razinama* and the conveyances thereunder."

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- 5 (1886) 11 Mad 56 (59), *Rathnasami v Subramanya*
 (1935) A I R 1935 Bom 203 (207) 156 Ind Cas 286 59 Bom 634, *Vasany Kalihari v Eruchshaw Dossabhai*
- 6 (1922) A I R 1922 Oudh 118 (114) 67 Ind Cas 595, *Thamman Singh v Dalchand*
- 7 (1909) 1 Ind Cas 1 (3) 32 Mad 410, *Kunhu Moidu v Madhava Menon*
 (1931) A I R 1931 Mad 124 (128) 129 Ind Cas 814, *Jagannatham Pillai v Official Assignee, Madras*
 (1915) A I R 1915 All 254 (255) 29 Ind Cas 363, *Vathra Pershad v Cheddi Lal*
 (1914) A I R 1914 Bom 141 (142) 39 Bom 177 23 Ind Cas 353, *Dinkar Hari v Chhaganlal Narsidas*
 (1906) 4 Cal L Jour 510 (518, 516) *Ethel Georgina Kerr v Clara B Ruxton*
 (1893) 26 Cal 222 (225) 8 Cal W N 228 *Sonafun Shaha v Dinonath Shaha*
 (1922) A I R 1922 Cal 168 (171) 49 Cal 438 63 Ind Cas 507, *Sristidhar Ghose v Rakkayahali Dass*
 (1925) A I R 1925 Oudh 737 (738) 91 Ind Cas 176 *Ram Samujh Singh v Mt. Vainath Kuer*
- 8 (1900) 27 Cal 762 (767) *Surja Prasad v Golab Chand*
 (1909) 1 Ind Cas 153 (154) (Cal), *Hira Lal Marwari v Chandrabali Hal darin*
 (1928) A I R 1928 Oudh 465 (467) 4 Luck 107 113 Ind Cas 489, *Jai Indra Bahadur Singh v Khairati Lal*
 (1924) A I R 1924 Oudh 147 (148) 77 Ind Cas 340, *Udairay Singh v Ram Udit Tewari*
 (1921) A I R 1921 Oudh 47 (47) 61 Ind Cas 205, *Gajadhar Balsh v Gauri Shankar*
 (1922) A I R 1922 Oudh 257 (258) 69 Ind Cas 786 25 Oudh Cas 164, *Ram Narain v Nand Kumar*
 (1927) A I R 1927 Oudh 315 (315) 102 Ind Cas 630 *Rudra Prasad v Nasir uddin Khan*
 (See also (1924) A I R 1924 All 543 (545) 46 All 334 78 Ind Cas 911, *Gouri Shanker v Shree Nandan*)
- 9 (1926) A I R 1926 P C 56 (59) 5 Pat 555 53 Ind App 131 95 Ind Cas 639 (P C)

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Note 19

An earlier decision of the Board in *Ramdin v Kalka Prasad*,¹⁰ was also relied upon in support of the above position. A Full Bench of the High Court of Madras,¹¹ after a review of the facts and circumstances under which the above case was decided by the Privy Council, has, however, come to the conclusion that the above observation of their Lordships was only by way of *obiter* and that Article 66 did not apply. As pointed out by Kumaraswamy Sastry, J., in delivering the judgment of the Full Bench, the suit in the case before the Privy Council was brought *ten years* after the mortgage debt became payable, and there was no question as to whether the three or six years' rule applied, as in either view the claim was barred being more than six years. The only contention advanced before the Board was that Article 132 applied, which was negatived. Further, it appears from the report of the case that the mortgage deed in question was not validly registered and the observation of their Lordships must be taken to have been made with reference to unregistered deeds, for otherwise there is no reason why their Lordships should refer and quote with approval the decision in *Miller v Runganath*,¹² wherein the period of limitation for personal relief in a mortgage suit was specifically held to be six years. In *Ramdin's case*¹⁰ (above referred to) also the suit was filed *ten years* after the mortgage money became payable, and the sole question argued before the Board was that the period of twelve years prescribed by Article 132 applied also to the claim for a personal decree. It is not clear from the report of the decision whether the particular mortgage deed in that case was, or was not, registered. That case, however, arose at a time when the Registration Act had not come into force and a reference to the mortgage document in the report as being 'not under seal' leads to the inference that the mortgage deed in question was not registered, for otherwise the observation of their Lordships in the earlier portion of the judgment "the question submitted for their Lordships consideration is whether the lesser period of limitation, *three or six years as the case may be*, has barred the personal remedy against the mortgagee even though the mortgage remains in full force against the mortgaged properties," cannot be explained. Further, the Judicial Committee have in two other earlier decisions in *Kameshwar Pershad v Rajkumari Ruttan Koer*¹³ and *Beti Maharani v Collector of Etawah*,¹⁴ specifically referred to the period of limitation as being six years in claims for personal decrees on the basis of registered mortgage deeds. Having regard to these decisions and also the well known case of *Tricomdas Cooverji Bhoja v Gopinath Jiu Thakur*,¹⁵ wherein this Article was held to

10 (1891) 7 All 502 (505) 12 Ind App 12 9 Ind Jur 160 4 Str 619 (P C)

11 (1929) A I R 1929 Mad 53 (60) 52 Mad 105 216 Ind Cas 817 (F B) Pathna
mbapathy Chettiar v Desangmony Pillai

12 (1885) 12 Cal 309 (306) 10 Ind Jur 376

13 11 Ind App 12 9 Ind Jur 160 4 Str 619 (P C)

14 11 Ind App 65 30 Ind Cas

be a special provision governing registered instruments evidencing a contract, it is submitted that the view taken by the Full Bench of the High Court of Madras which has been followed by Full Bench decisions of the High Courts of Allahabad¹⁶ and Rangoon¹⁷ is correct on principle

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20. Starting point of limitation in claims for personal relief on the basis of mortgage deeds. — The starting point of limitation in claims to enforce a personal claim arising from registered mortgage deeds, is the date fixed if any for the payment of the mortgage amount,¹ or, where no date is fixed for payment, the date of the mortgage deed,² and not the date of its registration.³ Where there is a stipulation in the mortgage deed that the mortgage money is payable at the end of a stipulated period, but there is a further stipulation that interest should be paid each year and in default of such payment of interest the entire mortgage money is payable, limitation starts only at the end of the stipulated period and not from the date of default in payment of interest.⁴ The

16 (1930) A I R 1930 All 69 (71, 72) 52 All 363 123 Ind Cas 321 (F B), *Radha Krishna v Tej Sarup*

17 (1937) A I R 1937 Rang 454 (457, 459) 172 Ind Cas 75 1938 R L R 35 (F B) *U San v U San*

Note 20

1 (1921) A I R 1921 Bom 437 (438, 439) 45 Bom 1206 63 Ind Cas 234, *Pithoba Mahipati v Balkrishna Sakharam* (Limitation can be extended under S 20 (2) of the Act—Mortgagee enjoying usufruct in lieu of interest)

(1933) A I R 1933 Lah 329 (330) 141 Ind Cas 733, *Ishar Das v Maya Mal*

(1930) A I R 1930 Lah 933 (921, 936) 129 Ind Cas 201, *Sahib Singh v Gurdial Singh*

(1919) A I R 1919 All 226 (227) 41 All 531 50 Ind Cas 640 *Makrand Singh v Kallu Singh*

(1920) A I R 1920 All 124 (124) 58 Ind Cas 278, *Shyam Lal v Lakhmi Chand*

(1896) 18 All 371 (372) 1896 All W N 107, *Sheo Charan v Lalji Mal*

(1926) A I R 1926 Oudh 336 (336) 95 Ind Cas 456, *Mt Amina Bibi v Kalka Singh*

(1920) A I R 1920 Bom 48 (49) 44 Bom 500 57 Ind Cas 76 *Krishnaji Sakharam v Kashim Mohaddis*

(1929) A I R 1929 All 775 (777) 52 All 71 122 Ind Cas 673, *Ramsaran Das v Bhagwan Singh*

(1929) A I R 1929 All 139 (141) 51 All 473 116 Ind Cas 488, *Kishensahas v Raghunath Singh*

2 (1883) 1893 All W N 185 (185), *Pate Ram v Baldeo*

(1898) 20 All 512 (516) 1898 All W N 133, *Chattarmal v Thakuri*

(1932) A I R 1932 Lah 592 (595) 140 Ind Cas 357, *Karari Singh v Mt Maya Wanti*

(1926) A I R 1926 Oudh 119 (190) 90 Ind Cas 340, *Sulhdeo Singh v Kashi Singh*

3 (1916) A I R 1916 All 187 (139) 33 Ind Cas 111, *Mohan Lal v Lekhraj Singh*

4 (1934) A I R 1934 All 397 (401, 404) 56 All 954 143 Ind Cas 951 (F B), *Md Hussain v Sanwal Das*

(1936) A I R 1936 Sind 14 (15) 161 Ind Cas 518 29 Sind L R 361, *Nenu-mal Jamal v Chandumal Assanmal*

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contrary view taken in the undermentioned cases⁵ cannot be accepted as correct in view of the decision of the Judicial Committee in *Lhasa Din v Mt Gulab Kunwar*^{5a} wherein their Lordships have definitely laid down that

A proviso of this nature is inserted in a mortgage deed exclusively for the benefit of the mortgagees and that it purports to give them an option either to enforce the security at once or if the security is ample to stand by the investment for the full term of the mortgage

In the undermentioned cases⁶ it was held that in a suit under Section 68 of the Transfer of Property Act claiming a personal decree limitation starts from the date on which the mortgagee is deprived of the mortgage security

In an application for personal decree under Order 34 Rule 6 of the Code of Civil Procedure it is the date of the mortgage suit and not the date of the application under that Rule that has to be looked into for the purpose of computing the six years period. In other words it is enough if the mortgage suit has been filed within six years from the date when the cause of action arose for the personal remedy⁷

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- 5 (1923) A I R 1923 All 1 (7) 45 All 27 69 Ind Cas 981 *Shib Dayal v Uaherban*
 (1930) A I R 1930 Lah 993 (994 996) 129 Ind Cas 201 *Sahib Singh v Gurdal Singh*
 (1929) A I R 1929 Snd 140 (144) 116 Ind Cas 581 *Neromal Jamal v Chandumal Assanai*
 5a (1932) A I R 1932 P O 207 (211) 138 Ind Cas 779 7 Luck 442 59 Ind App 376 (P O)
 6 (1905) A I R 1925 Rang 223 (293) 3 Rang 60 89 Ind Cas 56 *Maung Ian Kwin v Maung Po Ka*
 (1934) A I R 1934 Rang 227 (228) 151 Ind Cas 426 *P S A Alagan v Maung Po Peik* (Mortgage property sold for arrears of revenue—Held date of sale starting point)
 (1934) A I R 1934 Oudh 415 (416) 151 Ind Cas 448 *Shanbu Dal v Shyam Narain* (Cause of action arises when security is diminished and not from knowledge of it to mortgagee)
 (1931) A I R 1931 Oudh 5 (6) 129 Ind Cas 168 6 Luck 374 *Lalla Sngl v Mahtir Upadhyay* (Held the mortgagee was deprived of the mortgage even at the date of mortgage and therefore limitation starts from date of mortgage)
 7 (1908) 30 All 389 (399) 1908 All W N 161 5 All L Jour 670 *Jangl Singh v Chander Mal*
 (1906) 3 All L Jour 463 (464) 1906 All W N 193 *Dasant Lal v Gopal Parshad*
 (1899) 1899 All W N 2 (2) *Badrinan v Raja Ram*
 (1907) 31 Cal 62 (675) 6 Cal L Jour 119 11 Cal W N 674 *Rahmat Karim v Abd Karim*
 (1916) A I R 1916 Mad 13 (14) 27 Ind Cas 770 *Arasalar Peria Tirutadi Nagar v Muttammal Janaki*
 (1893) 6 Mad L Jour 291 (296) *Malaperumal v Nachappa*
 (1909) A I R 1909 Oudh 59 (60) 4 Luck 937 114 Ind Cas 69 *Abd Karim v Mui Chant*
 (1905) A I R 1925 Oudh 462 (464) 89 Ind Cas 810 *Bibi Batul v Kadir Bakh* (The plea of limitation can however be taken by the defendant in an application under Order 34 Rule 6 Civil C)
 (1903) 6 Oudh Cas 50 (73) *Disheshwar Dayal v Mt Hammat Ibrahim Khan*

The High Court of Lahore in the undermentioned cases⁸ has held that in a suit on a mortgage filed after the expiry of six years from the date fixed for payment of the principal sum but before the expiry of twelve years, a personal decree can be passed under O 34 R 6 of the Code of Civil Procedure with regard to the interest that had accrued six years before suit although the claim for personal relief with regard to the principal had become barred.

When the mortgage is found not binding as such on the sons of the mortgagor, but the document contains an *indemnity clause*, it has been held that a suit will lie, after the death of the mortgagor, against his sons for a personal decree against the assets of the mortgagor in their hands and that time for such a suit will run from the date when the plea of the sons as to the mortgage not being binding on them was upheld by the Court.⁹ In the absence of any such special covenant, the ordinary rule is that limitation starts from the date fixed for payment in the mortgage deed and not from the date when at the instance of the sons the mortgage is held to be not binding or unenforceable.¹⁰

21. Claim for personal relief in mortgage deeds not validly registered. — Where a fictitious item of property or an item of property not belonging to the mortgagor is included in a mortgage document for the purpose of giving jurisdiction to the Sub Registrar to register the document, the registration of the document is invalid as it amounts to a fraud upon the registration law and the document cannot be enforced as a mortgage. But in such a case, can the personal remedy arising by virtue of the covenant to pay contained in the deed be enforced as amounting to 'a breach of contract in writing registered within the period prescribed by this Article? Upon this

- 8 (1928) A I R 1928 Lah 653 (654) 111 Ind Cas 608, *Raha Ram v Hira Lal*
(1930) A I R 1930 Lah 737 (737) 126 Ind Cas 433, *Munshi Ram v Puran Chand*

[See however (1935) A I R 1935 Lah 516 (517) 158 Ind Cas 844 *Attar Singh v Dalip Singh*]

- 9 (1927) 106 Ind Cas 816 (816) (Lah), *Behar Lal v Hari Singh*

[See also (1932) A I R 1932 All 358 (360) 136 Ind Cas 829 *Ziauddin Ahmad Khan v Akbar Ali* (Mortgage deeds became infructuous owing to objection by third party in execution proceedings which objection was upheld in a later suit — Held whether limitation started from date of third party's objection or the decree in his favour, suit was within time)]

- 10 (1921) A I R 1921 Oudh 47 (48) 61 Ind Cas 205, *Gajadhar Bakhsh v Gauri Shankar* (Held a mortgage by the manager of joint Hindu family, unless made for necessity or antecedent debt, is absolutely void)

- (1922) A I R 1922 Oudh 257 (258) 25 Oudh Cas 164 69 Ind Cas 786 *Ram Narain v Nand Kumar*

- (1924) A I R 1924 Oudh 147 (148) 77 Ind Cas 340, *Udayraj Singh v Ram Udit Tewari*

[See also (1881) 3 All 346 (342), *Banshi Dhar v Har Sahas*]

⁸ See also (1908) 1 I R 1095 O 35 310 (1911) 30 I R 200 (1911) 30 I R 200

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point there is a conflict of opinion. The High Court of Madras¹ and the Chief Court of Oudh² have held that the claim for personal relief is governed by this Article, while the High Court of Calcutta³ and the Judicial Commissioner's Court of Nagpur⁴ have taken a contrary view. The reasoning advanced for the former view is that in so far as the document evidences a covenant to pay, there is no fraud upon the Registration law, as a document embodying a simple covenant to pay can be registered before any Sub Registrar. Devadoss, J., in the aforementioned Madras case observed also that portion of the document in which there was a transfer of specific immovable property as security was severable from the other portion of the document in which the mortgagor undertakes to repay personally, and that the latter portion was not affected by the invalidity in registration with regard to the former. The reasoning for the latter view is that if once it is held that the mortgage is not validly registered, it ceases to be a registered document for all purposes. The former view appears to derive some support from the decision of the Privy Council in *Mathura Prasad v Chandra Narayan Chowdhury*,⁵ where in dismissing a suit upon a mortgage on the ground that it was not validly registered, their Lordships gave an opportunity to the plaintiff to apply for personal relief before the High Court, subject however to the claim being entertainable at that stage and subject to any plea of limitation being raised by the other side.

22. Other suits based on covenants contained in registered mortgage deeds.

1 Where a mortgage has been executed to secure a loan in kind, there is a difference of opinion as to whether a suit to enforce the same is governed by this Article or Article 120 or Article 132. It was held in the undermentioned cases¹ that Article 132 did not apply but that Article 120 or this Article might apply. A contrary view,

Note 21

- 1 (1923) A I R 1923 Mad 447 (449 451) 46 Mad 435 73 Ind Cas 183, *Rama Rao v Ve Jayya*
 2 (1927) A I R 1927 Oudh 211 (215) 102 Ind Cas 326, *Ram Hrit Singh v Dunia Singh*
 [See h v e r]

- 3 (1937) A I R 1937 Cal 347 (350 352) 171 Ind Cas 965 *Sulendra Nath Singh v Keshab Chandra*
 [But see (1902) 29 Cal 654 (663) 6 Cal W N 856, *Jogjee Mohun Chatterjee v Bhoop Nath Ghosh*]

- 4 (1928) A I R 1928 Nag 1 (2) 23 Nag L R 143 107 Ind Cas 517, *Vankatesh v Annasa Lad*

- 5 (1921) A I R 1921 P C S (10) 48 Cal 503 49 Ind App 127 63 Ind Cas 770 (1 C)

Note 22

- 1 (1918) A I R 1918 Cal 913 (913) 41 Ind Cas 518, *Kandarpa Naran Man Lal v Sri Har Roy*
 (1917) A I R 1917 Cal 519 (520) 37 Ind Cas 805 *Rashbihari v Kunjabihari*

namely that Article 132 will apply in such cases was held in the cases noted below²

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2 A suit by the usufructuary mortgagee claiming a simple money decree on the basis of the covenant in the mortgage deed that the mortgage money is recoverable in case of default on the part of the mortgagor in delivering possession of the mortgaged properties,³ or on the ground that he was subsequently dispossessed by a third person by virtue of a superior title vested by the latter,⁴ is governed by this Article

3 A suit by the usufructuary mortgagee claiming *mesne profits* for the period he was kept out of possession of the mortgaged properties is governed by this Article. The claim for *mesne profits* is, in substance, one for compensation for a breach of a contract in writing registered⁵

4 A suit by the mortgagor against the usufructuary mortgagee for recovery of the mortgage amount on the ground that the same was not paid to him is governed by this Article. The withholding of the mortgage money by the mortgagee amounts to a breach of a contract that the mortgagee would pay the money to the mortgagor as a loan advanced on security of immovable property⁶

2 (1909) 2 Ind Cas 111 (112) (Cal) *Nilmoney Sinha v Hardhan Das*
(1910) A I R 1910 Cal 476 (477) 50 Ind Cas 608 *Sridhar Chandra v Ram Gobinda* (Walmsley, J dissenting)

3 (1909) 80 All 400 (402) 1909 All W N 160 5 All L Jour 436 *Collector of Mirzapur v Dewan Singh*

(1907) 4 All L Jour 249 (252) 1907 All W N 108 *Madan Lal v Beoti Singh*

(1882) 4 All 281 (283) 1882 All W N 33 *Sheo Narain v Jas Gobind*

(1898) 21 Mad 242 (243) 8 Mad L Jour 81, *Unschaman v Ahmed Kutta Raja*

(1916) A I R 1916 Lah 312 (312) 86 Ind Cas 262, *Bishen Singh v Dadna* (Mortgage with possession — Property found to be already mortgaged with possession—Suit for refund of money advanced by mortgagee—Suit held to be governed by Article 116)

[See however (1910) 6 Ind Cas 1013 (1015) 13 Oudh Cas 148 *Udit Narain v Sahib Ali* (Suit for refund of money advanced on a fraudulent mortgage of *sir* lands—Held Articles 95 and 97 applied)

(1921) A I R 1921 Pat 403 (405) 63 Ind Cas 297, *Jainandan Prashad v Baijnath Saran* (Held Article 132 applied)]

4 (1916) A I R 1916 Pat 350 (351) 35 Ind Cas 43, *Raja Ram Lal v Hanuman Upadhyaya* (Limitation starts from date of dispossession)

[See however (1910) 6 Ind Cas 1016 (1017) 13 Oudh Cas 155 *Ram Pal Jhan v Mahadeo Prasad* (Held Article 97 applies)]

(1920) A I R 1920 Bom 48 (49) 44 Bom 500 57 Ind Cas 76 *Krishnaji Sakharani v Kasim Mohiddinsahab* (Mortgage of *vatan* lands—Death of mortgagor—Starting point is the date of mortgagor's death and not date of dispossession by his sons)]

5 (1915) A I R 1915 All 393 (393) 31 Ind Cas 804, *Nirbhay Sinha v Tulsi Ram*

6 (1891) 18 All 200 (204) 1891 All W N 5, *Naubat Singh v Indar Singh*

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5 It was held in the undermentioned case⁷ that a suit by a mortgagor against a usufructuary mortgagee for compensation, on the ground that the latter who was bound under the mortgage deed to pay the Government revenue committed default and that, as a consequence, a portion of the mortgaged properties was sold for the arrears of revenue, would be governed by this Article. It was held further that time for such a suit would run from the date of the redemption suit filed by the mortgagor and not from the date of the sale for arrears of revenue. The reason given was that the mortgagee was under an obligation under Section 92 of the Transfer of Property Act on being paid the debt due to him to put the mortgagor back in possession of all the mortgaged property, and that such obligation was a *continuing obligation* which cannot be said to cease so long as the mortgagor's right to redeem was not lost. It was further pointed out that the obligation of the mortgagee to pay the Government revenue, though expressly embodied in the mortgage deed, was merely a statement of the statutory liability under Section 76 of the Transfer of Property Act and did not in any way curtail the general obligation of the mortgagee under Section 92 of that Act which must be taken as an implied term of the contract.

6 A suit by the mortgagor for compensation against the mortgagee who has undertaken, in the mortgage deed, to pay the sum due to a prior mortgagee and has failed to do so would fall under this Article. Limitation will start from the date on which the mortgagor is himself obliged to pay the prior mortgage i.e. the date on which he is actually damaged.⁸

23 Personal decree in suit to enforce vendor's lien for unpaid purchase money — The High Court of Patna has, in a recent decision,¹ held that, in a suit by the vendor to recover the balance of the unpaid purchase money in enforcement of the vendor's lien, a claim for a personal decree after enforcing the charge is governed by Article 111 and not by this Article. The reason advanced for such a view is that the obligation of the vendee to pay the purchase money is a statutory obligation and cannot be considered to

7 (1909) 3 Ind Cas 433 (434) 33 Mad 71 *Sivachindambara Mudeley v Kamakshi Ammal*

8 (1921) A I R 1921 All 133 (134) 60 Ind Cas 829 *Ishri Prasad v Muhammad Sami*

(1913) 19 Ind Cas 676 (677) (All) *Hakim Ali Khan v Dalip Singh*

(1919) A I R 1919 Oudh 36 (37) 54 Ind Cas 313 *Angad Singh v Kashi Prasad*

[See also (1920) 63 Ind Cas 87 (69) (All) *Saraju Misra v Ghulam Husain*

(1918) A I R 1918 Oudh 432 (434) 47 Ind Cas 161 *Prag v Mohan Lal*]

NOTE 23

1 (1937) A I R 1937 Pat 44 (47) 15 Pat 753 166 Ind Cas 599 *Ramparkha Pandey v Mt Ramjhar Kuer*

be a term of the contract between the parties as evidenced by the registered sale deed. The High Courts of Nagpur² and Rangoon³ have, however, taken a contrary view and held that the claim for a personal decree in such a case is governed by this Article. The latter view proceeds on the ground that the obligation to pay the purchase money is an implied term of the contract of sale. It is submitted that the latter view is correct on principle and is in accordance with the decision of the Judicial Committee in *Ram Raghubir v United Refineries (Burma) Ltd*,⁴ where, dealing with the question of personal liability for the anticipated deficiency in a suit to enforce the vendor's lien, their Lordships observed as follows:

"The learned Judges held that the liability of appellant 3 arose, in virtue of the conveyance, upon a contract in writing registered within the meaning of Article 116, Limitation Act, and that the six years' period allowed by that Article applied, with the result that the suit was well within time. Their Lordships think that, having regard to the judgment of this Board in *Tricomdas Cooverji Bhoja v Gopinath Jiu Thalur*,⁵ this view was manifestly correct."

In that case⁶ the question was raised as to whether Article 111 will apply to a case where no time is fixed for completing the sale and the purchase money is not payable until some date after conveyance of the property, but was left undecided.

24. Other suits falling under this Article. — The following suits have also been held to be governed by this Article:

- 1 A suit for recovery of arrears of allowance payable annually under a registered *ekrarnama*.¹
- 2 A suit for refund of money paid under a registered deed of redemption for committing default of a clause in the deed whereby the executant undertook to put the opposite party in possession of the properties.²
- 3 A suit by A against B for recovery of money was compromised during the pendency of the second appeal in the suit, B undertaking to pay A Rupees 240 in satisfaction of his claim, and A promising to withdraw the second appeal. In pursuance of the compromise, B also executed a registered hypothecation bond for the sum he had undertaken to pay, and the deed recited

2 (1937) A I R 1937 Nag 246 (247) I L R 1933 Nag 45 172 Ind Cas 680, *Shankar Rao v Bhujang Rao*

3 (1931) A I R 1931 Rang 139 (145) 9 Rang 56 134 Ind Cas 737 *Ram Raghubir Lal v United Refineries (Burma) Ltd*

4 (1933) A I R 1933 P C 143 (145) 60 Ind App 183 11 Rang 186 142 Ind Cas 788 (P C)

5 (1916) A I R 1916 P C 182 39 I C 156 41 I A 6 41 Cal 759 (P C)

NOTE 24

1 (1896) 23 Cal 645 (663) *Girijanand Datta Jha v Sasijanand Datta Jha*

2 (1931) A I R 1931 Lah 448 (450) 13 Lah 1 135 Ind Cas 63, *Chanan Mal v Maharaj*

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22—23

5 It was held in the undermentioned case⁷ that a suit by a mortgagor against a usufructuary mortgagee for compensation, on the ground that the latter who was bound under the mortgage deed to pay the Government revenue committed default and that, as a consequence, a portion of the mortgaged properties was sold for the arrears of revenue, would be governed by this Article. It was held further that time for such a suit would run from the date of the redemption suit filed by the mortgagor and not from the date of the sale for arrears of revenue. The reason given was that the mortgagee was under an obligation under Section 92 of the Transfer of Property Act on being paid the debt due to him to put the mortgagor back in possession of all the mortgaged property, and that such obligation was a *continuing obligation* which cannot be said to cease so long as the mortgagor's right to redeem was not lost. It was further pointed out that the obligation of the mortgagee to pay the Government revenue, though expressly embodied in the mortgage deed, was merely a statement of the statutory liability under Section 76 of the Transfer of Property Act and did not in any way curtail the general obligation of the mortgagee under Section 92 of that Act which must be taken as an implied term of the contract.

6 A suit by the mortgagor for compensation against the mortgagee who has undertaken, in the mortgage deed, to pay the sum due to a prior mortgagee and has failed to do so would fall under this Article. Limitation will start from the date on which the mortgagor is himself obliged to pay the prior mortgage, i.e. the date on which he is actually damaged.⁸

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7 (1909) 3 Ind Cas 433 (434) 33 Mad 71, *Sivachindambara Mudeley v Kamakshi Ammal*

8 (1921) A I R 1921 All 133 (134) 60 Ind Cas 829 *Ishri Prasad v Muham mad Sami*

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"The learned Judges held that the liability of appellant 3 arose, in virtue of the conveyance, upon a contract in writing registered within the meaning of Article 116, Limitation Act, and that the six years' period allowed by that Article applied, with the result that the suit was well within time. Their Lordships think that, having regard to the judgment of this Board in *Triscomdas Coorerys Bhoja v Gopinath Jiu Thakur*,⁵ this view was manifestly correct."

In that case⁶ the question was raised as to whether Article 111 will apply to a case where no time is fixed for completing the sale and the purchase money is not payable until some date after conveyance of the property, but was left undecided.

24. Other suits falling under this Article. — The following suits have also been held to be governed by this Article:

- 1 A suit for recovery of arrears of allowance payable annually under a registered *ekranama*.¹
- 2 A suit for refund of money paid under a registered deed of redemption for committing default of a clause in the deed whereby the executant undertook to put the opposite party in possession of the properties.²
- 3 A suit by A against B for recovery of money was compromised during the pendency of the second appeal in the suit B under taking to pay A Rupees 240 in satisfaction of his claim, and A promising to withdraw the second appeal. In pursuance of the compromise, B also executed a registered hypothecation bond for the sum he had undertaken to pay, and the deed recited

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- 2 (1927) A I R 1937 Nag 246 (247) 1 L R 1933 Nag 45 172 Ind Cas 680, *Shankar Rao v Dhujang Rao*
 - 3 (1931) A I R 1931 Rang 139 (145) 9 Rang 56 134 Ind Cas 797, *Ram Raghunath Lal v United Refineries (Burma) Ltd*
 - 4 (1933) A I R 1923 P C 143 (145) 60 Ind App 153 11 Rang 156 142 Ind Cas 789 (P C)
 - 5 (1916) A I R 1916 P C 152 89 I C 156 41 L A 6 41 Cal 759 (P C)

Note 24

- 1 (1927) 23 Cal 645 (663) *Girijanand Datta Jha v Sujanand Datta Jha*.
- 2 (1921) A I R 1931 Lah 419 (450) 13 Lah 1 125 Ind Cas 63, *Charan Mal v Maharaj*

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A's undertaking to withdraw the second appeal *A*, however, fraudulently proceeded with the appeal, obtained a decree, and recovered the decree amount from *B* through process of Court *B* then sued *A* to recover the amount thus fraudulently collected from him contrary to the covenant contained in the registered deed, and the suit was held to be governed by this Article³

- 4 A suit to recover Government rent and *under-proprietary rent* payable by the transferee under a registered maintenance deed to the transferor⁴

25. Claim for interest by way of damages. — In *Mathura Das v Raja Narindar Bahadur*,¹ their Lordships of the Judicial Committee observed as follows

"Supposing the construction put by the Courts below on the deed (mortgage deed) to be correct, the appellants still ask why they should not recover six years' arrears of interest by way of damages. It is very difficult to see why. The principal debt was not time barred and it was not paid. Every day that it remained unpaid there was a breach of contract and the bar of time applies only to breaches occurring six years before suit."

Following this principle it has been held that the Court can award interest *by way of compensation* for six years after the expiry of the term fixed for payment in a mortgage deed where the deed contains no stipulation for payment of *post diem* interest². Thus, in a deed of conditional sale where there was no stipulation for payment of interest after the due date fixed for the payment of the principal money with interest, *post diem* interest by way of compensation was awarded applying this Article to such a claim³.

3 (1902) 25 Mad 50 (54) *Khotappa v Vallur Zemindar*

4 (1929) A I R 1929 Oudh 311 (312) 5 Luck 166 118 Ind Cas 417, *Narsingh Partab Bahadur Singh v Mamman Jan*

Note 25

1 (1897) 19 All 39 (47) 23 Ind App 133 1 Cal W N 52 6 Mad L Jour 214 7 Sar 88 (P C)

2 (1916) A I R 1916 Lah 285 (287) 1916 Pun Re No 24 34 Ind Cas 916 *Muhammad Ismail v Gauri Prasad*

(1922) A I R 1922 Lah 254 (257) 3 Lah 200 66 Ind Cas 771 (F B) *Molan Mal v Muhammad Baksh*

(1919) A I R 1919 Lah 279 (280) 52 Ind Cas 320 *Ghumandi v Kanhaya*

*Ismail
Iyulu Reddy
Amanias Aiyar v*

Panchnada Odayar

(1897) 24 Cal 699 (703 704) 1 Cal W N 437 (F B) *Moti Singh v Ramohari*

(1894) 21 Cal 274 (278) *Bikramjit v Durga Dyal*

(1892) 19 Cal 23n *Golam Abbas v Mahamad Jaffer*

(1904) 7 Oudh Cas 11 (13) *Ram Parshad v Umrao*

(1895) 17 All 581 (587) 1895 All W N 128 (F B) *Narindra Bahadur Pal v Bhagwati Prasad*

3 (1892) 19 Cal 19 (25), *Gudri Koer v Bhubaneswari Coomar Singh*

117.* Upon a foreign judgment as defined in the Code of Civil Procedure, 1908.	Six years.	The date of the judgment.	Article 117
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Synopsis

1. Legislative changes.
2. Suit on foreign judgment.
3. "Foreign judgment."
4. Starting point.

1. **Legislative changes.** — Article 116 of the Act of 1871 corresponding to this Article referred to suits upon a "judgment obtained in a foreign country "

The words "judgment obtained in a foreign country " have now been substituted by the words "foreign judgment as defined in the Code of Civil Procedure, 1908 "

2. **Suit on foreign judgment.** — A State is not bound, under the Law of Nations, to enforce within its territories the judgment of a foreign tribunal¹ But in England and in countries where the English system of jurisprudence prevails, such a judgment is enforced on the principle that it creates a *legal obligation* on the part of the parties to do that which has been adjudged to, to be done² In other words, a foreign judgment creates an obligation belonging to the class of *implied contracts* "that every man hath engaged to perform what his duty or justice requires "³ This obligation gives rise to a *new cause of action* on which a suit may be founded⁴ Such suits are called suits "on foreign judgments " and are governed by this Article for purposes of limitation

* Act of 1877, Article 117

Same as above

Act of 1871

PART VII — SIX YEARS

116 — Upon a judgment obtained in a foreign country	Six years	The date of the judgment
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Act of 1859

No corresponding provision

Article 117 — Note 2

1 (1881) 40 L J Q B 62 (64) L R 6 Q B 132 24 L T 89 19 W R (Eng) 348 *Godard v Gray*

2 (1845) 13 M & W 623 (673) 2 D & L 680 14 L J Ex 145 67 R R 767, *Williams v Jones* (Cited in 20 Mad 112 (114))

3 (1842) 152 E R 343 (347) 11 L J Ex 303 1 Dowl (N S) 929 60 R R 901 9 M & W 810, *Pussell v Smyth* (Cited in 2 Mad 400 (403))

(1882) 6 Bom 292 (294) 6 Ind Jur 424, *Bhauanishankar v Pursadr Kalidas*

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4 (1933) A I R 1933 Mad 511 (512) 144 Ind Cas 853 56 Mad 951, *Bajjnath Karnani v Vallabhdas Damani*

Article 117
Note 3

3. "Foreign judgment." — The Article applies to suits on "foreign judgments" as defined in the Code of Civil Procedure, 1908 Under Section 2 sub section 6 of that Code, a "foreign judgment" means the judgment of a "foreign Court" and under sub section 5 "foreign Court" means "a Court situate beyond the limits of British India which has no authority in British India and is not established or continued by the Governor General in Council" Three conditions must therefore be satisfied in order to bring a Court within the definition of a "foreign Court"

- 1 it must be *situate outside British India*,¹
- 2 it must have *no authority in British India*, and
- 3 it must *not have been established or continued* by the Governor-General in Council²

It follows that the Privy Council is not a "foreign Court" as it *has authority in British India*³ The Courts in British Cantonments and Residency Bazzars are not foreign Courts⁴ as they are *established or continued* by the Governor General in Council But Courts in England and Scotland other than the Privy Council,⁵ the Supreme Court of Mauritius,⁶ the Courts of Native States⁷ as well as Courts in Ceylon⁸ are all foreign Courts, and their judgments "foreign judgments"

Note 3

- 1 See Section 1, *ante*
- 2 See Sections 43 and 45 of the Civil Procedure Code as to Courts situate beyond British India and established by the Governor General
- 3 (1884) 8 Bom 571 (574), *Arthur Bowles v Mary J. Bowles*
- 4 See Sections 43 and 45 of the Civil Procedure Code
- 5 (1884) 8 Bom 571 (574), *Arthur Bowles v Mary J. Bowles*
(1871) 8 Bom H O R O C 200 (208) *The London, Bombay and Mediterranean Bank Ltd v Hormazji Pestonjee Framji* (Court of Chancery)
(See also (1904) 31 Cal 274 (281) 8 Cal W N 207, *Deep Narain v Dietert*
(1901) 28 Cal 641 (645) 5 Cal W N 741, *Moazzam Hossein Khan v Raphael Robinson*)
- 6 (1902) 29 Cal 509 (516) 6 Cal W N 629 *Kassim Mamjee v Isuf Mahomed Sulliman*
- 7 (1894) 27 Cal 222 (237) 21 Ind App 171 4 Mad L Jour 267 6 Str 503
1894 Pun Re No 112 L R (1894) A C 670 4 R & J 267 (P O), *Gurdayal Singh v Raja of Faridkot*
(1888) 1888 Pun Re No 191 *Rajah of Faridkot v Bir Singh*
(1884) 7 Mad 164 (166) *Sama Rayar v Annamalai Chetty*
(1915) A I R 1915 Mad 486 (488) 26 Ind Cas 287 39 Mad 24 (F B) *Veera raghava Iyer v Yuga Sait*
(1913) 20 Ind Cas 704 (712) (Mad), *Viraraghava Iyer v Muga Sait*
(1933) A I R 1933 P C 134 (135) 142 Ind Cas 552 60 Ind App 167 56 Mad 405 (P O) *Anantapadmanabhaswamy v Official Receiver of Secunderabad* (Secunderabad District Court is Foreign Court)
(1877) 1877 Pun Re No 36 (F B) *Sujan Singh v Hardyal Singh*
(1882) 6 Bom 292 (294) 6 Ind Jur 424, *Bhavanishankar v Pursadri Kalidas*
- 8 (1909) 3 Ind Cas 190 (191) 32 Mad 469 *Sheik Atham v Daoud*
(1897) 20 Mad 112 (114) 7 Mad L Jour 76, *Nalla Karuppa Chettiar v Uthamed Ibrahim Sahib*

The word "judgment" as used in the expression "foreign judgment" in the Civil Procedure Code, has the meaning given to it by the English law and not the meaning given to it by Section 2 clause 9 of the Civil Procedure Code. In other words, the term "judgment" as used in the expression "foreign judgment" means the *decree or order* of a foreign Court and not the *statement of reasons* given by the Judge as the grounds of his decision.¹

An order of a foreign Court which is not a "judgment" cannot be a "foreign judgment".¹⁰ Thus, an order under Section 12 of the Arbitration Act enforcing an award in England is not a "judgment" and cannot be regarded as a "foreign judgment".¹¹ Similarly, a call order by a Liquidation Court in a foreign State authorising the institution of suits for recovery of sums from persons living outside the jurisdiction of the Court is not a final decision and is not a "foreign judgment".^{11a} An Act of State passed by a foreign State in its sovereign capacity is not a "foreign judgment".¹²

4. **Starting point.**—It has been seen in Note 3 that a valid foreign judgment in favour of a party gives him a new cause of action arising from the implied obligation of the other party to perform the duty adjudged by the judgment.

A foreign judgment is not to be treated as invalid in a British Indian Court by reason of the fact that the suit was brought on a claim which was barred under the Indian Limitation Act, but not barred under the foreign law. The reason is, as has been seen in Note 1 to S 11 *ante*, that in matters of procedure (and limitation is a matter of procedure) it is the *lex fori* that is to be considered.¹

As a suit on a foreign judgment is based on the new cause of action furnished by the judgment, the *date* of the judgment has

9 (1932) A I R 1932 Mad 661 (662) 138 Ind Cas 648, *Bajjnath Karnani v Vallabhadas Damani* (Reversed on another point in A I R 1933 Mad 511 (512))

(1933) A I R 1933 Mad 511 (512) 144 Ind Cas 553 56 Mad 571 *Bajjnath Karnani v Vallabhadas Damani* (A I R 1932 Mad 661 (662), Approved)

10 (1877) 1877 Pun Re No 86 (F B) *Sujan Singh v Hardayal Singh*

11 (1904) 31 Cal 274 (282) 8 Cal W N 207 *Deep Narain Singh v Dieterl*

11a (1935) A I R 1935 Lah 975 (976) 160 Ind Cas 346 *Modern Chemical Works Ltd Baroda v Uanmohan Nath* (8 Bom H C R 200 Not followed)

12 (1893) 17 Bom G O n (624) *Shriman Goswami v Shri Girdhar Lalji*

Note 4

1 See the cases cited in Foot Notes 7 and 8 of Note 1 to Section 11 *ante*

[See also (1924) A I R 1924 All 161 (161 162) 46 All 119 79 Ind Cas 332, *Ganga Prasad v Ganeshlal*

(1909) 2 Sind L R 51 (52) *Henry Seymore King v M B Braganza*

(1916) A I R 1916 Bom 200 (201) 36 Ind Cas 369 40 Bom 501 *Nabibhai Vazirbhai v Dayabhai Amulakh* (Law of limitation is 'lex fori'—Application for execution of foreign decree must be made within time prescribed by British Indian laws)

(1880) 2 Mad 337 (338) 5 Ind Jnr 193, *Kandasami Pillai v Mordin Sahib*]

Article 117
Note 3

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[See also (1904) 81 Cal 274 (281) 8 Cal W N 207, *Deep Narain v Dietert*

(1901) 28 Cal 641 (645) 5 Cal W N 741, *Moazzam Hossein Khan v Raphael Robinson*]

6 (1902) 29 Cal 509 (516) 6 Cal W N 829 *Kassim Mamjee v Isuf Mahomed Sulliman*

7 (1894) 22 Cal 222 (237) 21 Ind App 171 4 Mad L Jour 267 6 Sar 503 1894 Pun Re No 112 L R (1894) A C 670 4 R & J 267 (P C), *Gurdayal Singh v Raja of Faridkot*

(1888) 1888 Pun Re No 191, *Rajah of Faridkot v Bir Singh*

(1884) 7 Mad 164 (166) *Sama Rayar v Annamalai Chetty*

(1915) A I R 1915 Mad 486 (488) 26 Ind Cas 287 39 Mad 24 (F B) *Veera raghava Iyer v Muga Sait*

(1913) 20 Ind Cas 704 (712) (Mad), *Vararaghava Iyer v Muga Sait*

(1933) A I R 1933 P C 134 (135) 142 Ind Cas 552 60 Ind App 167 56 Mad 405 (P C) *Anantapadmanabhaswamy v Official Receiver of*

alidas

8 (1909) 3 Ind Cas 190 (191) 32 Mad 469, *Sheik Atham v Daoud*

(1897) 20 Mad 112 (114) 7 Mad L Jour 76, *Nalla Karuppa Chettiar v Unahmed Ibrahim Sahib*

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4. Starting point.—It has been seen in Note 2 that a valid foreign judgment in favour of a party gives him a new cause of action arising from the implied obligation of the other party to perform the duty adjudged by the judgment.

A foreign judgment is not to be treated as invalid in a British Indian Court by reason of the fact that the suit was brought on a claim which was barred under the Indian Limitation Act, but not barred under the foreign law. The reason is, as has been seen in Note 1 to S 11 *ante*, that in matters of procedure (and limitation is a matter of procedure) it is the *lex fori* that is to be considered.¹

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9 (1932) A I R 1932 Mad 661 (662) 138 Ind Cas 648 *Bairnath Karnani v Vallabhadas Damani* (Reversed on another point in A I R 1933 Mad 511 (512)).

(1933) A I R 1933 Mad 511 (512) 144 Ind Cas 853 56 Mad 571 *Bairnath Karnani v Vallabhadas Damani* (A I R 1932 Mad 661 (662), Approved).

10 (1877) 1877 Pun Re No 36 (F B) *Sujan Singh v Hardayal Singh*.

11 (1904) 31 Cal 274 (282) 8 Cal W N 207 *Deep Narain Singh v Dieterl*.

11a (1935) A I R 1935 Lah 975 (976) 160 Ind Cas 346 *Modern Chemical Works Ltd Baroda v Manmohan Nath* (8 Bom H O R 200 Not followed).

12 (1893) 17 Bom 620n (624) *Shriman Goswami v Shri Girdhar Lalji*.

Note 4

1 See the cases cited in Foot Notes 7 and 8 of Note 1 to Section 11 *ante*.

[See also (1924) A I R 1924 All 161 (161 162) 46 All 119 79 Ind Cas 332 *Ganga Prasad v Ganeshlal*.

(1880) 2 Mad 337 (338) 5 Ind Jur 193, *Kandasami Pillai v Moidin Sahib*].

Article 117
Note 4

appropriately been made the starting point of limitation under this Article²

Where the judgment of the foreign Court is appealed against and the appeal is dismissed, the judgment for the purpose of Article 117 is the judgment of the *Appellate Court* and not that of the Court of first instance³

Time spent in *executing* the decree in the foreign Court,⁴ or in prosecuting an application to set aside the decree where it has been passed *ex parte*,⁵ cannot be deducted in computing the period of limitation under this Article

Article 118

<p>118.* To obtain a declaration that an alleged adoption is invalid, or never, in fact, took place.</p>	<p>Six years.</p>	<p>When the alleged adoption becomes known to the plaintiff.</p>
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Synopsis

1. Legislative changes.
2. Scope and applicability of the Article.
3. "Adoption."
4. Starting point.
5. Registration of deed of adoption, if knowledge.
6. Minor plaintiff, if and when can be said to have knowledge.
7. Onus of proof.
8. Knowledge of the nearest reversioner.
9. Alienation subsequent to an adoption, if gives right to fresh cause of action.

*** Act of 1877, Article 118**

Same as above

Act of 1871, Article 129

<p>129 — To establish or set aside an adoption</p>	<p>Twelve years</p>	<p>The date of the adoption or (at the option of the plaintiff) the date of the death of the adoptive father</p>
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Act of 1859

See Note 1 Legislative changes Section 1 clause 16 was as follows —

<p>Limitation of six years applicable to all suits not especially provided for</p>	<p>To all suits for which no other limitation is hereby expressly provided — the period of six years from the time the cause of action arose</p>
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- 2 (1867) 8 Suth W R 32 (34) 2 Ind Jur (N S) 233, *Heeramonee Dossia v Pro mothonath Ghose*
 (1865) 4 Suth W R 108 (109), *Bolaram Gooy v Kameenee Dossce*
 3 (1933) A I R 1933 Mad 511 (512) 56 Mad 951 144 Ind Cas 853, *Baijanath Karnam v Vallabhadas Damani*
 4 (1867) 8 Suth W R 32 (33) 2 Ind Jur (N S) 233, *Heeramonee Dossia v Pro mothonath Ghose*
 5 (1927) A I R 1927 Lah 200 (209) 6 Lah 54 102 Ind Cas 523, *Hari Singh v Muhammad Said*

Other Topics

Article 118

Notes 1—2

Customary law — Adoption — Applicability of Article	See Note 3
Suit by reversioner is representative suit	See Note 8, Pt 1
Suit for possession	See Note 1 F-N (1), Note 2

1. Legislative changes.—Under *Act 14 of 1859*, there was no specific provision corresponding to this Article. The sixteenth clause of Section 1 of that Act which provided a period of limitation of six years for all suits for which no period of limitation was expressly provided in the Act, was held to apply to suits to declare an adoption invalid¹.

Article 129 of the Act of 1871, corresponding to this Article, provided a period of *twelve years for suits brought to set aside or establish an adoption*, the starting point being the date of the adoption or (at the option of the plaintiff) the date of the death of the adoptive father².

The provisions contained in Article 129 of the Act of 1871 became the subject-matter of two Articles in the Act of 1877, namely Article 118 and Article 119. There was a change in the language of the Articles, the period of limitation and the starting point. Article 118 applied to a suit for a declaration that an alleged adoption was invalid or never in fact took place. The limitation period was six years from the date when the alleged adoption became known to the plaintiff. Article 119 applied to a suit to obtain a declaration that an adoption was valid, the period of limitation being six years from the date when the right of the adopted son, as such, was interfered with.

The present Act has made no change in the Article as enacted in 1877.

2. Scope and applicability of the Article.—The Act of 1871, as has been seen already, used the words "to establish or set aside an adoption" and a question arose as to whether a suit for possession against a person who claimed to be in possession in right of adoption was or was not governed by Article 129 of that Act, corresponding

Article 118 — Note 1

- 1 (1875) 23 *Suth W R* 42 (44) 15 *Beng L R* 1, *Mrinmoyee Dabee v Bhoobun Moyee Dabee*

But a suit for possession of property was held governed by the 12 years' rule
(1864) 1864 *Suth W R* (Gap) 272 (272), *Radha Kisooree Dossee v Guthee Kissen Sircar*

- 2 (1876) 1 *Bom* 248 (252), *Kalava v Padapa*

Siddhessur Dutt v

64 6 *Sar* 261 (F C).

Article 118
Note 2

in part to this Article In *Jagadamba Chowdhuran v Dakkina Mohun*,¹ it was held by their Lordships of the Privy Council that the words 'to establish or set aside an adoption' were not technical words and did not describe with accuracy any known form of suit, and that, therefore, any suit *which brought the validity of an adoption into question* must be construed as a suit to 'set aside an adoption' even though it might also be looked at as a suit by the person entitled to recover possession. Their Lordships accordingly held that Article 129 and Article 142 applied to such cases. The same view with reference to the Act of 1871 was expressed by their Lordships of the Privy Council in *Mohesh Narain Munshi v Taruck Nath Moitra** decided six years later. See also the undermentioned case^{2a}

When the language of the Article was changed in the Act of 1877, and the words 'to set aside an adoption' were substituted by the words 'to obtain a declaration that an alleged adoption is invalid or never in fact took place' it would seem to be clear that the law as laid down in the two decisions of the Privy Council was changed. There arose however, a conflict of opinion on the point.

The *Allahabad High Court* held that there was no ambiguity about Article 118 of the Limitation Act of 1877 as there was in the case of Article 129 of the old Act of 1871, and that it referred only to suits purely for a declaration that an alleged adoption was invalid or never in fact took place³ and that when the suit was brought for the recovery of possession of property the suit would not be barred under this Article merely by reason of the fact that the Court in granting the relief was obliged to give a finding on the validity or otherwise of the adoption incidentally*. The *Calcutta High Court*⁴

Note 2

- 1 (1885) 13 Cal 303 (319-320) 13 Ind App 84 10 Ind Jur 307 4 Sar 715 (P C) (6 Ind App 110 (113) (P C) was explained)

[See also (1901) 25 Bom 337 (350) 27 Ind App 216 5 Cal W N 10 2 Bom L R 927 10 Mad L Jour 368 7 Sar 739 (P C) *Val-*
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(1923) A I R 1923 AH 25 (27) 45 AH 1 75 Ind Cas 14 *At Radha Dulariya v Rashik Lal*

(1925) A I R 1925 AH 79 (80) 46 AH 637 87 Ind Cas 938 *Shib Deo Misra v Ram Prasad*

[But see (1911) 11 Ind Cas 476 (477) 34 All B *Chunni Lal v Sita-Ram*

(1890) 1890 AH W N 241 (242) *Inda v Jehangira*]

- 5 (1887) 14 Cal 401 (417) *Lala Perbhu Lal v J Myline*

similarly held that a suit for possession was not barred under this Article though it might be necessary for the plaintiff to establish incidentally the invalidity of the adoption. The *Bombay High Court* on the other hand, held,⁶ overruling previous decisions,⁷ that the rule indicated by the Privy Council as applicable to the Act of 1871 should be applied to the Act of 1877 also, and that, therefore, a suit to recover possession which involved the decision of an issue as to the validity or otherwise of the defendant's adoption was a suit to obtain a declaration that an alleged adoption was invalid or never in fact took place to which the present Article applied and that it must be brought within six years dating from the plaintiff's knowledge of the adoption. The *Madras High Court* also took a similar view and held that the Article applied to suits for possession also, if the displacement of an adoption was necessary for plaintiff's success in the possessory suit.⁸

In this state of authorities the question again came up before the Privy Council in the case of *Tirubhuvan Singh v Rameswar Balsh*.⁹ There again it was a case of conflict between the reversioner and a defendant claiming under an adoption which was held either non-existent or invalid by both the Courts in India. It was contended that the Act of 1877 did not apply to the case and that the principle of *Jagadamba's case*¹ applied. In answer to this contention their Lordships observed as follows:

Giving full effect to the *Jagadamba's case*¹ and the other cases which followed it they do not think that the immunity, such as it is gained by the lapse of twelve years after the date of an apparent adoption amounts to acquisition of title within the meaning of Section 2 of the Act of 1877.

In consequence of this decision the High Court of Madras went back on its previous decision reported in I L R 26 Mad 291 decided

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- (1898) 95 Cal 354 (364) *Jagannath Prasad Gupta v Ranjit Singh*
 (1900) 27 Cal 242 (254 255) 4 Cal W N 405 *Ram Chandra Mookerjee v Ranjit Singh*
 (1905) 9 Cal W N 222 (224) *Bishanta Chandra Roy Choudhry v Kali Charan Roy Choudhry*
 (1910) 7 Ind Cas 421 (423) (Cal), *Ehazabai Pershad v Mewar Lal*
 6 (1900) 24 Bom 260 (285) 1 Bom L R 799 (F B) *Shrinwas v Hanmant*
 (1901) 25 Bom 26 (28) 2 Bom L R 495 *Barot Narayan v Barot Jesang*
 (1902) 4 Bom L R 893 (907 908) *Jamnabas v Dharsey*
 7 (1888) 13 Bom 160 (165) 13 Ind Jur 229 *Paday, Rav v Ram Rav* (9 All 253 Followed)
 (1897) 21 Bom 159 (161) *Fannamma v Manjaya*
 (1897) 21 Bom 376 (379) *Harilal v Bai Rewa*
 (1886) 1886 Bom P J 277 (277) *Ramchandra v Ravji*
 8 (1896) 20 Mad 40 (46) 6 Mad L Jour 272 *Pariath Ammal v Swaminatha Gurukkal*
 (1903) 26 Mad 291 (296 322) 18 Mad L Jour 27 (F B) *Ratnam Asari v Ailandammal*
 9 (1906) 23 All 727 (739) 33 Ind App 156 10 Cal W N 1065 8 Bom L R 722
 16 Mad L Jour 440 3 All L Jour 695 4 Cal L Jour 405 9 Omdh Cas 377 1 Mad L Tim 265 (P C)

Article 118
Note 2

in 1902 and held that the Article should be restricted only to declaratory suits in respect of adoptions and not to suits for possession¹⁰ In *Muhammad Umar Khan v. Muhammad Niazudin Khan*,¹¹ another decision of the Privy Council, the principle was re-affirmed and the omission to bring within the period prescribed by this Article a suit to obtain a declaration that an alleged adoption was invalid or never in fact took place was held to be no bar to bring a suit for possession of property. Notwithstanding the above decision, the Bombay High Court stuck to its own view expressed in *Shrinivas v. Hanmant*,¹¹ and held bound by the principles mentioned in the earlier decisions under the Act of 1871 that the Article applied to suits for possession also.¹³ The matter was later on considered by a Full Bench of the same High Court¹⁴ and the previous decisions were overruled and the law brought into conformity with the other High Courts. The Judicial Commissioner's Court of Nagpur¹⁵ and the Patna High Court¹⁶ took the same view as the Allahabad High Court.

In the *Punjab* the authorities were not uniform. In some of the earlier cases a distinction was drawn between cases of adoption where they were wholly unauthorised either by law or by custom and cases where the act was done with authority but defective in certain respects necessary to sustain the validity of the adoption. In the former class of cases it was held that the Article did not apply at all as the adoption had no legal inception and as such the reversioners were under no obligation to sue and obtain a declaration that the alleged adoption was invalid before they could recover possession.¹⁷ It was further thought that the third column of the Article

- 10 (1908) 80 Mad 308 (310) 17 Mad L Jour 182 2 Mad L Tim 178, *Manjamma v. Veerayya*
(1907) 17 Mad L Jour 282 (283) *Rama Row v. Venkoba Row*
(See also (1925) A I R 1925 Mad 497 (568) 48 Mad 1 93 Ind Cas 705, *Maharajah of Kolhapur v. Sundram Iyer*.)
- 11 (1912) 18 Ind Cas 344 (345) 39 Cal 418 39 Ind App 19 1912 Pun Re No 126 (P C)
- 12 (1900) 24 Bom 260 (273, 274) 1 Bom L R 799 (F B)
- 13 (1918) 20 Ind Cas 162 (169) 37 Bom 513 *Srinivas Sarjgerao v. Balwant Venkatesh*
(1917) A I R 1917 Bom 242 (242) 41 Bom 728 41 Ind Cas 845, *Chandappa v. Kallandappa* (Overruled by the Privy Council in A I R 1924 P C 137.)
- 14 (1922) A I R 1922 Bom 223 (231, 232) 46 Bom 776 67 Ind Cas 134 (F B), *Dodawa v. Yellau Malappa Beni*
- 15 (1890) 3 C P L R 32 (35), *Chintaman v. Seth Mohanlal*
(1898) 11 C P L R 49 (53), *Deorao v. Mt. Sakhubai*
(1920) A I R 1920 Nag 187 (194) 56 Ind Cas 620, *Somidas v. Dhanraj*
(1924) A I R 1924 Nag 319 (324) 78 Ind Cas 284, *Mt. Annapurmbai v. Ruprao*
(1924) A I R 1924 Nag 142 (144) 78 Ind Cas 987, *Mt. Munna v. Suklal*
[See also (1927) A I R 1927 Nag 369 (370) 105 Ind Cas 112, *Pandurang v. Mt. Baki*.]
- 16 (1920) A I R 1920 Pat 291 (320) 47 Ind Cas 929 5 Pat L Jour 164, *Shah Deo Narain Deo v. Kusum Kumari*
17. (1905) 1905 Pun Re No 86 1906 Pun L R No 30 1905 Pun W R No 112 (F B), *Karamdad v. Nathu*
(1892) 1892 Pun Re No 144, *Bhagat Ram v. Tulsi Ram*

assumed that the alleged adoption was *prima facie* a fact capable of being known as such to the plaintiff and when the evidence disclosed that the alleged adoption never in fact took place or that there was no *prima facie* evidence that it did take place, it was held that the Article would not bar the suit.¹⁸ In the undermentioned case,¹⁹ a Full Bench of the Lahore High Court held that there was no such distinction and that the Article did not apply to cases of recovery of possession when the question of adoption was incidentally in issue.^{19a} The question has now been placed beyond doubt by the decision of the Judicial Committee in *Kalyandappa v Chanbasappa*,²⁰ where the matter was fully discussed with reference to all the earlier decisions on the point, and it was held that a suit for possession against a person claiming to be in possession in right of an adoption is not barred by this Article. Lord Phillimore observed as follows.

"The words 'a suit to obtain a declaration' are terms of art. They relate back to the Specific Relief Act passed in the same year 1877, being Act No. 1 of that year, whereas the Limitation Act is Act No. 15. Section 42 of the Specific Relief Act deals with declaratory decrees and the illustration (f) is much in point.

" 'A Hindu widow in possession of property adopts a son to her deceased husband. The person presumptively entitled to possession of the property on her death without a son may, in a suit against the adopted son, obtain a declaration that the adoption was invalid.' "

"It is to this class of suits that this particular limitation applies.²¹ The date from which time begins to run is a subjective or personal date, and the condition of obtaining the particular relief which is sought in a declaratory suit is that the plaintiff should not be guilty of laches, the measure of laches being fixed by the statute as six years. But, if a claimant chooses to run the

(1901) 1901 Pun Re No. 67, *Muhammad Din v Sadar Din*.

(1908) 1908 Pun Re No. 71. 1908 Pun W R No. 56 *Nizam v Bhana*.

(1911) 10 Ind Cas 838 (330) (Lah) *Niamat v Nura*.

(1911) 11 Ind Cas 96 (98) (Lah), *Abdul Rahman v Bure Khan*.

18 (1894) 1894 Pun Re No. 73 (F B) *Sultan v Itah Baksh*.

(1893) 1893 Pun Re No. 96, *Wasira v Fallu*.

(1902) 1902 Pun L R No. 14, *Hoshnaki v Lachman*.

(1909) 2 Ind Cas 975 (975). 1909 Pun Re No. 68, *Champat Rai v Daulat Ram*.

19 (1914) A I R 1914 Lah 809 (312, 313). 1914 Pun Re No. 81. 25 Ind Cas 429 (F B), *Arjan Singh v Lachman Singh*.

19a See also (1911) 11 Ind Cas 11 (14). 1911 Pun Re No. 44, *Nathu v Rahman*.
(1908) 1908 Pun Re No. 96. 1908 Pun W R No. 79, *Surjan Singh v Kharak Singh*.

20 (1924) A I R 1924 P O 187 (142). 48 Bom 411. 51 Ind App 220. 79 Ind Cas 971 (P C).

21 See to the same effect (1927) A I R 1927 Mad 785 (785). 105 Ind Cas 154, *Muthu Krishna Mudaliar v Harinarayana Mudaliar* (If the widowed daughter of the propositus professes to adopt a son, the nearest reversioner in family of the propositus has a right of suit with in the terms of S. 42, Act 1 of 1877 to set aside such adoption.)

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risk that an adoption which he has not attacked will have every presumption made in its favour by reason of its long standing, he can wait till his reversionary right has accrued and even till the limit (no doubt a very wide limit) of twelve years from that accruer has passed "

This view was again confirmed by the Privy Council in *Padmalay Achariya v Fakira Debya*,²² where a suit by a Hindu widow to recover possession of the estate of her deceased husband from the defendant who claimed to be the adopted son of the deceased was held not governed by Article 118. See also the undermentioned cases²³ to the same effect. It is only if in truth and substance, the suit is one for a declaration that an adoption is invalid, this Article would apply²⁴ and even in cases where such a suit would be barred by time, Courts have in the interests of justice allowed the plaintiff to convert the suit into one for the recovery of possession of the estate and the plaint amended accordingly.²⁵

Where the reversioner a suit for possession of the estate of the last male owner is resisted by a person alleging himself to be the adopted son of the last male owner, but it is found as a fact that the adoption was by the widow to herself, it is of course clear that this Article will not apply, as the plaintiff is not embarrassed by the widow's adoption of the defendant and could recover the estate without, in any way, disturbing the adoption.²⁶

3. "Adoption." — In *Valippa Nayar v Paru*,¹ it was held that the adoption referred to was an adoption of a son according to the ordinary Hindu law and did not extend to the affiliation of females as under Malabar law or according to the usage of women of the dancing girl caste in some parts of the country. In *Kalyandappa v*

22 (1931) A I R 1931 P C 84 (85) 131 Ind Cas 758 (P C)

23 (1926) A I R 1926 Lah 654 (655) 8 Lah 48 96 Ind Cas 749 *Jholi v Khazana*

(1935) A I R 1935 Lah 213 (215) 149 Ind Cas 494 *Hirde Ram v Jhandu*

24 (1927) A I R 1927 P O 229 (230) 106 Ind Cas 498 (P O) *Jagmohan Saran v Deoki Nandan*

(1901) 24 Mad 405 (406) *Ayyadurai Pillai v Solai Ammal*

(1892) 1892 Pun Re No 45 *Mt Begam v Mt Nur Bibi*

(1901) 1901 Pun Re No 116 1901 Pun L R No 178 *Hem Raj v Sahiba*

(1931) A I R 1931 Lah 456 (457) 131 Ind Cas 631, *Phool Singh v Tota*

(1929) A I R 1929 Lah 579 (581, 582) 123 Ind Cas 87, *Sadhu Ram v Bishambhar Dial*

25 (1930) A I R 1930 Mad 47 (48) 124 Ind Cas 208 *Sree Ramulu v Hanu mayya*

26 (1895) 22 Cal 609 (614) 22 Ind App 51 6 Sar 558 (P C) *Lachman Lal Chowdhri v Kanhaya Lal Mowar*

(1880) 6 Cal L R 12 (15) 9 Ind App 110 4 Sar 15 (P C) *Raj Bahadur Singh v Achumbit Lall*

(1880) 6 Cal L R 46 (47) *Purna Narain Adhikar v Hemokant Adhikar*
 (See the point of distinction pointed out by Lord Hobhouse in 13 Cal 308 (321))

(1898) 1 Oudh Cas 30 (36) *Bhagwana v Barjor Singh Das*

Note 3

1 (1899) 9 Mad L Jour 196 (193)

Chanbasappa,² their Lordships of the Privy Council observed that there may be tribal customs among certain Muhammadans allowing adoption carrying rights of succession and that to such cases also this Article might apply

4. Starting point. — Time, under this Article, runs from the date when the alleged adoption becomes known to the plaintiff¹ The fact that the person making the adoption was alive within six years before the suit,² or the fact that the widow of the adoptive father admits the title of the adopted son,³ cannot save the bar of limitation To constitute knowledge under the Article, the knowledge need not necessarily have been obtained first hand There must however be some foundation in fact and the question how far that condition is satisfied is a question of degree only to be solved by reference to the facts of each case⁴

5. Registration of deed of adoption, if knowledge. — The mere registration of a deed of adoption does not amount to a notice of adoption to the persons interested in challenging the validity of such adoption¹ Thus, where a deed of adoption was registered, but the plaintiff had no knowledge thereof until a date when a gift was mutated, it was held that time, under this Article, ran from the date of mutation and not from the date of registration² Where however, a deed of adoption was registered, the adopted son and adoptive father lived together for a considerable time and the reversioner contesting the adoption resided in the same village it was held that under the circumstances, a presumption arose that the reversioner came to know of the fact of adoption at a time which was beyond the period of limitation³

2 (1924) A I R 1924 P C 137 (141) 51 I A 220 48 Bom 411 79 I C 971 (P C)

Note 4

(1896) 24 Cal 1 (7) 23 Ind App 97 6 Sar 630 (P C) *Hurri Dhusan Mukerji v Upendra Lal Mukerji*

(1938) A I R 1938 Lah 193 (194) *Mt Manbhari v Mt Surti*

(1889) 17 Cal 518 (532) *Mansukhand v Jagat Seltani*

2 (1903) 27 Bom 614 (618) 5 Bom L R 588 *Ramchandra v Narayan*

3 (1901) 1901 Pun Re No 116 1901 Pun L R No 178 *Hem Raj v Sahiba*

4 (1903) 5 Bom L R 594 (587) *Femunadas v Balshet*

(1916) A I R 1916 Mad 896 (897) 29 I C 785 *Audi Narayanaiah v Ssramulu*

Note 5

1 (1925) A I R 1925 Lah 25 (26) 5 Lah 368 84 Ind Cas 174, *Ghulam Muhammad v Mirza*

2 (1934) A I R 1934 Lah 274 (275) 15 Lah 645 149 Ind Cas 986 *Chiragh Din v Mehtab*

3 (1909) 4 Ind Cas 889 (890) (Lah) *Sawan Singh v Mansa*

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Notee
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6. Minor plaintiff, if and when can be said to have knowledge. — In a suit by the minor natural son born subsequent to an adoption by his father, to declare that the adoption was invalid, it was held by the High Court of Madras that a minor could not be fixed with knowledge of an adoption from the date of his birth and that a suit by him to set aside the adoption was not governed by Article 118 of the Act.¹ This, however, does not mean that no knowledge can be imputed to a minor at any time during his minority. In *Kalyandappa v Chanbasappa*,² their Lordships of the Privy Council observed as follows.

“This line of reasoning seems to assume that you cannot impute knowledge to a minor, a view which is certainly not in accordance with the facts of human nature.”

The question of the minor's knowledge does not seem to be of any importance except in cases where the minor is suing for declaring the invalidity of an adoption more than three years after he attains majority, but less than six years after the date of his knowledge.

7. Onus of proof. — Where the plaintiff has given *prima facie* evidence of his want of knowledge of the fact of adoption, it will be for the defendant to show in the clearest possible way that plaintiff had the knowledge beyond six years of the date of suit.¹ Where, however, an adoption has been recognised as valid during a long course of years, it was held by their Lordships of the Privy Council that, altogether apart from the law of limitation, the burden resting upon any litigant, who challenges the validity of an admitted adoption, was of the heaviest order.² Where on the facts it was found that the plaintiff challenging the adoption had himself asserted over and over again the factum of adoption, consented to be bound by it and received consideration for such assertions, it was held that a suit by him several years thereafter to challenge the adoption was clearly barred.³

Notes 6

- 1 (1926) A I R 1926 Mad 1123 (1123) 93 Ind Cas 435 *Sidda Reddi v Jayaram Reddi*.
- 2 (1924) A I R 1924 P C 137 (141) 51 Ind App 220 48 Bom 411 79 Ind Cas 971 (P C)

Notes 7

- 1 (1920) A I R 1920 Lah 514 (515) 1 Lah 608 59 Ind Cas 124, *Mt. Sujan Devi v Jagiri Mat*
(1911) 9 Ind Cas 163 (165) (Mad), *Venkubayamma v Narasimha Row*
(1925) A I R 1925 Lab 25 (26) 5 Lah 368 84 Ind Cas 174, *Ghulam Muhammad v Mirza*
(1887) 9 All 253 (269), *Ganga Sahai v Lekhray Singh*
(1895) 22 Cal 609 (614) 22 Ind App 51 6 Sar 558 (P O), *Lachman Lal Choudhury v Kanhaiya Lal Bhowar*.
- 2 (1925) A I R 1925 P C 201 (202) 89 Ind Cas 817 (P O), *Venkata Seetharama chandra Row v Kanchumarthi Raju*
[See also (1874) 21 Suth W R 61 (85), *Gooroo Prosunno Singh v Nal Madhub Singh* (Compare as to nature of proof required)]
- 3 (1923) A I R 1923 All 58 (62) 45 All 169 (176) 69 Ind Cas 971, *Udit Narain Singh v Randhir Singh*

8 Knowledge of the nearest reversioner. — A suit by a Hindu reversioner for a declaration that an adoption is invalid is a representative suit on behalf of all the reversioners.¹ Consequently time, under this Article, will run against the whole body of reversioners from the date of knowledge of the nearest reversioner, of the adoption.² A suit therefore by a remote reversioner to set aside the adoption would be barred, if filed more than six years after the next reversioner obtained knowledge thereof.³ The fact that the nearest reversioner did not bring the suit because he had been bribed to give his consent to the adoption and that the next reversioner was born after the alleged adoption and before the suit had become time-barred, would not give any fresh cause of action or stop time running, which had begun to run against the whole body of reversioners from the date of adoption.⁴ In the undermentioned case,⁵ the question whether a suit by the reversioner who was a minor at the date of adoption would be in time if filed within three years after his attaining majority where the immediate presumptive reversioner died before the period of limitation expired, was referred to a Full Bench, but was not decided.

9, Alienation subsequent to an adoption, if gives right to fresh cause of action. — There is a difference of opinion on the question whether, when the alleged adopted son makes an alienation of the properties of the adoptive father, such alienation would give a fresh cause of action against the adopted son in a suit challenging the alienation. It was held in the undermentioned cases of the Lahore High Court¹ that there is no such cause of action and that a suit

Note 8

1 See Notes 17 and 18 to Section 8 *ante*

(1915) A I R 1915 P C 124 (125 126) 42 Ind App 125 38 Mad 406 (411) 29 Ind Cas 298 (P C) *Venkatarayana Pillai v Subbammal*

(1905) 29 Mad 890 (893 411) 1 Mad L Tim 183 16 Mad L Jour 207 (F B) *Punnamma v Perrasu* (13 Mad L Jour 859 must be deemed to be overruled)

(1903) 18 Mad L Jour 359 (360) *Adilakshmi v Venkataramayya* (Overruled in 29 Mad 890)

(1868) 9 Suth W R 463 (465) *Brojo Kishoree Dasse v Srinath Bose*

(1925) A I R 1925 P C 272 (276) 47 All 853 28 Oudh Cas 352 52 Ind App 398 91 Ind Cas 370 (P C) *Mata Prasad v Nageshar Sahas*

2 (1921) A I R 1921 Mad 880 (880) 60 Ind Cas 93 44 Mad 218, *Venka Sivayya v Ademma*

" "

" "

" "

(But see (1934) A I R 1934 Lah 968 (969) 154 Ind Cas 677 117 All 1000 117 Ind Cas 677 117 All 1000 *Ram v Salu* (Where it was held that the bar against the father would not bar the son — This decision, as pointed out in Note 17 to Section 6 *ante* is not correct)

4 (1921) A I R 1921 Mad 880 (881) 44 Mad 218 60 Ind Cas 93 44 Mad 218, *Venka Sivayya v Ademma*

5 (1929) A I R 1929 Mad 577 (588) 52 Mad 620 119 Ind Cas 119 119 Ind Cas 119 *Annappurnamma v Appaya Sastri*

Note 9

1 (1930) A I R 1930 Lah 488 (489) 121 Ind Cas 236, *Bhoyt Lal*

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Note 9

challenging the alienation after the expiry of the period of limitation prescribed for a suit for a declaration of the invalidity of the adoption would be barred. A contrary view was held by the same High Court in *Jhola v Khazana*². In *Bapasa v Akkamma*³ Wallis C J held that such a suit would be barred while Coutts Trotter J held a contrary view. In *Semba Parayan v Maral*⁴ the same High Court distinguished the case of *Bapayya v Akkamma*³ and held that such a suit was not barred. It is submitted that this last view is correct. The principle of the decision of the Privy Council in *Kalyandappa v Chanbasappa*⁵ is clearly applicable to such cases and the plaintiff is entitled to ignore the adoption and ask for any relief to which he may be entitled.

Article 119

<p>119.* To obtain a declaration that an adoption is valid</p>	<p>Six years</p>	<p>When the rights of the adopted son, as such, are interfered with</p>
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Synopsis

- 1 Legislative changes
- 2 Scope and applicability of the Article
- 3 "Adoption"
- 4 Starting point — 'Interference'

Other Topics

Factum and validity of adoption	See Note 2
Mere denial of status of adopted son is not interference	See Note 4 Pts 5 & 6
Mere postponement of right of adopted son to succeed	See Note 4
Suit for possession — Article not applicable	See Note 2 Pt 1

1 Legislative changes — See Note 1 to Article 118 *ante*

2 Scope and applicability of the Article — Article 118 *ante* applies to suits for declaration that an alleged adoption is *invalid*

* Act of 1877

Same as above

Act of 1871 Article 129

See Article 129 given under Article 118 *ante*

Act of 1859

No corresponding provision

(1921) A I R 1921 Lah 389 (390) 56 Ind Cas 931 *Khishal Singh v Kanda*

2 (1926) A I R 1926 Lah 654 (655) 8 Lah 48 96 Ind Cas 749

3 (1917) A I R 1917 Mad 68 (69) 36 Ind Cas 255

4 (1927) A I R 1927 Mad 674 (676) 102 Ind Cas 885

5 (1924) A I R 1924 P C 137 (141) 51 Ind App 220 48 Bom 411 79 Ind Cas 971 (P C)

or *never in fact took place*, while this Article applies to suits for declaration that an adoption is *valid*. As has been seen in Note 2 to Article 118, that Article applies only to suits to *obtain declaration* merely and not to suits for *possession* or for other relief to which the plaintiff may be entitled. The same principles apply to this Article also, and consequently this Article also applies to a suit for a mere declaration of the validity of an adoption and not to a suit for possession, even though the plaintiff may have to establish the validity of the adoption as the basis of his claim to possession¹. For a full discussion of the subject, see Note 2 to Article 118, *ante*.

Does this Article apply to a suit for a declaration that an adoption *did in fact take place*?

There is a difference of opinion on the point arising from the fact that Article 118 provides for a suit for declaration that an adoption *did not in fact take place*, while this Article does not provide for a suit for a declaration that an adoption *did in fact take place*, but merely provides for a suit for declaration that an adoption is *valid*. It was held by the Bombay High Court in the undermentioned cases² that this Article applied only to a suit for declaration as to the *validity* of an adoption and not as to the *factum* of adoption. In a later case,³ however, the same High Court dissented from its earlier view and held, following the view of Bhashyam Ayyangar, J. in *Ratnamasari v Akilandammal*,⁴ that the Article would apply to all suits in which either the *factum* or the *validity* of the adoption is in question, for the simple reason that the mere *factum* of adoption will not entitle one to a legal character unless the adoption

Article 119 — Note 2

- 1 (1897) 25 Cal 354 (359) *Jagannath Prasad Gupta v Ranjit Singh*
(1902) 24 All 195 (197-200) 1902 All W N 10, *Lal v Murliidhar*.
(1903) 26 All 40 (46) 1903 All W N 163 *Chandania v Salig Ram*
(1888) 13 Bom 160 (165) 18 Ind Jur 229, *Padajurav v Ramrav*
(1925) A I R 1925 Mad 497 (563) 48 Mad 1 93 Ind Cas 705 *Maharajah of Kolhapur v Sundaram Iyer*
(1909) 4 Ind Cas 1167 (1167) (Mad) *Appavu Manigaran v Muthusawmy Pillai*
(1914) A I R 1914 Lah 309 (310-312) 1914 Pun Re No 81 25 Ind Cas 429, (F B) *Arjan Singh v Lachman Singh* (Overruling 1904 Pun Re No 3)
(1934) A I R 1934 Bom 110 (112) 58 Bom 280 149 Ind Cas 674, *Bhagvathi bai v Appa Dada*
(1902) 26 Bom 720 (724) 4 Bom L R 516, *Gangabai v Tarabai*
(1924) A I R 1924 Nag 142 (144) 78 Ind Cas 987 *Mt Munna v Sukhlal*
See also the cases cited in Foot Note (10) in Note 2 to Article 118
- 2 (1906) 31 Bom 80 (85) 8 Bom L R 897 *Shivaram v Krishnabai*
(1903) 28 Bom 94 (100) 5 Bom L R 708 *Ningauca v Ramappa*
- 3 (1907) 32 Bom 7 (9) 9 Bom L R 1054, *Laxmana Basappa v Ramappa Yellappa*
- 4 (1902) 26 Mad 291 (311) 13 Mad L Jour 27

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is also valid and that a plaintiff would have consequently to sue for a declaration that his adoption is valid, whether the *factum* itself is denied, or the *factum* is admitted but the validity is challenged

3. "Adoption." — See Note 3 to Article 118, *ante*

4. Starting point — 'Interference.' — Time, under this Article, runs from the date when the rights of the adopted son, as such, are first *interfered* with. The interference contemplated is interference by the *defendant* and not interference by a *third party* unconnected with the defendant.¹ It must further be an interference with the rights of the *alleged adopted son* and not with merely the rights of a *third person* such as the widow of the adopted son.² But it need not relate directly to the property sought to be recovered in the suit. It may be with respect to *any* property to which the adopted son is entitled.³ The interference referred to is again one which must amount to an *absolute* denial of the status of the plaintiff as an adopted son and to his *unconditional* exclusion from the enjoyment of his right in virtue of that status. The Article has no application to a case where the facts suggest that an interference was intended to have no greater effect than that of *postponing* the right of the adopted son to succeed as heir to the property of his adoptive father. Thus, where the adoptive father's widow holds the property in her own right as widow, subject to plaintiff's right to succeed her on her death as her adopted son, the widow's conduct and action do not exclude the plaintiff *absolutely* and *against all*, from his right to claim the property as her adopted son at *any time*, and the plaintiff's cause of action under this Article would arise when his adoption is expressly and completely repudiated.⁴

Similarly, a mere unsuccessful attempt by somebody to exclude the adopted son from the property to which he would be entitled, or a mere denial of status of adopted son would not be an 'interference' within the meaning of this Article.⁵ There must be some act done which is incompatible with the recognition of the adoption.⁶

A gift of property by the adoptive mother to her daughter in derogation of the adopted son's rights accompanied by a transfer in the daughter's favour is a direct interference with the rights of the adopted son.⁷

Note 4

1 (1903) 26 All 40 (49) 1903 All W N 163 *Chandania v Salig Ram* (Per Stanley C J and Burkill J)

2 (1902) 26 Bom 720 (723 726) 4 Bom L R 516 *Gangabai v Tarabas*

3 (1903) 13 Mad L Jour 145 (145), *Akilandamma v Ratnamasari*

4 (1904) 28 Bom 94 (101) 5 Bom L R 708, *Ningawa v Ramappa*

5 (1924) A I R 1924 Rang 34 (34) 1 Rang 185 74 Ind Cas 970 *Maung Gye v Maung On Gang*

6 (1920) A I R 1920 Bom 110 (110, 111) 58 Ind Cas 994 *Girijabai v Sadashiv*

7 (1903) 13 Mad L Jour 144 (144) *Ponnammal v Ratnam Asari*

120.* Suit for which no period of limitation is provided elsewhere in this schedule.	Six years.	When the right to sue accrues.	Article 120
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Synopsis

1. Legislative changes.
2. Scope of the Article.
3. Starting point.
4. Suit relating to trust and management of trust property (Section 10).
5. Suit for pre-emption (Article 10).
6. Claim suit (Articles 11, 11-A, 13).
7. Suit to set aside sale for arrears of public demand (Article 12).
8. Suit questioning official act or order (Article 14).
9. Suit for compensation for land acquired (Articles 17 and 18).
10. Suit for injunction (Articles 32, 41).
11. Suit for declaration of right as to property attached under the Criminal Procedure Code (Article 47).
12. Suit for possession of moveable property (Articles 48, 49).
13. Suit to recover deposit (Article 60).
14. Suit for money due by defendant for money received by him (Articles 61, 62).
15. Suit for accounts (Articles 64, 89, 106).
16. Suit on administration bond (Article 68).
17. Suit on promissory note (Article 73).
18. Suit by attorney or vakil for costs (Article 84).
19. Suits relating to contract of agency (Article 89).
20. Suit to avoid a will (Articles 91, 92, 93).
21. Suit for construction of will.
22. Suit for a declaration that decree is not binding nor to set aside a decree (Article 95).
23. Suit for relief on the ground of fraud (Article 95).
24. Suit for relief on the ground of mistake (Article 96).

* Act of 1877, Article 120 and Act of 1871, Article 116

Same as above

Act of 1859, Section 1, clause 16

Limitation of six years applicable to all suits not especially provided for.

To all suits for which no other limitation is hereby expressly provided — the period of six years from the time the cause of action arose.

Article 120

25. Suit for contribution (Articles 61, 81, 99, 107).
26. Suit for refund of money paid to defendant.
27. Suit relating to partnership (Article 106).
28. Suit for profits (Article 109).
29. Suit for revenue assessed on land (Article 110).
30. Suit relating to companies (Articles 36, 112).
31. Suit for declaration (Articles 11, 11A, 92, 93, 118, 119, 125).
32. Suit for distributive share of deceased's property (Article 123).
33. Suit for possession of, and for removal of, a person from office (Article 124).
34. Suit by Hindu reversioners (Article 125).
35. Suit to set aside father's alienation (Article 126).
36. Suit impeaching alienation by karnavan of Malabar tarwad.
37. Suit for joint possession (Article 127).
38. Suit for partition (Article 127).
39. Suit for customary dues or for yeomlab allowance.
40. Suit for emoluments of hereditary office (Article 131).
41. Suit to enforce mortgage or pledge (Article 132).
42. Suit to enforce an award.
43. Suit for taxes.
44. Suit by creditor against alienee from devisee.
45. Suit by auction-purchaser for refund of purchase money.
46. Suit for restitution of conjugal rights.
47. Suit for dissolution of marriage.
48. Suit to establish exclusive right of worship.
49. Suit to enforce Hindu son's pious obligation to pay his father's debts.
50. Suit for correction of, or for declaration as to the entry in, Record of Rights.
51. Suit for damages.
52. Suit under Section 68 of the Transfer of Property Act.

Other Topics

- Right to set aside decree barred—Relief consequential to setting aside is also barred See Note 22, Pt 9
- 'Right to sue'—Meaning of See Note 3
- Successive denials of plaintiff's right—Cause of action, when arises See Note 31, Pts 11a to 20
- Suit by Muhammadan heir to recover his share of inheritance from his co heirs See Note 12, Pt.

Suit by or against executor or administrator	See Note 4 Pts 12 to 15
Suit by reversioner for recovery of moveable property	See Note 12 Pt 7
Suit by trustee for monies due to him	See Note 4 Pts 16, 17 20 to 23
Suit for accounts against trustee	See Note 4 Pts 7 to 11
Suit for accounts by member of a joint Hindu family against manager	See Note 15 Pt 5
Suit for damages for breach of trust	See Note 4 Pts 1 1a
Suit for declaration and further relief — Article governing suit for further relief applies	See Note 31 Pt 4
Suit for declaration of right to malikana allowance	See Note 30 Pt 7
Suit for declaration—When right to sue accrues	See Note 31 Pts 6b to 9d
Suit for possession of non hereditary office—Article applies	See Note 33 Pt 2
Suit for removal of encroachment on public way	See Note 10 Pt 8
Suit to set aside alienation of non ancestral property by Hindu father — This Article and not Article 126 applies	See Note 35 Pt 1
Suit to set aside decree on grounds other than fraud — Article applies	See Note 22 Pt 5 Note 23
Suit to set aside transfer by debtor in fraud of creditors	See Note 23, Pt 2
Suit to set aside voidable decree	See Note 22 Pt 6

Article 120 Note 1

1. **Legislative changes** — Clause 16 of Section 1 of the Act of 1859 corresponded to this Article, and suits not falling within the other provisions of the Act were held to be governed by the said clause¹

Article 120 — Note 1

- 1 (1867) 7 Suth W R 439 (493) *Kazeo Nusecutoolah v Roop Sona Debee* (Moveable property seized under sham decree—Suit brought to recover)
- (1874) 23 Suth W R 42 (44) 15 Beng L R 1 *Gopeenath Nask v Jadoo Ghose* (Declaratory suit)
- (1872) 18 Suth W R 132 (130) *Debnath Roy Chowdhry v Gudahur Dey* (Suit for compensation for the use and occupation of premises by a defendant who does not stand in the position of tenant)
- (1872) 17 Suth W R 208 (208) *Thakoor Doss Acharjee Cauckerbutty v Shashee Bhushan Chatterjee* (Suit for mesne profits)
- (1871) 16 Suth W R 297 (298) *Mt Kishenbutty v Mr Roberts* (Suit against the defendant for compensation in the shape of rent for the land which he held in the name of his servant)
- (1870) 14 Suth W R 322 (322) *Shumboo Chunder Mullick v Pran Kristo Mullick* (Moveable property obtained for borrowing thereon—Suit for recovery of)
- (1868) 11 Mad 207 (209) 12 Ind Jur 257 *Lenkatachalam v Venkatayya*
- (1868) 9 Suth W R 318 (321) *Woomatool Fatima Begum v Meerunmun Nissa Khanum* (Suit by a Muhammadan widow to establish her lien for dower on deceased's estate)
- (1866) 6 Suth W R 113 (114) *Fusul Mahomed Mundul v Raj Coomaree Debee* (Suit for mesne profits)
- (1866) 6 Suth W R 108 (108) *James Gray v Anund Mohun Moister*
- (1866) 5 Suth W R 277 (278) *Veer Mahomed Kaseem Chowdhry v A J Forbes* (Suit for damages to the extent of the injury sustained by plaintiff by defendant prevailing upon ryots who have entered into a lawful contract with him (plaintiff) to break that contract)
- (1865) 4 Suth W R S C O Ref 9 (9) *Boykunt Nath v Ramnauth Bhooya* (Action by one of the proprietors of a joint estate against a co-sharer to recover money due by the latter on account of the revenue of his share of the estate to the payment of which revenue the Collector had applied a deposit made by the plaintiff)

Article 120
Note 2

- (1922) A I R 1922 Cal 499 (500) 67 Ind Cas 943, *Ramharas Kapals v Rohini Kanta Chakravartthy* (Article 62)
- (1905) 32 Cal 527 (535, 536) 1 Cal L Jour 167, *Mahomed Wahib v Mahomed Ameer* (Do)
- (1912) 17 Ind Cas 351 (352) (Cal), *Lachmi Narain v Dhanukdhar Prosad Singh* (Do)
- (1935) A I R 1935 Mad 354 (355) 159 Ind Cas 750, *Sivaramaraju v Secretary of State* (Do)
- (1915) A I R 1915 Mad 405 (407) 39 Mad 62 26 Ind Cas 219, *Baisnoth Lala v Ramadoss* (Do)
- (1914) A I R 1914 Mad 572 (573) 37 Mad 381 14 Ind Cas 254, *Sankunni Menon v Govinda Menon* (Do)
- (1883) 1883 Pun Re No 56 page 172, *Surjan Singh v Charan Dass* (Article 62—Suit for specific sums received by guardian during plaintiff's minority)
- (1912) 17 Ind Cas 311 (315) 1913 Pun Re No 36, *Chand Mal v Sansar Chand* (Article 62 — Suit to recover interest from holder of Government promissory notes)
- (1915) A I R 1915 Mad 596 (597) 27 Ind Cas 807, *Arunachalam Chetty v Raman Chetty* (Articles 62 and 89)
- (1912) 17 Ind Cas 513 (515) (Mad), *Krishnaswamy Chetty v Sitaram Chetty* (Article 74)
- (1915) A I R 1915 Mad 979 (983) 88 Mad 374 21 Ind Cas 24, *Sitarama Chetty v Krishnaswamy Chetty* (Articles 74, 75)
- (1922) A I R 1922 Cal 53 (54) 65 Ind Cas 219, *Sarashbala Das v Chun Lal Ghosh* (Article 89)
- (1924) A I R 1924 Mad 840 (842) 84 Ind Cas 276, *Parthasarathi Appa Rao v Turlapati Subba Rao* (Do)
- (1905) 92 Cal 719 (727) 1 Cal L Jour 232, *Shib Chandra v Chandra Narayan* (Do)
- (1909) 3 Ind Cas 634 (685) (Cal), *Mohendra Nath Ghosh v Jadu Nath Mullick* (Do)
- (1916) A I R 1916 Mad 281 (283) 26 Ind Cas 740 89 Mad 876, *Venkata chalam Chetty v Narayanan Chetty* (Do)
- (1929) A I R 1929 Lah 407 (408) 119 Ind Cas 327, *Bur Chand v Ganpat Rai* (Do)
- (1912) 14 Ind Cas 19 (21) (Lah) *Sham Lal v Bainka Mal* (Do)
- (1916) A I R 1916 Low Bur 40 (41) 36 Ind Cas 418 *Ardikappa Chetty v Kadappa* (Articles 89 and 90)
- (1919) A I R 1919 Pat 995 (396) 51 Ind Cas 733 4 Pat L Jour 304 *Anant Ram Bohidar v Ganeshram Bohidar* (Suit by proprietor against loan bardar for account of profits — Suit based on implied contract—Suit is governed either by Article 89 or Article 115)
- (1910) 7 Ind Cas 60 (64) 34 Mad 143 *Venkata Suryanarayana Jagapathi raju v Goluguru Bapiraju* (Article 95—Suit by certified purchaser to set aside a fraudulent sale)
- (1910) 6 Ind Cas 1013 (1015) 13 Oudh Cas 148, *Udit Narain Singh v Sahib Ali* (Article 95 or 97)
- (1918) A I R 1918 Mad 728 (730) 42 Ind Cas 519 *Govindasamy Pillai v Municipal Council Kumbakonam* (Article 97)
- (1935) A I R 1935 Oudh 378 (380) 155 Ind Cas 299, *Shambhu Dutt v Ram Bakhsh* (Do)
- (1937) A I R 1937 Oudh 286 (287) 166 Ind Cas 705, *Gobind Prasad v Hasan Shah* (Article 97 or Article 62)
- (1933) A I R 1933 Lah 581 (582) 145 Ind Cas 186, *Kalkha Singh v Fazal Din* (Article 97)
- (1933) A I R 1933 Oudh 478 (480) 147 Ind Cas 1042 *Bhikham Singh v Sant Bakhsh Singh* (Article 99)
- (1935) A I R 1935 Mad 128 (129) 155 Ind Cas 591, *Vedaguru Sastrisar v Sankaracharya Swamigal* (Article 102)
- (1901) 4 Oudh Cas 355 (361), *Salik Ram v Ashik Husain* (Article 105)

- (1918) A I R 1918 Cal 294 (300, 301) - 43 Ind Cas 893, *Kali Das v Danpadi Sundari* (Article 106)
- (1932) A I R 1932 Lah 519 (521) 198 Ind Cas 375, *Karam Chand v Bashehar Nath* (Do)
- (1906) 1906 Pun Re No 73 p 278 1906 Pun W R No 49, *Amin Chand v Gujar Val* (Do—Suit for contribution after dissolution of partnership by a surviving partner against representatives of a deceased partner)
- (1933) A I R 1933 Mad 853 (357) 144 Ind Cas 573, *Srinivasulu Naidu v Ramakrishna Naidu* (Do)
- (1922) A I R 1922 Cal 235 (236) 66 Ind Cas 879, *Nagendra Nath Pal v Sarat Kamini Dass* (Article 109)
- (1918) A I R 1918 Cal 360 (362) 43 Ind Cas 781, *Saraj Ranjan v. Prem Chand* (Do)
- (1933) A I R 1933 Lab 615 (616) 146 Ind Cas 939, *Basheshar Das v Duran Chand* (Do—Suit for recovery of mesne profits wrongfully received by defendant)
- (1915) A I R 1915 Mad 1193 (1194) 28 Ind Cas 85, *Rangasamy v Alagayammal* (Do)
- (1935) A I R 1935 Oudh 515 (517) 157 Ind Cas 960, *Bharat Singh v. Gur Prasad* (Do)
- (1906) 93 Cal 998 (1000), *Kallar Roy v Ganga Pershad Singh* (Article 115)
- (1938) A I R 1938 Lah 267 (268), *Municipal Committee, Amritsar v Kanshi Ram* (Do — Suit for compensation not received)
- (1919) A I R 1919 Mad 778 (775) 48 Ind Cas 810, *Gopalaswami Nair v Nammalwar Nair* (Do)
- (1915) A I R 1915 Mad 889 (891) 38 Mad 275 21 Ind Cas 65, *Vairavan Chetty v Aricha Chetty* (Do)
- (1914) A I R 1914 Mad 4 (5) 22 Ind Cas 60, *BalaKrishnudu v Narayana swamy Chetty* (Do)
- (1930) A I R 1930 Oudh 895 (397) 126 Ind Cas 682 6 Luck 80 *Chatur Gun v Shahasady* (Article 115)
- (1934) A I R 1934 Pat 7 (8) 12 Pat 792 148 Ind Cas 375, *Gopal Saran Narain Singh v Chhakauri Lal* (Article 115—Suit for compensation for breach of term in a compromise)
- (1937) A I R 1937 Pat 860 (862) 16 Pat 302 169 Ind Cas 364 *Chaitassa Municipality v Gobind Sao* (Article 115—Suit by Municipality on a contract to recover tolls in a market)
- (1926) A I R 1926 Mad 681 (683) 95 Ind Cas 83, *Gopala Chetty v Narayana swamy Chetty* (Article 123)
- (1901) 25 Mad 861 (364) 12 Mad L Jour 183, *Rajamannar v Venkata Krishnayya* (Do)
- (1929) A I R 1929 Lah 753 (758) 11 Lah 325 122 Ind Cas 467, *Harry Percival Robson v Administrator General Punjab* (Do — Suit by administrator of intestate persons against an executor *de son tort*)
- (1891) 13 All 368 (371) 1891 All W N 130 *Chand Mal v Angan Lal* (Article 124 or Article 144)
- (1931) A I R 1931 Mad 505 (511) 133 Ind Cas 193, *Wuthukumaraswami Pillai v Subbaraya Pillai* (Article 124)
- (1937) A I R 1937 Nag 84 (85) 168 Ind Cas 351 I L R 1937 Nag 151, *Mothram Danaji v Shenu* (Do — Suit for declaration of maharajatan)
- (1937) A I R 1937 Oudh 373 (377) 168 Ind Cas 593, *Chandrika Bakhsh Singh v Bhola Singh* (Do — Suit for possession of office of shebait)
- (1905) 27 All 513 (516) 1905 All W N 69 2 All L Jour 304 *Jadu Nath Prasad v Girdhar Das* (Article 124 or Article 144)
- (1915) A I R 1915 Lah 153 (160) 29 Ind Cas 789, *Hira v Mt Ghathu* (Article 125)
- (1922) A I R 1922 Lah 98 (100) 2 Lah 5 58 Ind Cas 833 *Mt Amir Begum v Hussain Bibi* (Do)
- (1910) 8 Ind Cas 930 (933) 4 Sind L R 161, *Metharam v Rewachand* (Article 127)

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Note 2

- (1934) A I R 1934 P O 109 (112) 148 Ind Cas 796 58 Bom 306 61 Ind App 190 (P O), *Secretary of State v Parashram Madhav Rao* (Article 131)
- (1915) A I R 1915 All 67 (67) 28 Ind Cas 600, *Mohammad Husain v Mohammadi Bibi* (Do)
- (1937) A I R 1937 Mad 303 (307) 173 Ind Cas 307, *Chakrapani Pao v Venkatadri Appa Rao* (Do—Suit for declaration of right to impose toll)
- (1929) ,

Article 120—2 by the mortgagee is governed by

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was held

- (1916) A I P 1000 L Jour 124, *Brij Beha*
- (1924) A I 1 Pratab Dubey v
Sheo
- (1931) A I R 1931 Cal 493 (495) 134 Ind Cas 75, *Rajeshwar Prasad v Rajani Nath* (Article 132)
- (1904) 31 Cal 745 (751), *Upendra Chandra Singh v Mohari Lal Marwari* (Do)
- (1906) 3 Cal L Jour 52 (57, 58), *Matara Gupta v Hem Chandra* (Do)
(Do)
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by his
deceased father when the mortgage is binding on the defendant)
- (1934) A I R 1934 Mad 1 (7) 149 Ind Cas 379 57 Mad 219, *Rama Raya* (Article 132)
p 45 (P C) *Barhamdeo*
- (1913) 2
P
- (1897) 16 J. Lun Re No 33 page 157, *Mt Fazel Nishan v Muhammadji* (Do)
- (1899) A I R 1899 Soam Lal
recation of
- (1 d Husain
- (1899) P O

was not upon immovable property and that therefore it was governed by Article 132 and not by Article 120 or by Article 65)

- (1938) A I R 1938 Pat 16 (16) 173 Ind Cas 64 *Ramsan Ali v Lal Singh* (Article 132)
- (1919) A I R 1919 Lah 12 (13) 1 Lah 66 51 Ind Cas 755, *Shadi v Abdur Rahman* (Article 134)
- (1931) A I R 1931 All 225 (227) 124 Ind Cas 19, *Mt Basanti Bibi v Babu Lal Poddar* (Article 141)
- (1915) A I R 1915 Cal 727 (728) 26 Ind Cas 368, *Anat Ullah v. Sadat ullah* (Article 142)
- (1912) 14 Ind
(Do)
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In *Mohamad Riasat Ali v Hasin Banu*,³ their Lordships of the Privy Council observed "Article 120 provides the period of limitation of six years for a suit for which no period of limitation is provided elsewhere in the schedule Their Lordships think this Article should be applied, unless it is clear that the suit is within some other Article" The function of a residuary Article such as this is to provide for cases which could not be covered by the exact words used in both the first and the third columns of the specific Articles In *Seet Kutti v Patumma*,⁴ Mr. Justice Sheshagiri Aiyar observed as follows

"The function of the residuary Article is to provide for cases which could not be covered by the exact words used in both the columns of an Article After all, no Legislature and the

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- (1910) 6 Ind Cas 841 (842) (All), *Muktabal Singh v Haran Singh* (Article 144—Gift by one member of joint Hindu family without consent of others—Suit by other members for declaration that they are owners in possession of entire family property—Gift need not be set aside—Suit is governed by Article 144 and not by Article 91 or Article 120)
- (1918) A I R 1918 Mad 464 (468) 41 Mad 124 42 Ind Cas 866, *Chidambaramatha Thambiran v Nallanra Mudaliar* (Article 144)
- (1915) A I R 1915 Mad 539 (539) 25 Ind Cas 692 *Venkataratnam v Venkataratnam* (Do)
- (1921) A I R 1921 Cal 405 (406) 69 Ind Cas 910 *Harish Chandra Shaha v Prannath Chakravarthi* (Do—Suit for declaration of right of public highway and for removal of obstruction)
- (1906) 33 Cal 831 (831, 839) 4 Cal L Jour 162, *Bhajahari Saha v Behary Lal* (Article 144)
- (1910) 6 Ind Cas 942 (943) 1910 Pun Re No 8 (Rev) *Har Lal v Gohri* (Article 144—Suit for dispossession of the vendee of occupancy rights under Section 6 of the Punjab Tenancy Act, when the sale is made without the landlord's written consent)
- (1894) 1894 Pun Re No 56 page 181, *Bhasi Asa Ram v Altar Singh* (Article 144)
- (1932) A I R 1932 Lah 47 (48) 134 Ind Cas 119 *Abdul Rahman v Mt Chhajji* (Article 144)
- (1936) A I R 1936 Oudh 168 (169) 160 Ind Cas 920 *Udas Bhan Singh v Sheoambar Saha* (Article 144—Mortgage with possession—Mortgagee's claim for equity of redemption is governed by Article 144 and not by Article 120)
- (1933) A I R 1933 Bom 26 (29 32) 141 Ind Cas 103, *Narayan Balwant v Dattaraya Ramchandra* (Article 144)
- (1937) A I R 1937 Oudh 145 (148) 162 Ind Cas 225 12 Luck 161, *Tulsia Ram v Mt Muna Kuar* (Article 144)
- (1894) 8 O P L R 49 (52), *Thakur Beharilal v Ramcharan* (Article 144)
- (1910) 6 Ind Cas 579 (580) 34 Mad 74, *Syed Noonsheen Saib v Syed Ibrahim Saib* (Article 144)
- (1907) 6 Cal L Jour 535 (537) *Lala Govind Prasad v Chairman of Patna Municipality* (Article 145)
- (1930) A I R 1930 Lah 913 (914) 129 Ind Cas 199, *Gurbaksh Singh v Kharasit Ram* (Do)
- (1922) A I R 1922 Cal 189 (189, 190) 64 Ind Cas 75, *Prasanna Kumar Mandal v Nilambar Mandal* (Article 145)
- 3 (1894) 21 Cal 157 (163) 20 Ind App 155 R & J s No 133 6 Sar 374 17 Ind Jur 484 (P C)
- 4 (1919) A I R 1919 Mad 972 (983) 40 Mad 1040 43 Ind Cas 31 (F B) (Per Sheshagiri Aiyar, J)
[See also (1918) A I R 1918 Mad 548 (551) 41 Ind Cas 531, *Doraisamy v Vauthylinga*]

Article 120
Notes
2—3

ingenuity of no draftsman can provide in terms against all possible contingencies, and that is the reason why residuary Articles are inserted in the Limitation Act "

3. Starting point.—Time, under this Article, runs from the date when the "right to sue" accrues. The words "right to sue" mean a right to seek relief, that is, a right to prosecute by law, to obtain relief by means of legal procedure,¹ in other words, a right to sue accrues when a *cause of action* arises.² In order that there may accrue a right to sue, there must, first, have come into existence the substantive right asserted in the suit, and secondly, such right must have been infringed or threatened to be infringed. The right and its infringement or threat of infringement constitute the cause of action and give rise to a right to sue. In *Mt Bolo v Mt Koklan*,³ their Lordships of the Privy Council observed that "there can be no 'right to sue' until there is an accrual of the right asserted in the suit and its infringement, or at least clear and unequivocal threat to infringe that right by the defendant against whom the suit is instituted."

See also the undermentioned cases.⁴

The question as to when a right to sue arises must depend largely upon the circumstances of the particular case.⁵ And the

Note 3

- 1 (1914) A I R 1914 Mad 709 (709) 38 Mad 1064 24 Ind Cas 369, *Venkata chala Reddiar v Collector of Trichinopoly*
- 2 (1935) A I R 1935 Bom 213 (215) 156 Ind Cas 531 *Percy F Fisher v Ardeshr Hormasji*
(1902) 26 Bom 597 (599, 600) 4 Bom L R 325, *Gopal v Ramchandra*
(1922) A I R 1922 Oudh 109 (III) 65 Ind Cas 452, *Mid Hamidullah Khan v Mt Fakhrizahan Begam*
(1930) A I R 1930 Mad 173 (173) 120 Ind Cas 890 *Basarayya v Bapanna Rao*
- 3 (1930) A I R 1930 P C 270 (272) 11 Lah 657 57 Ind App 325 127 Ind Cas 787 (P C)
- 4 (1931) A I R 1931 P C 9 (12) 8 Rang 645 58 Ind App 1 130 Ind Cas 609 (P C), *Annamalai Chettiar v Muthukaruppan Chettiar*
(1931) A I R 1931 Bom 500 (502) 134 Ind Cas 1221, *Sadasuappa Gangappa v Sangappa Channurappa*
(1936) A I R 1936 Pat 323 (332) 15 Pat 151 163 Ind Cas 940 *Kankya Lal Misur v Mt Hira Bibi*
(1932) A I R 1932 Mad 589 (591) 137 Ind Cas 707, *Kandasamy Pillai v Munisami Mudaliar*
- 5 (1916) A I R 1916 Cal 751 (754) 31 Ind Cas 242 *Brojendra Kishore Roy v Bharat Chandra Roy*
(1922) A I R 1922 Cal 8 (10) 65 Ind Cas 8, *Joynarain Sen Ukil v Brakanta Roy*
(1931) A I R 1931 Lah 238 (239) 12 Lah 13 131 Ind Cas 298 *Tulsi Ram v Badhawa* (It depends upon particular class of case to which Article 120 is sought to be applied.)
(1933) A I R 1933 Lah 270 (270) 143 Ind Cas 725 *Mohammad Umar v Mohammad Ibrahim* (Starting point depends on facts and relief sought in each case.)
(1935) A I R 1935 Bom 213 (215) 156 Ind Cas 531 *Percy F Fisher v Ardeshr Hormasji* (The interpretation of the words 'right to sue', as laid down by the Privy Council must depend upon the particular class of case to which the Article is sought to be applied. In order that

words 'right to sue' must mean the right to bring the particular suit with reference to which the plea of limitation is raised⁶

Where the right asserted in the suit itself comes into existence within six years of the date of the suit, it is obvious that its infringement, if any, must be within six years, and consequently no question of limitation will arise⁷ No question of limitation also arises where the wrong giving rise to a cause of action is a continuing one (see Notes to Section 23)

Generally, speaking, a *knowledge* of the facts giving rise to the cause of action is not necessary to start time running. But if the nature of the right imports, as a necessary condition, knowledge of certain facts, then the right to sue cannot be said to arise until the plaintiff has the necessary knowledge⁸

The expression 'right to sue' accrues does not always mean 'the right to sue first accrues'. In suits such as for partition, administration and the like which do not necessarily arise out of any wrong the right to sue accrues day by day so long as the right to the property exists. The case may be different where the suit is based on a wrong⁹

there may be an infringement or threatened infringement of the plaintiff's right there need not necessarily be a demand and refusal in every case)

(1933) A I R 1933 Bom 276 (279-280) 145 Ind Cas 190 *Sharadha Peeth*

injunction restraining the defendants from recovering possession and from asserting their claim. Held that the plaintiff having claimed in his own right time commenced to run from his installation to the office)

(1922) A I R 1922 Bom 438 (440) 75 Ind Cas 617 *Vithal Dhondji v Suryaji Ramchandra* (Devasthan lands given to defendants under a sanad for the services which they rendered to the temple—Defendants alienating these lands—Suit by the manager of Devasthan for a declaration that property was Devasthan property and for possession of the lands—Held the cause of action arose within the meaning of Article 120 only when the defendant attempted to alienate the lands and not by the mere grant of the sanad. But the Article did not apply in the case as plaintiff claimed possession)

7 (1914) A I R 1914 Cal 29 (32) 20 Ind Cas 910 *Barhamdat Missir v Krishna Sahay* (Rent free lands held by Revenue Court to be liable for rent—Suit for assessment of fair rent within six years thereof not barred—Cause of action must have arisen only after decree of Revenue Court)

Article 120
Note 4

4. Suit relating to trust and management of trust property. — This Article will apply to a suit relating to trust property only where Section 10 *ante* does not apply nor any other specific Article in the Schedule. This Article has been held to apply in the following classes of cases —

Suit for damages

A suit for damages for breach of trust in the management of the trust property will be governed by this Article, time running from the date of the breach and not from the date of the loss consequent on the breach¹

A suit against a trustee or ex trustee to make good the loss sustained by the trust by reason of his omission to collect moneys due to the trust would be governed by this Article, if a sole trustee of a public trust commits a breach of trust, the loss cannot be made good without voluntary action on the trustee's part, until there is a new trustee. The right to sue in such a case would arise only when a new trustee is appointed. If there are other trustees who are themselves not liable, time will start running immediately the loss is occasioned because they will have in themselves the right to sue their co trustees for the loss occasioned by them. If the co trustees have also made themselves liable for the breach of trust, the position would be the same as in the case of a defaulting sole trustee. In the case of a private trust, the *cestui que trust* would ordinarily have the right to sue from the date of the breach of the trust. It will, therefore, depend on the circumstances when time will begin to run^{1a}

Suit to enforce trust

It was held in the undermentioned case,² following the decision in *Uttam Chandra Daw v Raj Krishna Dalal*,³ that a suit to enforce a trust would be governed by this Article. In *Chhatra Kumari Devi v Mohan Bikram Shah*,⁴ it was held by their Lordships of the Privy Council that a suit by a beneficiary under a trust to enforce the trust by compelling the trustee to convey the trust properties to him would be governed by this Article.

Suit to enforce right to manage trust property

In *Balantrao v Puranmal*,⁵ the plaintiff sued to enforce his own personal right to manage an endowment dedicated to religious purposes. There was no question whether or not the property was

Note 4

- 1 (1936) A I R 1936 Bom 80 (34) 160 Ind Cas 612, *Shrinbas Dinshaw v Narsiji Pestonji*
- 1a (1938) A I R 1938 Mad 353 (356) 174 Ind Cas 459 (FB) *Subbiah Thevar v Samiappa Mudaliar*
- 2 (1927) A I R 1927 Mad 1135 (1136) 101 Ind Cas 89 *Chinnahannu Padayachi v Paramasiva Mudaliar*
- 3 (1920) A I R 1920 Cal 363 (366) 47 Cal 877 55 Ind Cas 157 (FB)
- 4 (1931) A I R 1931 P C 196 (202) 10 Pat 851 58 Ind App 279 133 Ind Cas 705 (P C)
- 5 (1884) 6 All I (10) 10 Ind App 90 13 Cal L R 39 4 Sar 435 7 Ind Jur 329 (P C)

being applied to such purposes by the manager in possession. The Privy Council observed as follows

Article 120
Note 4

The plaintiff is suing only for his own personal right to manage or in some way to control the management of the endowment. The consequence is that the case does not fall within Section 10 of the Limitation Act. If it does not, then it must be within one of the Articles of the Schedule. Their Lordships do not see any reason to differ from the High Court in thinking that it may fall within Article 123 or Article 145 (of the Act of 1871), but they desire to express no opinion upon that point, and there is some difficulty in ascertaining the exact nature of the suit, owing to the obscurity with which the plaintiff's title is stated in the plaint. But if it does not fall within either of those Articles, then the case is caught by the general Article 118 (now Article 120), which provides for every case that is not previously provided for in the Act.

Where the members of devasthanam committee appointed under Act 20 of 1863 sued for a declaration that the suit temple was subject to the control of the committee and for an injunction directing the defendant to produce for their inspection all the temple properties and accounts it was held that the suit was governed by this Article and not by Article 131 or Article 144.⁶ See also the undermentioned case.^{6a}

Suit for accounts

Under the Act of 1877 there was a conflict of opinion as to whether a suit for accounts against an express trustee fell within Section 10 of that Act.⁷ It was held in some cases that this Article applied to such suits.⁸ Under the present Act such a suit is expressly included in Section 10 and will not be barred.⁹

A suit for accounts against a person not holding under an express trust but who renders himself liable in equity to account for a particular fund would be governed by this Article.¹⁰ The cause of

6 (1917) A I R 1917 Mad 407 (407) 35 Ind Cas 646 *Siddalinga Swamulu v Ramachandra Charlu*

6a (1918) A I R 1918 Lah 826 (828) 1918 Pun Re No 11 41 Ind Cas 636 *Bahag Mal v Bhagwan Das* (Suit for declaration of plaintiff's right to manage Dharmasala)

7 See Note 23 to Section 10 ante

8 (1920) A I R 1920 Cal 558 (560) 57 Ind Cas 605 *Dhanpat Singh v Mohesh Nath Tewari*

(1880) 5 Cal 910 (914) 6 Cal L R 195 *Saroda Pershad Chattopadhyaya v Brojo Nath Bhattacharjee*

9 See Note 23 to Section 10 ante

10 (1931) A I R 1931 P C 9 (12) 8 Rang 645 53 Ind App 1 130 Ind Cas 603 (PC) *Annamalai Chettiar v Muthukaruppan Chettiar*

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Note 4

action for such a suit would arise when an account is demanded and refused¹¹

Suit by or against an executor or administrator

A suit by an executor for recovery of monies due to him from the estate¹² or against an executor for accounts¹³ or against an executor or administrator to recover monies misappropriated by him¹⁴ will be governed by this Article. In the last case the cause of action will arise on the termination of the administration and not on the date of the misappropriation¹⁵

Suit by trustee for monies due to him

Where the legal representatives of a deceased *shebait* brought a suit to recover the amounts which the *shebait* was compelled to spend out of his private funds in protecting the *debutter* estate and performing his obligations as *shebait*, it was held by the Privy Council that the period of limitation for the suit was six years from the death of the *shebait*¹⁶. See also the undermentioned cases¹⁷ to the same effect

Suit impeaching alienation of trust property

A suit for declaration that an alienation of trust property is invalid is not one for recovery of possession and would be governed not by Article 134, but by this Article¹⁸. A suit for ejectment against the

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- (1935) A I R 1935 Cal 511 (518) 62 Cal 120 157 Ind Cas 936 *In Re Elisa Martin* (Person dealing with fund as executor — Suit against for accounts)
- (1885) 7 All 25 (29) 1884 All W N 219 *Muhammad Habibullah Khan v Safdar Hussain Khan* (Suit for possession of his share of the property and for an account and for the profits)
- (1924) A I R 1924 All 884 (887) 47 All 17 84 Ind Cas 631 *Behari Lal v Shienarain*
- 11 (1931) A I R 1931 P O 9 (12) 8 Rang 645 58 Ind App 1 130 Ind Cas 609 (P C) *Annammal Chettier v Muthukaruppan Chettier*
- 12 (1916) A I R 1916 Mad 720 (723) 28 Ind Cas 221 89 Mad 365 *Chidamba bara Mudaliar v Krishnasamy Pillas*
- 13 (1909) 1 Ind Cas 289 (302) (Cal) *Baroda Prasad Banerji v Gajendra Nath*
- 14 (1910) 5 Ind Cas 832 (833) (Mad) *Nagarathnammal v Namaswamy Mudali*
- 15 (1910) 5 Ind Cas 832 (833) (Mad) *Nagarathnammal v Namaswamy Mudali*
- 16 (1910) 5 Ind Cas 404 (405) 37 Cal 229 37 Ind App 27 (P C) *Peary Mohan v Norendra Nath*
- 17 (1916) A I R 1916 Mad 57 (59 60) 38 Mad 260 28 Ind Cas 290 *Kahba Mavulviya v Saran Bivi Sasla Ammal* (37 Cal 229 (P C) Followed—Cause of action will arise when he ceases to be trustee—It is doubtful if cause of action will arise when he gives up possession)
- (1901) 5 Cal W N 273 (277) *Raja Peary Mohan Mukerjee v Narandra Krishna Mukerjee* (Do)
- 18 (1914) A I R 1914 Mad 708 (710) 24 Ind Cas 369 38 Mad 1064 *Prasanna Venkatachala v Collector of Trichinopoly*
- (1923) A I R 1923 Pat 475 (479) 2 Pat 391 74 Ind Cas 403 *Muhammud Fahmul v Jagat Ballab Ghosh* (Waqf property—Wrongful alienation by mutwalli of such property — Beneficiary in such property bringing a declaratory suit that the alienation is void—Such a suit is governed by Article 120)

mortgagees of properties dedicated to an endowment on the ground that such mortgage was invalid is governed by this Article. Such a suit is not one for possession.¹⁸ See also the undermentioned case.^{19a}

Article 120
Notes
4—6

Suit for recovery of trust property

A suit by a trustee against the legal representatives of his co-trustee for recovery of trust property consisting of a sum of money would be governed by this Article.²⁰ A suit for the recovery of certain Government Promissory Notes conveyed on an invalid trust would also be governed by this Article. The cause of action for the latter suit would arise on the conveyance and not when the trustee refuses to re-convey the property.²¹ A suit by a trustee to recover from a former trustee a certain sum of money which he had taken from the temple funds would be governed by this Article and not by Section 10 or Article 61.²²

See also the undermentioned case.²³

5. Suit for pre-emption.—A suit for pre-emption not falling within Article 10 *ante* would be governed by this Article. See generally the Notes to Article 10 and the undermentioned cases.¹

6. Claim suit.—A claim suit, not governed by Article 11 or Article 13, may be governed by this Article.¹ A claim by the

19 (1936) A I R 1936 Lah 784 (785) 165 Ind Cas 48, *Dwarika Das v Rishi Ram*

(1919) A I R 1919 Lah 12 (12) 51 Ind Cas 755 1 Lah 60 *Shadi v Abdur Rahman*

-ja Datta v Ekadashia
by manager of Hindu

Jamnadas Gordan Das

21 (1896) 20 Bom 511 (516) *Cowsaj N Pochkhanawalla v R D Setna*

22 (1934) A I R 1934 Mad 542 (543) 152 Ind Cas 345 *Krishna Kudra v Sri Venkatramana Temple*

23 (1910) 7 Ind Cas 475 (476) 38 Cal 284 *Bali Panda v Jadu Mony Santra*
(Suit to remove idols)

Note 5

1 (1903) 7 Oudh Cas 1 (3) *Dalip Singh v Sheo Nandan*

(1936) A I R 1936 Lah 503 (504) 164 Ind Cas 366 *Jahan Khan v Ditta*
(Where one pre-emptor files a suit against another claiming that he has a superior right of pre-emption and that a decree obtained by such other pre-emptor is based on fraud it is Article 120 that is applicable)

(1907) 1907 Pun Re No 30 page 121 1908 Pun L R No 19 1907 Pun W R No 145 *Bahadur v Alia*

(1894) 1894 Pun Re No 37 page 165 *Kamar ud din v Bhaktavar* (Where

Note 6

1 (1921) A I R 1921 Mad 163 (167) 44 Mad 902 70 Ind Cas 439 (F B),
Arunachalam Chetty v Perasams Serras

Article 120

Note 4

action for such a suit would arise when an account is demanded and refused ¹¹

Suit by or against an executor or administrator

A suit by an executor for recovery of monies due to him from the estate,¹² or against an executor for accounts¹³ or against an executor or administrator to recover monies misappropriated by him¹⁴ will be governed by this Article. In the last case the cause of action will arise on the termination of the administration and not on the date of the misappropriation¹⁵

Suit by trustee for monies due to him

Where the legal representatives of a deceased *shebait* brought a suit to recover the amounts which the *shebait* was compelled to spend out of his private funds in protecting the *debutter* estate and performing his obligations as *shebait*, it was held by the Privy Council that the period of limitation for the suit was six years from the death of the *shebait*¹⁶. See also the undermentioned cases¹⁷ to the same effect

Suit impeaching alienation of trust property

A suit for declaration that an alienation of trust property is invalid is not one for recovery of possession and would be governed, not by Article 134, but by this Article¹⁸. A suit for ejectment against the

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- (1935) A I R 1935 Cal 511 (518) 62 Cal 120 157 Ind Cas 936 *In Re Elisa Martin* (Person dealing with fund as executor — Suit against for accounts)
- (1885) 7 All 25 (29) 1884 All W N 219 *Muhammad Habibullah Khan v Safdar Hussain Khan* (Suit for possession of his share of the property and for an account and for the profits)
- (1924) A I R 1924 All 884 (887) 47 All 17 84 Ind Cas 631 *Behari Lal v Shivnarain*
- 11 (1931) A I R 1931 P C 9 (12) 8 Rang 645 58 Ind App 1 130 Ind Cas 609 (P C), *Annamalai Chettier v. Muthukaruppan Chettier*
- 12 (1916) A I R 1916 Mad 720 (723) 28 Ind Cas 221 89 Mad 365 *Chidambaram Mudaliar v Krishnasamy Pillai*
- 13 (1909) 1 Ind Cas 289 (302) (Cal) *Baroda Prasad Banerji v Cajendra Nath*
- 14 (1910) 5 Ind Cas 832 (833) (Mad) *Nagarathnammal v Namaswamy Mudali*
- 15 (1910) 5 Ind Cas 832 (833) (Mad) *Nagarathnammal v Namaswamy Mudali*
- 16 (1910) 5 Ind Cas 404 (405) 37 Cal 229 37 Ind App 27 (P C) *Peary Mohan v Norendra Nath*
- 17 (1916) A I R 1916 Mad 57 (59 60) 38 Mad 260 28 Ind Cas 290 *Kaliba Maruluvja v Saran Bhai Saita Ammal* (37 Cal 229 (P C) Followed—Cause of action will arise when he ceases to be trustee—It is doubtful if cause of action will arise when he gives up possession)
- (1901) 5 Cal W N 278 (277) *Raja Peary Mohan Mukerjee v Narandra Krishna Mukerjee* (Do)
- 18 (1914) A I R 1914 Mad 708 (710) 24 Ind Cas 369 38 Mad 1064 *Prasanna Venkatachala v Collector of Trichinopoly*
- (1923) A I R 1923 Pat 475 (479) 2 Pat 391 74 Ind Cas 403 *Muhammad Fahmul v Jagat Ballab Ghosh* (Waqf property—Wrongful alienation by mutwalli of such property — Beneficiary in such property bringing a declaratory suit that the alienation is void—Such a suit is governed by Article 120)

mortgagees of properties dedicated to an endowment on the ground that such mortgage was invalid is governed by this Article. Such a suit is not one for possession.¹⁹ See also the undermentioned case.^{19a}

Article 120
Notes
4—6

Suit for recovery of trust property

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5. Suit for pre-emption.—A suit for pre-emption not falling within Article 10 *ante* would be governed by this Article. See generally the Notes to Article 10 and the undermentioned cases.¹

6. Claim suit.—A claim suit not governed by Article 11 or Article 13 may be governed by this Article.¹ A claim by the

19 (1936) A I R 1936 Lah 784 (785) 165 Ind Cas 49, *Duarla Das v Rith Ram*

(1919) A I R 1919 Lah 12 (12) 51 Ind Cas 755 1 Lah 66 *Shadi v Abdur Rahman*

(1899) 1899 Pun Re No 8 p 41 *Narain Singh v Ishar Singh* (Suit by a person interested in an endowed property for dispossession of an assign of the last manager is not a suit for possession)

(1904) 1904 Pun Re No 9 p 42 1905 Pun L R No 45, *Asa Ram v Paros Ram ja Datta v Ekadaha* by manager of Hindu

Jamnadas Gordan Das

21 (1896) 20 Bom 511 (516) *Cowasji N Pochkhanawalla v R D Setna*

22 (1934) A I R 1934 Mad 542 (543) 152 Ind Cas 845 *Krishna Kudia v Sri Venkatramana Temple*

23 (1910) 7 Ind Cas 475 (476) 33 Cal 234 *Bali Panda v Jadu Mony Santra* (Suit to remove idols)

Note 5

1 (1903) 7 Oudh Cas 1 (3) *Dalip Singh v Sheo Nandan*

(1936) A I R 1936 Lah 503 (504) 164 Ind Cas 366 *Jahan Khan v Ditta* (Where one pre-emptor files a suit against another claiming that he has a superior right of pre-emption and that a decree obtained by such other pre-emptor is based on fraud it is Article 120 that is applicable)

(1907) 1907 Pun Re No 30 page 121 1903 Pun L R No 19 1907 Pun W R No 145 *Bahadur v Aha*

(1894) 1894 Pun Re No 37 page 105 *Kamar ud din v Bhaktavar* (Where

Note 6

1 (1921) A I R 1921 Mad 163 (167) 44 Mad 902 70 Ind Cas 439 (F B), *Arunachalam Chetti v Periasami Serrai*

Article 120
Notes
6—8

Official Receiver after attachment before judgment of the insolvent's property is not one under Order 21 Rules 60, 61 or 63 of the Civil Procedure Code. A suit by the Official Receiver to set aside an order against him on such claim is not governed by Article 11 or Article 13, but is governed by this Article²

7. Suit to set aside sale for arrears of public demand.—A suit to set aside a sale for arrears of public demand would be governed by Article 12 where the sale is not void, but would be governed by this Article if it is void¹

8. Suit questioning official act or order.—Article 14 provides for suits to *set aside* any act or order of an officer of Government in his official capacity. It has been seen in the Notes to that Article that where it is not necessary for the plaintiff to set aside an act or order as, for example, where the act or order does not affect his rights or where it is a nullity, that Article does not apply. Therefore, a suit in which the validity of an act or order of an officer of Government is questioned would not be governed by Article 14, but would be governed by this Article if the case does not fall under any other specific Article. Where a private owner of property claims that he is entitled to a particular property and the Government through its officers assert a claim thereto and the plaintiff sues for a declaration of his title to such property, the suit cannot be considered to be one falling under Article 14 by reason of the existence of the assertion of title by the officers of the Government. The case would fall within this Article¹. Where the plaintiff sued for a declaration that the defendants were not permanent tenants of a field and the order of the Revenue Officer that the defendants were such tenants was incorrect, it was held that the order was one which the plaintiff was not bound to set aside, that therefore Article 14 did not apply and that the case fell within this Article². *D* held occupancy lands on the borders of a certain creek. In 1911, alleging that the land

(1883) 13 Cal L R 139 (141) *Brojo Mohun Bhutta v Radhika Prosunnoo Chunder*

(1932) A I R 1932 Lah 516 (518) 138 Ind Cas 412, *Jagiri Lal v Tara Chand*

(1933) A I R 1933 Lah 449 (450) 144 Ind Cas 378, *Qasim Ali v Kalyandas*

(1934) A I R 1934 Pat 580 (581) 152 Ind Cas 297, *Mt Dabhal Kumares Jayashwalin v Mulchand Maruarsi*

See also Note 19 to Article 11, *ante*

2 (1922) A I R 1922 Mad 189 (191) 45 Mad 70 69 Ind Cas 326, *Official Receiver, South Malabar v Veeraraghavan Pillai*

Note 7

1 (1907) 34 Cal 241 (244) 5 Cal L Jour 335, *Sham Lal Mandal v Nilmani Das*

(1907) 5 Cal L Jour 686 (686) *Sookan Sahu v Lala Badri Narain*

(1897) 1 Cal W N 516 (517) *Sarada Charan v Kista Mohun*

Note 8

1 (1927) A I R 1927 Nag 10 (12) 22 Nag L R 147 98 Ind Cas 22, *Secretary of State v Bagmal Krishandayal*

2 (1927) A I R 1927 Nag 159 (160) 100 Ind Cas 4, *Bala v Girdhar*

in dispute was alluvial, he applied to the Collector under Section 63 of the Bombay Land Revenue Code, 1874 for grant of the occupancy of the land to him. The Collector held that the land was not alluvial and disposed of the same to another person under Section 37 of that Code. *D* thereupon filed a suit for a declaration that the order was null and void. It was held that the plaintiff was not bound to set aside the said order, that he could ignore it, and that consequently this Article and not Article 14 applied to the case.³ See also Notes to Article 14 *ante*.

Article 120
Notes
8—10

9. Suit for compensation for land acquired. — A suit for compensation for land acquired by Government where such compensation was not *determined*, is not governed by Article 17, but is governed by this Article.¹

A suit for damages against the Collector for refusing to make an award for compensation on acquisition of land is not governed by Article 18, but is governed by this Article.²

This Article applies also to a suit to recover from the Government compensation under the Land Acquisition (Mines) Act, 1885³ and to a suit by a mortgagor against the usufructuary mortgagee claiming a share of the compensation awarded under the Land Acquisition Act.⁴

10 Suit for injunction. — A suit for injunction which is not governed by any of the specific Articles, such as Article 32 or Article 41, would be governed by this Article.¹

- 3 (1931) A I R 1931 Bom 369 (370) 55 Bom 447 134 Ind Cas 716 *Damodar Narayan v Secretary of State*
[See also (1891) 16 Bom 455 (465) *Samaldas Bechar Desai v Secretary of State*]

Note 9

- 1 (1907) 34 Cal 470 (487) 11 Cal W N 356 5 Cal L Jour 609 *Maharajah Sir Rameswar Singh v Secretary of State*
2 (1904) 27 Mad 535 (538) 14 Mad L Jour 173 *Mantharavadi Venkayya v Secretary of State*
3 (1936) A I R 1936 Pat 513 (518) 164 Ind Cas 860 15 Pat 510 *Secretary of State v Lodna Colliery Co Ltd*
4 (1919) A I R 1919 Oudh 26 (26) 22 Oudh Cas 342 54 Ind Cas 535 *Ladhi Prasad v Nizamuddin Khan* (Suit by mortgagor against mortgagee claiming share of compensation awarded under Land Acquisition Act is governed by Article 120 and not by Article 62)

Note 10

- 1 (1890) 18 Mad 445 (446) *Kanakasabai v Muttu*
(1923) A I R 1923 All 452 (453) 76 Ind Cas 535 *Mt Kokla Kunwar v Kahanmal* (Where a person put up beams against the wall of another more than six years before suit a suit for removal of the beams is barred)
(1904) 26 All 391 (393) 1904 All W N 69 *Hanrao v Babulal* (Suit to restrain the lessee from interfering with the lessor's right under a covenant in the lease to enter upon the land demised and to cut and take away certain trees)
(1921) A I R 1921 Lah 242 (243) 60 Ind Cas 20 *Lal Singh v Hira Singh* (Suit for a perpetual injunction directing the defendant to remove certain thatched sheds and to restore the courtyard in front of the plaintiff's house to its original condition would be governed by this Article)

Article 120
Note 10

Illustrative cases

- 1 Where a co proprietor of land diverts the land to a purpose other than one for which it is set apart and such diversion amounts to nuster of the plaintiff, a suit by the latter for an injunction restraining the defendant from so diverting the land would be governed not by Article 32 but by this Article *
- 2 A suit for an injunction directing defendants to remove certain constructions erected by the latter on common land,³ or a suit for removal of an encroachment on reserved land ⁴ or a suit by a zamindar for removal of a structure put up by a mortgagee of occupancy holding without the zamindar's consent ⁵ or a suit by a zamindar for removal of trees planted on waste land by a person having no such right,⁶ or a suit to remove buildings erected on a graveyard,⁷ will be governed by this Article
- 3 A suit for the removal of encroachment on public way and for ousting the defendant from the portion so encroached upon would be governed by this Article ⁸ As to whether the cause of action for such a suit is a continuing wrong within the meaning of Section 23 see Note 13 to Section 23
- 4 A suit for injunction directing the defendant to close certain windows which had been opened by him in a party wall belonging to the plaintiff and the defendant is one governed

(1895) 1895 Bom P J 257, *Vishnu Lazman v Govind Mahadev*

(1919) A I R 1919 Oudh 393 (393) 52 Ind Cas 855 *Badal v Nageshwar Bakhsh Singh* (A suit by the landlord for the removal of trees wrong fully planted by a person is governed by Article 120—The suit must be confined to trees planted within six years immediately preceding its institution)

(1914) A I R 1914 All 631 (532) 25 Ind Cas 185 *Sheo Prasad v Mangar Manhar* (Where defendants opened a door in their wall and used that for trespassing on plaintiff's land it was held that each act of entry constituted a fresh cause of action)

2 (1933) A I R 1933 Lah 705 (709) 14 Lah 267 145 Ind Cas 553 (F B) *Mas tan Singh v Santa Singh*

3 (1934) A I R 1934 Lah 701 (703) 156 Ind Cas 358 *Qarum v Deua Singh*

six years]

4 (1912) 13 Ind Cas 661 (662) (Lah) *Ganda Singh v Nathu Ram*

5 (1911) 12 Ind Cas 108 (108) (All) *Lach Ram v Jangri Ras* (If Article 8^o does not apply then Article 120 would apply)

(1904) A I R 1924 All 814 (814) 78 Ind Cas 849 *Pijari Lall v Bed Ram*

6 (1889) 10 All 634 (635) 1888 All W N 257 *Mushraf Ali v Iftikhar Hus- sain*

7 (1938) A I R 1938 Lah 254 (255) *Mohammad Din v Mohammad Din*

8 (191^o) 15 Ind Cas 285 (286) 1912 Pun Ro No 124 *Achar Singh v Badhawa* (1923) A I R 1928 Lah 792 (792) 110 Ind Cas 517 *Gurdit Singh v Hari Singh*

(1928) A I R 1928 Lah 794 (795) 112 Ind Cas 381 *Man Pirthi v Hansraj*
[See also (1937) A I R 1937 Lah 94 (94) 171 Ind Cas 609 *Meher Chand v Sam Gaman*]

by this Article and time will run from the opening of such windows⁹

Article 120
Notes
10—11

5 A suit to restrain defendant from infringing a trade mark will be governed by this Article and the cause of action would arise on each infringement of the trade mark until the trade mark has become *publici juris*¹⁰

6 A suit for an injunction restraining defendant from discharging rain water on to the roof of the plaintiff's shop through a *parnala* is governed by this Article. The right to sue would arise on each occasion when the defendant discharges water through the *parnala* on to the plaintiff's shop and the plaintiff is entitled to rely upon the last occasion when this was done as the starting point of limitation¹¹

7 The defendant who was a tenant of a house built his own house on the adjoining land and constructed a staircase supported by a pillar driven into the land belonging to the house of which he was the tenant. In 1905 the plaintiff took a permanent lease of the latter house and in 1912 he asked the defendant to pull down the staircase. The latter refused and the plaintiff then brought a suit for a mandatory injunction directing the defendant to remove the staircase. It was held that this Article would apply. It was not definitely stated as to when exactly the cause of action for the suit arose, but their Lordships seem inclined to the view that it arose when the defendant's tenancy terminated¹²

11. Suit for declaration of right as to property attached under the Criminal Procedure Code. — Where property is attached under the Criminal Procedure Code, a suit by a party affected by the attachment to establish his right to the property is governed by this Article¹

9 (1925) A I R 1925 Bom 373 (374) 49 Bom 586 87 Ind Cas 977, *Imambhai Kamruddin v. Rahimbhai Usman Bhai*

10 (1903) 2 Low Bur Rul 113 (114), *Aga Mahmood v. Eduard Peltzer* (Article 40 or Article 36 does not apply.)

11 (1920) A I R 1920 Lah 195 (196) 56 Ind Cas 1003 *Nur Muhammad v. Gaurishankar*

(1929) A I R 1929 Lah 88 (89) 109 Ind Cas 638 *Haru Ram v. Kaliana Ram* (Suit for injunction for removal of a *parnala* is governed for purposes of limitation by Article 120, but the cause of action is continuing and arises from day to day.)

12 (1918) A I R 1918 Bom 178 (179 180) 42 Bom 333 45 Ind Cas 592 *Haru Ram v. Shubhalas*

Note 11

1 (1903) 26 Mad 410 (416), *Raja of Venkatagiri v. Isakapalli Subbiah*

(1933) A I R 1933 Pat 224 (233) 12 Pat 261 149 Ind Cas 561, *Jurawan v. Ramsarekh Singh* (Order passed under Section 146.)

(1925) A I R 1925 Nag 236 (236) 20 Nag L R 195 85 Ind Cas 631, *Yelnath v. Bahia*

(1936) A I R 1936 Oudh 88 (89) 164 Ind Cas 118 12 Luck 371, *Partab Bahadur Singh v. Jagatjit Singh*

Article 120
Notes
11—12

As to whether the order of attachment is a continuing so as to start limitation running every moment of the time which the attachment continues, see Notes 2, 4 and 17 to 23, *ante*

12. Suit for possession of moveable property. — possession of moveable property will, when it is not, any other specific Article, fall under this Article. Thus, declaration that the plaintiff is entitled to an eight anna certain moveable property and for recovery of possession therefrom from the defendant who wrongfully withholds the same,¹ or a suit for a share of money inherited from a particular person,² or a suit by one of the heirs of a deceased Muhammadan to recover his share of the inheritance from his co heirs,³ or a suit for partition of cash and moveables,⁴ is governed by this Article. See also the undermentioned cases⁵

Note 12

1 (1933) A I R 1933 Cal 253 (257) 143 Ind Cas 402, *Swarnamoyee Das v Probodh Chandra*

(1917) A I R 1917 Lah 181 (182) 40 Ind Cas 874 1917 Pun Re No 92 *Mahomed Hamud Ullah Khan v Muhammad Yajid Khan* (Article 62 or Article 49 does not govern suit for share of the cash forming part the estate to be divided between co heirs)

2 (1917) A I R 1917 Mad 244 (246) 82 Ind Cas 83, *Abdul Rahman v Pathummal Bui*

8 (1916) A I R 1916 Mad 1207 (1210) 29 Ind Cas 275, *Marian Beeliammal v Kadir Mira Sahib Taragan*

(1903) 7 Cal W N 155 (157) *Poyran Bibi v Lakhu Khan Begari*

Jur 484 R & J

Hajee Dapu v
 share of wife's
 property)

(1897) 19 All 169 (170) 1897 All W N 34 *Umaradas Ali Khan v Wilayat Ali Khan* (Article 123 does not apply)

4 (1922) A I R 1922 All 525 (525) 64 Ind Cas 974 44 All 244 *Bashirunnissa Bibi v Abdur Rahman*

(1920) A I R 1920 Sind 92 (93) 14 Sind L R 137 63 Ind Cas 685 *Ramdas v Ajkul a Das* (Suit by a person claiming as heir of a deceased person for a share of his property is governed by Article 120 and not by Articles 49 and 123)

5 (1914) A I R 1914 Lah 161 (161) 21 Ind Cas 919 1914 Pun Re No 84 *Joti Parshad v Sant Lal* (Suit for recovery of share of moveables on death of widow of brother)

(1918) A I R 1918 Pat 548 (551) 46 Ind Cas 627 *Radha Kishan v Nau ratan Lal* (Mortgaged property sold in execution of decree—Suit to recover sale proceeds of the property — Suit is one to recover moveable property—Articles 132 and 144 do not apply)

(1908) 10 Bom L R 210 (229 230) *Ganpatrao v Vamanrao* (Where immovable property is converted into money, the money becomes moveable property)

(1915) A I R 1915 Mad 539 (539) 25 Ind Cas 692 *Yenkataramnai v Yen kataramnah*

(1922) A I R 1922 Cal 321 (328) 49 Cal 45 64 Ind Cas 980 *Pramatha Nath Dose v Dhuban Mahan Bose*

[See (1926) A I R 1926 Cal 670 (674) 55 Cal 903 112 Ind Cas 496, *Aurabindo Nath Tagore v Monorama Debi* (Article 49 or Article 120 will apply)]

Where a Hindu family became divided in status and some members sued the others for their share of moveable property, out-standings and collections made by the various members in respect of the properties, it was held that this Article applied to the case and that time ran from the demand of the share by the plaintiff and the refusal by the defendant to give such share.⁶ The cause of action for a reversioner for the recovery of moveable property after the death of the Hindu widow, arises on the date of her death.⁷

13. Suit to recover deposit.—A suit for money deposited under an agreement that it shall be payable *on demand* is specifically provided for by Article 60, *ante*. A suit to recover the deposit not falling under Article 60 would be governed by this Article. Thus a deposit as security for the due performance of a certain act is not one payable on demand. A suit to recover such a deposit would be governed by this Article.¹ See for a fuller discussion Note 7 to Article 60. The right to sue to recover a deposit made as a security for the due performance of the duties of an office would accrue, not from the date of dismissal of the plaintiff from the office, but from the date when the account of charges due against the deposit is made and sent in to him.²

14. Suit for money due by defendant for money received by him.—A suit for money due by defendant for moneys received by him *for the plaintiff's use* is specifically provided for in Article 62. A suit for money paid to the defendant upon an existing consideration which afterwards fails is also specifically provided for by Article 97. Where defendant has received money which he is bound to pay to the plaintiff and the case is not covered by the specific Articles 62 or 97 or by any other Article, this Article will apply to a suit to recover such amount. The following are illustrative cases in which this Article has been held to apply —

- 1 The surplus proceeds of a rent sale were taken by a creditor, but the sale having been set aside subsequently the zamindar, at whose instance the rent sale was held, was made to pay back the whole amount to the purchaser at the rent sale. The zamindar then sued the creditor for refund of the amount taken by him. It was held that Article 62 did not apply but only this Article.¹

6 (1922) A I R 1922 Mad 150 (157) 71 Ind Cas 177 45 Mad 618 (F B) *Yeru kola v Yerukola*

7 (1899) 23 Bom 725 (736) 1 Bom L R 607 26 Ind App 71 3 Cal W N 621 7 Sar 543 (P C) *Ranchordas v Parvati Bai*

(1922) A I R 1922 Cal 321 (328) 64 Ind Cas 950 49 Cal 45 *Pramatha Nath Bose v Bhuvan Mohan Bose*

Note 13

- 1 (1886) 12 Cal 113 (115) *Upendra Lal Mukopadhyaya v Collector of Rayshahye*
(1910) 8 Ind Cas 370 (371) 13 Oudh Cas 286, *Sahawat Ali v Baldeo Sahas*
- 2 (1886) 12 Cal 113 (115), *Upendra Lal Mukopadhyaya v Collector of Rayshahye*

Note 14

- 1 (1928) A I R 1928 Cal 296 (297) 110 Ind Cas 49, *Shiba Koomares Deby v. Dik hi Bala Das*

Article 120
Note 14

- 2 A, a Hindu widow, granted a *mukarrari* lease to X of certain *mouzas*. The *mouzas* were taken up by Government who deposited the compensation money in the Collectorate. A then died and X drew out the money from the Collectorate. The reversioners thereafter sued X for the amount taken by him and it was held that the suit was governed by this Article and not by Articles 62 or any other Article.²
- 3 Plaintiff sued for specific performance of a contract of mortgage with possession. The defendant filed a cross suit for possession of the land (the mortgage being oral). The plaintiff's suit was dismissed and the defendant's suit decreed on the ground that an oral mortgage was invalid. The plaintiff then sued the defendant for the refund of the money advanced on the mortgage. It was held that this Article and not Article 97 applied to the case.³
- 4 A decree holder executed the decree against the judgment-debtor without giving credit to the amounts received by him from the defendant and the defendant's house was sold. The decree-holder realized amounts far more than were due to him. It was held that a suit by the judgment debtor for refund of the excess realized by the decree holder was governed not by Article 97 but by this Article.⁴
- 5 The defendant was wrongly paid by order of Court a sum of money legally belonging to the plaintiff. In a suit by the plaintiff for a refund of the sum so paid it was held that this Article and not Article 29 applied to the case.⁵
- 6 A debt due to a judgment debtor was attached by his decree holder and when the debtor paid the money into Court it was paid out to the attaching creditor. A third person who claimed to be an assignee of the debt before its attachment by the decree holder sued the latter for recovery of the money. It was held that this Article or Article 62 applied to the case.⁶

2 (1880) 5 Cal 597 (601) 5 Cal L R 45 *Nund Lal Bose v Meer Abou Mahomed*

[See also (1892) 15 Mad 382 (383) *Krishnan v Perachan*]

3 (1925) A I R 1925 Rang 373 (374) 92 Ind Cas 736 *Maung Po Kin v Maung Po Oh* (A advanced money to B—B purported to hand over a piece of land to A—The agreement between them was that if B failed to repay the said sum within three years the land would be conveyed to A—The agreement was oral—B failed to pay and A brought a suit for specific performance of the agreement—B filed a cross suit in which he claimed the possession of the land—B

4 (1933) A I R 1933 Lab 112 (112) 140 Ind Cas 472 *Karam Elahi v Har Ram*

5 (1898) 11 Mad 345 (355), *Rupa Bai v Adummulam*

(1917) A I R 1917 All 276 (278 279) 39 Ind Cas 532 39 All 322, *Ram Narain v Dny Bankey Lal*

5a (1914) A I R 1914 Mad 126 (129) 22 Ind Cas 870 38 Mad 972 (F B), *Yellammai v Ayyappa Naick*

See also Notes 26 and 45 *infra*, and the following cases ⁶

Article 120
Note 14

6 (1912)

(1917) A I R 1917 Mad 948 (949) 40 Mad 291 32 Ind Cas 893, *Subba Rao v Rama Rao* (Suit by co-sharer for share of profits received by defendant—Article 120 governs suit)

(1900) 27 Cal 180 (184) *Kamala Kant Sen v Abul Barkat* (Sale of mortgaged property for arrears of Government revenue—Suit to recover mortgage amount from surplus sale proceeds—Article 182 will apply, if not Article 120)

(1890) 13 Mad 437 (441, 442), *Narayana v Narayana* (Suit for restitution not falling within Section 144, Civil Procedure Code)

(1935) A I R 1935 Pat 42 (43), *Soma Singh v Jas Gobind Pandey* (Money paid to person apparently entitled—Suit by person having interest in land for moneys so paid)

(1894) 10 Cal 860 (866) 11 Ind App 59 4 Sar 548 8 Ind Jur 322 (P C), *Gurudas Pyne v Ram Narain Sahu* (Suit to enforce an equitable claim in respect of the sale proceeds of moveables wrongfully converted by a deceased person, against whom a decree had been obtained, such proceeds being held by the defendant as agent of the representative of the deceased)

(1914) A I R 1914 All 338 (339) 36 All 555 25 Ind Cas 943, *Municipal Board of Ghasipur v Deoks Nandan Prasad* (Suit for refund of octros taken by Municipality and refused to be returned)

made liable for his joint and jointed, the universal agent of the deceased, brought suit for the amount Article 120 governs such suit)

(1935) A I R 1935 Pat 159 (160) 156 Ind Cas 887, *Narasim Pande v Mathura Nath Pandey* (A member of a Hindu family had assigned to him a mortgage bond by the *karta* of the family at the partition

version by the *karta* or a case where having held the money for many years from the date of the partition, he must be said to hold it in trust for the plaintiff in which event Article 120 would apply and not Article 62)

(1878) 2 Cal L R 354 (355), *Kalichurn Dutt v Jagesh Chunder Dutt* (A got a decree against B for rent at an enhanced rate on the 29th of June 1863 which decree was affirmed both in regular and special appeals, but was reversed by the Privy Council on the 5th May 1878 Between the two dates above mentioned, A got 16 other decrees for

120)

(1906) 1906 Pun Re No 83 page 307 1907 Pun L R No 89 1906 Pun W R No 126, *Dost Muhammad Khan v Sohan Singh*

Article 120
Notes 15

15. Suit for accounts. — A suit for accounts which is not governed by any other specific Article is governed by this Article¹ Thus, a suit for accounts not covered by Article 64,² or one between principal and agent not governed by Article 89,³ or by a partner against other partners not governed by Article 106,⁴ would be governed by this Article. A suit for accounts by a member of a joint family against the manager thereof,⁵ or by one co-sharer against another who has received the profits of the common property,⁶ or by

- (1888) 1888 Pun Re No 59 *Aashi Ram v Secretary of State* (Suit for money awarded by Magistrate to Government by order under Criminal Procedure Code)
- (1933) A I R 1933 Mad 524 (525) 143 Ind Cas 496 *District Board of Ramnad v Mahomed Ibrahim Sahib* (Subscription collected by defendant for construction of bridge—Suit for recovery)
- (1921) A I R 1921 Lah 196 (197) 79 Ind Cas 294 *Mahomed Ibrahim v Mahomed Ismail* (Suit by co-mortgagee for his share of mortgage money realised by defendants)
- (1937) A I R 1937 Mad 787 (789) *Secretary of State v Lohanatha Behara* (Money deposited in treasury by order of Court and held by the Collector as stake holder—Suit by person entitled to it is governed by Article 120. Time runs when his right is denied)
- (1923) A I R 1923 Nag 94 (94) 71 Ind Cas 42 *Lazman v Bishras* (Suit for refund of the money wrongly recovered under a decree would be governed by Article 120 and the period would run from the date of decree)

Note 15

- 1 (1896) 19 Mad 425 (431) *Cursetjee Pestonjee v Dadabai and Eduljee*
(189) 19 All 244 (246) 1897 All W N 43 *Sri Raman Lalji Maharaj v Gopal Lalji Maharaj*
- 2 (1925) A I R 1925 Mad 1260 (1262) 91 Ind Cas 388, *Arunachalam Chetti v Raja Rajeswara Sethupathi* (Suit for accounts on the basis of a compromise decree)
(1911) 11 Ind Cas 540 (542) (Cal) *Jaslam Singh v Choonee Lall* (Suit on oral adjustment of accounts)
- 3 (1903) 25 All 55 (56) 1903 All W N 191 *Bindraban Behari v Bas Jamna Kunwar* (Pleader drawing money from Court for client—Suit against pleader's representative)
(1909) 2 Ind Cas 118 (121) 31 All 429 *Gurraj Singh v Rani Raghuraj Kunwar* (Suit against son of agent for accounts—Article 62 or Article 120 applies)
(1912) 13 Ind Cas 930 (935) 1912 Pun Re No 1 *Mt Fatima v Mt Imtiaz Jan* (Suit for account against heir of deceased agent—Article 120 applicable)
(1909) 2 Ind Cas 118 (121) 31 All 429 *Gurraj Singh v Rani Raghuraj Kunwar*
(1886) 1886 Pun Re No 95 page 239 *Seth Chand Mal v Kahan Mal*
(1928) A I R 1928 Bom 365 (367) 113 Ind Cas 173 *Govind Das v Ganpat Das* (If Article 82 does not apply Article 120 applies)
- 4 See Note 27 *infra*
- 5 (1921) A I R 1921 Cal 571 (572) 53 Ind Cas 877 *Bisumabhar Halder v Giridala Das*
(1882) 8 Cal 483 (485) 11 Cal L R 57 (F B) *Kalidhun Chuttopadhyaya v Shiba Nath Chuttopadhyaya*
- 6 (1937) A I R 1937 Bom 217 (222) 169 Ind Cas 232 *Jaffar El Edroos v Mohomed El Edroos* (Suit by one co-sharer against another who had received the sale proceeds of a *lak* the same being a common property of all—Suit for a share of such proceeds)
(1937) A I R 1937 Pesh 28 (30) 168 Ind Cas 41 *Ayub Khan v Akram*
(1898) 1898 Pun Re No 51 page 177 *Sa'isar Singh v Tiloka*

A against *B* where *A* and *B* have agreed to trade separately and then to look into the accounts and equalise the profits⁷ would be governed by this Article. See also the undormentioned cases⁸.

In order that a suit may be one *for accounts* the main object of the suit must be to obtain an account. Where under an award two persons are made liable each for the payment of the moiety of the expenses of certain temple held jointly by them and one of such persons sues the other to recover the expenses which he had incurred in excess of his share, the suit would be governed by Article 61 and not by this Article although it might be necessary to take accounts for the purpose of granting relief⁹.

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- (1936) A I R 1936 Rang 407 (411) 166 Ind Cas 504 *Mahomed Ameen v Eusof Haje Ahamed* (Co heirs)
- (1929) A I R 1929 Ondh 83 (85) 4 Luck 265 115 Ind Cas 99 *Suraj Narain Singh v Narbada Prasad*
- (1933) A I R 1933 Mad 200 (202) 142 Ind Cas 708 *Leria Rowther v Syed Ammal* (Muhammadian co-sharers)
- 7 (1927) A I R 1927 Mad 775 (776) *Bhainarayana v Venkayya*
- 8 (1938) A I R 1938 Lah 139 (142) *Vidya Wanti Kaur v Shahdev Singh* (Widows of deceased coparcener filing suit for rendition of accounts against one of the surviving coparceners)
- (1891) 1891 Pun Re No 84 page 420 *Sher Ali Khan v Khawaja Muham mad* (Suit by a ward against his guardian for an account of the profits made by the latter during the former's minority has limitation for six years under this Article)
- (1930) A I R 1930 Rang 197 (199) 127 Ind Cas 477 *Ma Eym Ain v A R M A L A Chettyar Firm*
- (1936) A I R 1936 Mad 170 (171) 161 Ind Cas 849 *Sitaramaswami v Mahalakshamma* (Agreement that defendant should render account of income to plaintiff in case plaintiff wins certain suit — Plaintiff bringing another suit for accounts after winning first suit)
- (1936) A I R 1936 Mad 876 (878) 169 Ind Cas 362 *C T V E Vairavan Chetty v Chettich Achi* (Hundi vested in defendant for payment of debts of third person—Suit for accounts in respect of)
- (1894) 18 Bom 401 (424) *Adiocate General of Bombay v Abdul Kadar Jitaker*
- (1908) 32 Bom 364 (371) 10 Bom L R 117 *Ayeslaba v Ebrahim Haji Jakob* (Suit against executors—Accounts for a period previous to the six years preceding the filing of the suit cannot be given)
- (1911) 12 Ind Cas 586 (587) (Bom) *Mahomedbhai v Ismail Haji Halim bhai* (Suit for an account of the profits of a joint house)

share in the estate)

t L Jour 373 *Abdul*
suits by a separated
there is a complete

- (1917) A I R 1917 Pat 74 (75) 40 Ind Cas 860 2 Pat L Jour 649 *Janar dhan Prosad v Mt Janakibai* (Suit for accounts against administrators)
- 9 (1897) 19 All 244 (246) 1897 All W N 43 *Sri Raman Lalji Maharaj v Gopal Lalji Maharaj*

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The cause of action for a suit for accounts will arise on the date when an account is demanded and is refused ¹⁰

16. Suit on an administration bond. — A suit on an administration bond not covered by Article 68 *ante* would be governed by this Article ¹ Where the condition in an administration bond was to the effect that the administrator would file inventories at certain periods and would administer the assets of the deceased person, and the administrator died without performing these conditions, it was held in a suit to enforce such bond that time ran from the death of the administrator and not from the date of the breach of the obligation to exhibit the inventory ²

17. Suit on promissory note. — A suit on a promissory note payable "at any time within six years on demand" does not fall within either Article 73 or Article 59 and is, therefore, governed by this Article ¹

18. Suit by attorney or vakil for costs — Article 84 *ante*, provides the period of limitation for such suits That Article will, however, apply only to a suit by an attorney or vakil against his *client* and not against the opposite party Hence, where a consent decree provides that the costs of one party should be paid to his attorney by the other party, and the attorney sues such other party for the costs, the suit will be governed by this Article and not by Article 84 ¹

19. Suits relating to contract of agency. — As to suits for accounts by a principal against his agent, see Note 15 *ante*

A suit for recovering account papers from the agent would be governed by this Article ¹ Where one person acts as the agent of two principals and uses money belonging to one of them for the benefit of the other, a suit by the former against the latter for recovery of such money is not a suit for a loan (inasmuch as the lender and the

10 (1933) A I R 1933 Mad 200 (202) 142 Ind Cas 703 *Syed Levva: Rowther v Syed Ammal* (If suit is filed within six years of cause of action the accounting may be for a period exceeding six years)

Note 16

- 1 (1936) A I R 1936 Bom 363 (365) 165 Ind Cas 672 60 Bom 1027 *Manubhai Chundul v General A F & L Assurance Corporation* (In a similar case however Article 68 was applied in A I R 1924 Rang 68)
 (1911) 9 Ind Cas 935 (937) 33 All 414 *Kantee Chandra v Al: Nabi*
 2 (1911) 9 Ind Cas 935 (937) 33 All 414 *Kantee Chandra v Al: Nabi*

Note 17

- 1 (1883) G Mad 290 (291) 7 Ind Jur 356 *Sanjiv v Errappa*

Note 18

- 1 (1932) A I R 1932 Bom 376 (385) 138 Ind Cas 832 *Rustomji v Fazal Rahim*

Note 19

- 1 (1905) I Cal L Jour 147 (150) *Madhub Chunder Chuckerbutti v Debendra Nath Dey*

borrower is the same person) and is one governed by this Article² *A* advanced money to *S* to buy him a horse *S* bought a mare which *A* refused to take *S* retained the mare and agreed to return the amount on selling the mare *S* then sold the mare and thereupon *A* sued for the recovery of the loan It was held that *A* had an equitable right to follow the proceeds in the hands of *S* and that the suit was governed by this Article³

20. Suit to avoid a will.—A suit to avoid a will on the ground that it was a voidable transaction,¹ or a suit for a declaration that an alleged will is a forgery,² is governed by this Article Articles 91 to 93 do not apply to wills³

21. Suit for construction of a will.—A suit for the construction of a will is governed by this Article¹ So long as the estate is in the hands of the executor and the administration has not been completed, the time does not begin to run for such a suit, inasmuch as the right to obtain construction of the will is a continuing right² Where a Hindu reversioner sues after the death of the widow of a Hindu testator for a construction of the latter's will and codicil, time will run from the death of the widow The reversioners have a subsisting right as long as the widow is alive³

22. Suit for declaration that decree is not binding or to set aside a decree.—A person not a party to a decree cannot, as a general rule sue to *set aside* the decree But he can sue for a declaration that the decree is not binding upon him Such a suit would be governed by this Article¹ The cause of action for such a suit would be the date when the plaintiff's rights are jeopardised² It was held in the undermentioned case³ where a worshipper sued for a declaration that a decree obtained on a mortgage of *wakf* property was not binding on the trust, that the cause of action accrued

2 (1937) A I R 1937 All 173 (174) 98 Ind Cas 1010 *Jaunpur Sugar Factory Ltd v Upper India Rice Mills Ltd*

3 (1927) A I R 1927 Oudh 574 (574) 106 Ind Cas 35, *Azam Ali v Shamsher Ali*

Note 20

1 (1926) A I R 1926 Lah 635 (636) 96 Ind Cas 835 *Firoz v Sultan Surkhru*

2 (1909) 4 Ind Cas 923 (929) (Lah) *Mt Gauhar Bibi v Ghulam Muhammad*

3 (1896) 23 Cal 1 (10) 22 Ind App 171 6 Sar 627 (P C) *Sajid Ali v Ibad Ali*

Note 21

1 (1893) 20 Cal 906 (924, 925) *Chukhun Lal Roy v Lolit Mohan Roy*

(1924) A I R 1924 Cal 411 (413) 75 Ind Cas 41 *Ramlamal Banik v Syam Sundar*

2 (1924) A I R 1924 Cal 411 (413) 75 Ind Cas 41 *Ramlamal Banik v Syam Sundar*

3 (1898) 20 Cal 906 (924 925) *Chukhun Lal Roy v Lolit Mohan Roy*

Note 22

1 See cases cited in Foot Notes 2 3 and 4

2 (1930) A I R 1930 All 420 (422) 123 Ind Cas 830 *Abdul Ahad v Chabi Ram*

3 (1933) A I R 1933 Lah 270 (271) 143 Ind Cas 725 *Mohomed Umar v Mahomed Ibrahim*

Where a person is a party to a decree, he can only sue to set aside the decree on any ground recognized by law as sufficient for setting aside the decree. A suit to set aside a decree on the ground of fraud is specifically provided for in Articles 95 *ante*. But there is no Article in the Limitation Act specifically providing for a suit to set aside a decree on grounds other than fraud. This Article, therefore, will apply to such suits.⁶ The accrual of the right to sue in such suits will, however, depend upon the facts of the case and the grounds alleged for setting the decree aside. Thus, where the suit is one to set aside a voidable decree, as where a compromise decree is obtained against a minor without the sanction of the Court, the cause of action will arise on the date of the decree itself, since the decree, if voidable at all, is voidable from its date.⁶ If the suit is to set aside a decree obtained against a minor on the ground of gross negligence of his guardian, the minor suing to set aside the decree, the cause of action would be the date when the gross negligence of the guardian becomes known to the minor.⁷ In *Sadashivappa Gangappa v. Sangappa Chanvirappa*,⁸ where a minor, against whom a decree was passed on an award made in a reference in a suit without the sanction of the Court, sued to set aside the decree it was held by the High Court of Bombay that the cause of action did not arise from the date of the decree but on the date when the decree came to the knowledge of the plaintiff. Thus, it is submitted does not seem to be correct.

Where, without setting aside a decree a party thereto cannot obtain a relief denied to him by such decree such as the right to the possession of immovable property, a suit to obtain such a relief alone

- 4 (1932) A I R 1932 Mad 589 (590) 137 Ind Cas 707 *Kandasami Pillai v Munisami Mudaliar*
 6 (1924) A I R 1924 All 625 (634) 46 All 575 83 Ind Cas 762 *Mt Phulwant, Kunwar v Janeshar Das*
 7 (1930) A I R 1930 Mad 173 (174) 120 Ind Cas 880 *Basavayya v Bapana Rao*
 (1936) A I R 1936 Pat 231 (240 241) 14 Pat 824 162 Ind Cas 235 *Mathura Singh v Rama Rudra Prasad*
 (1936) A I R 1936 Mad 804 (806) 170 Ind Cas 379 *Swami Konar v Sankaradasa*
 (1936) A I R 1936 Pat 231 (241) 162 Ind Cas 235 14 Pat 824 *Mathura Singh v Rama Rudra Prasad* (In this case the plaintiffs were under the Court of Wards—It was held that time ran from the knowledge of the Court of Wards)
 8 (1931) A I R 1931 Bom 500 (502) 134 Ind Cas 1221

would be barred under this Article if a suit to set aside the decree would be barred on the date of the suit.⁹

23 Suit for relief on the ground of fraud — Article 95 *ante* is a specific Article providing for suits for relief on the ground of fraud. A suit for relief on the ground of fraud which does not fall within that Article would be governed by this Article. Thus a suit by the creditor of a person to set aside a transfer by such person in fraud of creditors has been held to fall not under Article 95¹ but under this Article². A suit for a declaration that the defendant has fraudulently procured the entry of his name in the revenue records and that the plaintiff alone is entitled to succeed to his father's property would be governed by this Article³. So also is a suit by the worshippers of a temple for a declaration that a mortgage executed by a trustee of certain temple property is fraudulent and not binding on the temple.⁴

The right to sue or the cause of action would accrue in such cases on the date on which the plaintiff obtains *knowledge* of the fraud in accordance with the fundamental principle of law that so long as a person on whom fraud has been practised remains in ignorance of the fraud no time shall run against him.⁵ In *Basavayya v Bapana Rao*⁶ the plaintiff sued for a declaration that a decree obtained by the defendant was invalid as against him and for an injunction

9 (1922) A I R 1922 Lah 166 (167) 62 Ind Cas 794 9 Lah 164 *Jita Singh v Man Singh*

Note 23

I See Note 8a to Article 95 *ante*

2 (1931) A I R 1931 Oudh 333 (339) 7 Luck 181 132 Ind Cas 51 *Parkash Narain v Barendra Bikram Singh*

(1931) A I R 1931 Lah 70 (71) 12 Lah 282 130 Ind Cas 778 *Lal Singh v Jas Chand*

(1916) A I R 1918 Mad 494 (495) 29 Ind Cas 62 *Authikesaraloo Naveker v Shah Abdulla Hussain Sahib Khadirs*

(1926) A I R 1926 Mad 66 (67) 92 Ind Cas 405 *Narasimham v Narayana Rao*

(1918) A I R 1918 Mad 76 (77) 44 Ind Cas 551 *Venkateswara Aiyar v A P R.*

3 (1934) A I R 1934 Lah 574 (575) 148 Ind Cas 776 *Bhagat Ram v Pars Ram*

4 (1928) A I R 1928 Mad 837 (839) 112 Ind Cas 22 *Viswanadham v Narayana Dass*

5 (1934) A I R 1934 Lah 574 (575) 148 Ind Cas 776 *Bhagat Ram v Pars Ram*

(1928) A I R 1928 Mad 837 (839) 112 Ind Cas 22 *Viswanadham v Narayana Dass*

(1930) A I R 1930 Mad 173 (174) 120 Ind Cas 880 *Basavayya v Bapana Rao*

(1918) A I R 1918 Mad 76 (78) 44 Ind Cas 551 *Venkateswara Aiyer v A P R.*

(1931) A I R 1931 Lah 70 (71) 130 Ind Cas 778 12 Lah 282 *Lal Singh v Jas Chand*

(1926) A I R 1926 Mad 66 (69) 92 Ind Cas 405 *Narasimham v Narayana Rao* (Per Madhavan Nair J.)

6 (1930) A I R 1930 Mad 13 (174) 120 Ind Cas 880

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23—25

restraining the defendant from executing the decree against him or his property on the ground that the plaintiff's guardian was fraudulent and grossly negligent. It was admitted that this Article applied to the suit, and as to the starting point their Lordships of the Madras High Court observed as follows

"To cases in which the relief is sought on the ground of fraud, misconduct, mistake, etc., it would appear that limitation is made to commence from the time when the fraud, misconduct or mistake becomes known to the plaintiff, e.g. *vide* Articles 90, 91, 92, 95, 96 and 114. Under Articles 91 and 114, limitation would begin to run from the time when the facts entitling the plaintiff to the relief asked for become known to him. Article 120 being an omnibus one, the general expression employed in column three is necessitated by a variety of suits (not specifically provided for) coming within its purview, in some of which there would be fraud, misconduct, or mistake as part of the cause of action, but in the rest that element would be absent. It would thus be in consonance with the scheme of the Act, as indicated by such specific Articles referred to above dealing with suits based on a cause of action consisting of fraud, misconduct, etc., if the right to sue should be deemed to accrue under Article 120, from the time of the plaintiff's knowledge of the same even in respect of suits based on similar grounds coming under that Article."

24. Suit for relief on the ground of mistake.—A suit for relief on the ground of mistake is specially provided for in Article 96. It has been held that that Article is intended to apply only to those cases in which the Courts are asked to relieve parties from the consequences of *mistakes committed by them in the course of contractual transactions*.¹ Suits for relief on the ground of mistake not falling within the purview of Article 96 would be governed by this Article.² See also Note 2 to Article 96 and the cases cited in Foot-Notes 7a to 9 thereof.

25. Suit for contribution.—A suit for contribution not falling within any of the specific Articles, such as Articles 61, 99 and 107, will be governed by this Article.¹ As has been seen in the Notes to Articles 61 and 99, it is a general principle that a right to contribution cannot arise unless the plaintiff has made a *payment* in respect of which he sues for contribution. The right to sue in such

Note 24

¹ See Note 2 to Article 96 *ante*

² (1938) A I R 1938 Lah 99 (101) I L R 1937 Lah 623, *Jivan Singh v Dewan Radhakishan*

Note 25

¹ — — — — —

ada Mohun v Monir
 one co tenant against
 if others had already

[Note—Claim against landlord is governed by Article 120]
 (1914) A I R 1914 Cal 160 (162) 20 Ind Cas 21, *Janki Koor v Doms Lal*

cases will, however, arise on the date of such payment only if the benefit to the defendant is immediate^{1a} Where it is an essential part of the cause of action that the defendant shall have received a benefit by the payment or other act of the plaintiff, the plaintiff's cause of action does not arise until the stage is reached when the defendant is so benefited² As to what constitutes payment, see Notes to Articles 61 and 99, *ante*

Illustrative cases

- 1 Plaintiffs and defendants were joint owners of a tank The Municipality ordered that the tank should be filled up and it was filled up by plaintiffs incurring the necessary expense therefor They then filed a suit for contribution against the defendants in respect of the expenses incurred It was held that the suit was governed by this Article and not by Article 61³ It was also held that the right to sue for contribution accrued when *the filling of the tank was completed* and the defendant benefited, and not when each item of expense was incurred⁴
- 2 A landlord paid cess to Government, a portion of which the tenant was bound to contribute A suit by the landlord against the tenant for such contribution is governed by this Article⁵
- 3 A and B were co sharers in a mortgage A filed a suit on the mortgage making B a party defendant as he refused to join A as plaintiff A decree was passed in favour of A and B and B took

(1920) A I R 1920 Mad 890 (892) 53 Ind Cas 796 *Vasalakshiammal v Narayanasami Iyer* (Widow is entitled to recover the amounts spent by her for her daughter's marriage from the person bound to pay it either under Section 69 Contract Act or under principle analogous to the same and the period of limitation is six years)

(1899) 26 Cal 241 (244) *Kumar Nath Bhattacharjee v Nobo Kumar Bhatta charjee*

(1897) 20 Mad 23 (25) *Pattabhiramayya Naidu v Ramayya Naidu*

(1892) 15 Mad 492 (493) 2 Mad L Jour 258 *Ananda Raru v Vayanna* (A suit by a proprietor against other proprietors for apportionment of the assessment on lands included in a single patta and for recovery of contribution in respect of amounts paid)

1a See (1921) A I R 1921 Cal 814 (816) 57 Ind Cas 894 *Gopenath Munshee v Chandranath Munshee*

(1899) 26 Cal 241 (244) *Kumar Nath Bhattacharjee v Nobo Kumar Bhattacharjee*

(1925) A I R 1925 Mad 1282 (1284) 90 Ind Cas 973 *Kuppusami Iyer v Raja Rajeswara Sethupathi*

2 (1919) A I R 1919 Mad 1145 (1152) 45 Ind Cas 786 *Souri Naicker v R G Orr* (Repairs of tank by lessee for his benefit—Other lessees incidentally benefited—Suit for contribution and charge for decree amount)

3 (1921) A I R 1921 Cal 93 (94) 62 Ind Cas 615 *Upendra Krishna v Naba Kishore*

(1919) A I R 1919 Mad 1145 (1152) 45 Ind Cas 786 *Souri Naicker v R G Orr*

4 (1919) A I R 1919 Mad 1145 (1152) 45 Ind Cas 786 *Souri Naicker v R G Orr*

(1921) A I R 1921 Cal 93 (94) 62 Ind Cas 615 *Upendra Krishna v Naba Kishore*

5 (1919) A I R 1919 Mad 31 (32) 52 Ind Cas 469, *Mutturamalinga Sethupathi v Mahalinga Raju*

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the benefit of the judgment by drawing out the money from the Court *A* then sued *B* for contribution in respect of the expenses incurred for the suit. It was held that the suit was governed by this Article and that the cause of action arose when the defendant was benefited, which was when he drew a cheque from Court for his share of the mortgage amount ⁶

- 4 *A* and *B* were jointly liable under a decree. *C* paid off the said decree without any request on the part of *A*, but *A* was held liable to pay *C* the amount paid by him on the ground that he was benefited by the payment. *C* accordingly realized the amount from *A* by sale of his property. *A* thereupon sued *B* for contribution. It was held that if the realization by *C* of the amount due to him by sale of *A*'s property is not considered to be a 'payment' by *A*, the Article applicable would be this Article and that the right to sue would accrue when *A*'s property was sold ⁷

26. Suit for refund of money paid to defendant. — A suit for refund of monies advanced for a purpose which fails would be governed by this Article where the suit does not fall within Article 62¹. Where *A*, acting on behalf of *B*, a minor, sold some property to *C* stipulating that *C* should retain the purchase money and pay it over to *B* on attaining majority, and *B* died during minority leaving *A* as the next heir and *A* sued to recover the purchase money in the hands of *C*, it was held that the suit fell within this Article and not Article 111².

27. Suit relating to partnership. — The following suits relating to partnership are governed by this Article —

1 Suit for dissolution of partnership¹

- 6 (1923) A I R 1923 Mad 64 (67) 70 Ind Cas 405 *Sundara Iyer v Ananta padmanaba Iyer* (A I R 1921 Cal 93, Followed)

[See however (1887) 1887 All W N 128 (128) *Powell v Powell* (*C* sued *A* and *B* — *A* incurred the expenses in defending the suit on behalf of both *A* and *B* — *A* then sued *B* for contribution — Held Article 120 does not apply)]

- 7 (1914) A I R 1914 Cal 160 (162) 20 Ind Cas 24 (26) *Janki Koor v Doms Lal*

Note 26

- 1 (1934) A I R 1934 Oudh 329 (333) 150 Ind Cas 718 *Audesh Singh v Commissioner, Lucknow*
 (1930) A I R 1930 Rang 21 (27) 7 Rang 540 120 Ind Cas 902 *U Sein Po v U Pyu*
 2 (1933) A I R 1933 Lah 860 (861) 15 Lah 35 147 Ind Cas 269 *Gulab v Mt Saricar Jan*

Note 27

- 1 (1919) A I R 1919 Mad 838 (839) 48 Ind Cas 89 *Narayanaswami v Gangadhara*
 (1928) A I R 1928 Rang 160 (162) 6 Rang 199 110 Ind Cas 349 *Khorasany v C Acha*
 (1930) A I R 1930 Lah 378 (379) 100 Ind Cas 613 *Din Muhammad v Kanshi Ram*
 (1908) 12 Cal W N 455 (455) *Duarha Das Karnani v Chun Lal Daga*

2 A suit to establish the plaintiff's right as partner and for accounts, time runs in such a case from the date of the plaintiff's exclusion²

3 A suit by a partner against his sub partner for a share for the loss sustained by the former in the main partnership³

4 A suit for accounts without any prayer for dissolution of partnership⁴

28 Suit for profits — Article 109, *ante*, is a specific provision for suits for the profits of immovable property *belonging to the plaintiff* which have been *wrongfully* received by the defendant. A suit for profits not falling within that Article either on the ground that the property in respect of which the profits are claimed does not belong to the plaintiff or on the ground that the defendant's receipt of profits is not wrongful would be governed by this Article¹. Thus a suit for profits by one co owner of property against others who had received the profits thereof is not one governed by Article 109 but is governed by this Article² (See also Note 3 to Article 109). A suit for profits of a business carried on by two brothers which business is subsequently wound up would be governed by this Article

(1921) A I R 1921 Cal 539 (540) 66 Ind Cas 811 *Haramohan Poddar v Sudar Sen Poddar*

2 (1920) A I R 1920 Mad 680 (684 685) 58 Ind Cas 969 *Venkayya Naidu v Lakshminarasayya*

(1930) A I R 1930 Lah 378 (379) 120 Ind Cas 613 *Din Muhammad v Kanshi Ram*

(1903) 12 Cal W N 455 (458) *Dwaraka Das Karnani v Chunilal Daga*

(1882) 4 All 437 (451) 1882 All W N 87 *Harrison v Delhi and London Bank*

3 (1934) A I R 1934 Mad 12 (13) 148 Ind Cas 204 57 Mad 347 *Seenayya v Ramalinga Jya*

4 (1933) A I R 1933 Nag 127 (190) 29 Nag L R 34 141 Ind Cas 277 *Binjray v Kisanlal*

Note 28

1 (1921) A I R 1921 Cal 77 (78) 66 Ind Cas 876 *Bhubaneswar Bhattacharjee v Dwarikar Bhattacharjee*

(1906) 3 Cal L Jour 182 (186) *F H Hollaway v Guneshwar Singh* (Possession in execution of a decree subsequently set aside is not wrongful — On this point there is a conflict of opinion. See Notes to Article 109)

2 (1922) A I R 1922 Mad 150 (157) 45 Mad 643 71 Ind Cas 177 (F B) *Yerukola v Yerukola* (Division in status effected between members of Hindu family—Subsequent suit for partition by metes and bounds and for share of profits received by members after taking account — Article 120 applies and time runs from date of demand)

(1896) 23 Cal 793 (804) *Robert Watson & Co Ltd v Ramchand Dutt*

(1923) A I R 1923 Mad 679 (681) 75 Ind Cas 848 *Kuppuswami Chetty v Singaravelu Chetty*

(1935) A I R 1935 Mad 731 (733 734) 156 Ind Cas 640 *Siddalinga Gowd v Bhimana Gowd*

(1925) A I R 1925 P C 93 (93) (P C) *Madnapore Zamindary Co Ltd v Naresh Narain*

(1924) A I R 1924 Rang 155 (160) 1 Rang 405 76 Ind Cas 855 *Maung Po Kin v Maung Shwe Dya* (A suit by one co-heir against another)

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and time runs from the date of the knowledge of the winding up of the business.³ Certain lands were attached under Section 146 of the Criminal Procedure Code and suits were filed to establish the rights of parties. Pending the decision in such suits, the defendant withdrew the profits of the attached property which had been deposited in Court. The suits were subsequently compromised to the effect that the attached lands should belong to the plaintiff. Plaintiff thereupon sued the defendant for the profits so withdrawn by the defendant. It was held that the suit was governed by this Article.⁴

Where an auction purchaser or an assignee under a private treaty of the arrears of maintenance due and payable to a junior member of a Malabar *tarwad* from out of the profits of the *tarwad* property sues for recovery of such arrears, the suit would be governed by this Article and not by Article 127.⁵

29 Suit for revenue assessed on land. — *A* was the inamdar of a certain village. *B* held certain lands in the said village but he was not placed in possession thereof either by *A* or his predecessor in title under any agreement. *A* sued to recover from *B* five years arrears of assessment. It was held that the suit was not for rent but for the payment of land revenue inasmuch as there was no relationship of landlord and tenant between the parties but only

(1931) A I R 1931 Rang 150 (152) 131 Ind Cas 511 *Maung Po Ngun v Ma Saw Tin*

(1916) A I R 1916 Nag 40 (41) 18 Nag L R 127 41 Ind Cas 848 *Baiwant v Deorao* (Article 62 or Article 89 does not apply)

(1896) 10 C P L R 98 (100) *Mahammad Farrukh v Kadir Ali Khan*

(1916) A I R 1916 Pat 884 (885) 35 Ind Cas 430 1 Pat L Jour 69 *Kisan Dayal Singh v Kisan Deo Jha*

(1929) A I R 1929 Oudh 83 (85) 4 Luck 265 115 Ind Cas 99 *Suraj Narain Singh v Narbada Prasad* (Suit by one tenant in common against another for recovery of money received by him in excess of his share is governed by Article 120 and not by Article 62)

(1933) A I R 1933 Lah 951 (952) 147 Ind Cas 909 *Kidar Nath v Shiv Dayal*

(1915) 32 Ind Cas 102 (104) 1915 Pun Re (Rev) No 5 page 16 *Kadim Husain Khan v Mt Murad Bibi* (Article 62 does not apply)

(1921) 61 Ind Cas 393 (393) (Lah) *Mt Shams ul Nissa v Yakub Bakhsh*

(1936) A I R 1936 Mad 654 (655) 162 Ind Cas 771 *Sundararaja Iyengar v Raghava Reddi*

(1928) A I R 1928 Nag 65 (65) 105 Ind Cas 777 *Bhudi Lal v Mokham Chand*

(1936) A I R 1936 All 706 (707) 165 Ind Cas 266 *Charan Singh v Duan Singh*

(1932) A I R 1932 All 272 (273) 135 Ind Cas 836 *Lakshmi Chand v Mt Anandi*

(1917) A I R 1917 Mad 901 (902) 33 Ind Cas 705 39 Mad 54 *Madar Sahib v Kader Moideen Sahib*

(1921) 61 Ind Cas 393 (393) (Lah) *Mt Shams-ul Nissa v Yakub Bakhsh*

3 (1923) A I R 1923 Mad 679 (681) 75 Ind Cas 848 *Kuppusami Chetty v Singaratelu Chetty*

4 (1923) A I R 1923 Cal 379 (381) 50 Cal 475 72 Ind Cas 1041, *Anantaram Bhattacharjee v Hemchandran Kar*

5 (1936) A I R 1936 Mad 573 (574) 163 Ind Cas 190 *Narayana Thirumuppu v Govinda Thirumuppu*

that of superior and inferior holder and that therefore this Article and not Article 110 applied to the case¹

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30. Suit relating to companies. — As to suits under Section 235 of the Companies Act, 1913, see Note 6 to Article 36 and the undermentioned cases¹

A suit by the liquidator of a company for money due in respect of unpaid calls would be governed by this Article where the case does not fall under Article 112² See Note 2 to Article 112

A suit by a share holder for recovery of arrears of dividend is a claim for debt and is governed by this Article It is not a claim arising out of a contract within Article 115 of the Act³

31. Suit for declaration. — Articles 11, 11 A, 92, 93, 118, 119 and 125 are some of the specific Articles providing for suits for declaration under various circumstances A suit for a declaration not falling within any other Article of the Schedule will fall under this Article¹ Thus, a suit for a declaration of title to property is

Note 29

- 1 (1901) 25 Bom 556 (559 563) 3 Bom L R 135, *Sadashiv v Ramkrishna*
(1904) 6 Bom L R 423 (427), *Antaji v Kashinath*

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- 1 (1937) A I R 1937 Pat 293 (301) 168 Ind Cas 786, *Peninsular Locomotive Co Ltd v H Langham Reed*
(1938) A I R 1938 All 789 (799 810) 145 Ind Cas 893 55 All 912 (F B) *Shyam Lal v Official Liquidators of U P Oil Mills Co Ltd*
2 (1903) 1903 Pun Re No 70 page 301 1903 Pun L R No 160, *Harchand Ras v Rang Lal*
(1935) A I R 1935 Lah 335 (336) 156 Ind Cas 951 16 Lah 1055 *Jagroan Trading Syndicate Ltd v Manak Chand Roshan Lal*

and was based on the order The plaint was in the form of an ordinary action Held that the suit was governed by Article 120)

- (1886) 10 Bom 483 (487) *Parrell Spinning and Weaving Co Ltd v Manek Haji*

- 3 (1926) A I R 1926 Mad 515 (520) 49 Mad 568 91 Ind Cas 515 (F B) *Venkata Gurunadha Ram Seshayya v Tripurasundari Cotton Press Bezuada* (A I R 1919 Mad 646 Overruled)

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- 1 (1938) A I R 1938 Bom 115 (120 121) *Isap Bapuji Amaji v Umargi Abhram Adam*
(1916) A I R 1916 Cal 392 (393) 84 Ind Cas 709 *Dina Nath v Rama Nath*
(1920) A I R 1920 Nag 6 (5) 54 Ind Cas 800 *Pratapnag v Raja Dattaji Rao* (Suit for declaration that defendant is not son of a particular person)
(1933) A I R 1933 Lah 370 (371) 144 Ind Cas 976 *Court of Wards Bhabaur Estate v Bahkhar Ali Khan* (Where a plaintiff in a suit for declaration of a right to graze cattle over certain lands proves that he was obstructed in the enjoyment of his right within three years before suit, the onus is shifted on to the defendant and he has to show, in order that the suit may be time-barred that such obstruction took place more than six years before the suit)

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not governed by any other Article and is therefore governed by this

(1919) A I R 1919 Cal 215 (217) 49 Ind Cas 965, *Jitendra Gopal v Matan gms* (Suit for declaration that allotment by Collector under Bengal Estates Partition Act is not legally valid)(1888) 1888 Pun Re No 135 page 368, *Ram Chand v Muhammad Khan*Salamat
hment—
120 and(1913) 20 Ind Cas 490 (491) 35 All 308, *Raghuuandan Prasad v Sheo Prasad* (Suit to have municipal election declared void and contrary to law)(1915) A I R 1915 Lah 278 (279) 27 Ind Cas, 574 *Nur Khan v Mi Bakhtawar* (A declaratory suit for setting aside a will is governed by Article 120)(1937) A I R 1937 Oudh 47 (51) 166 Ind Cas 232, *Ram Khelawan v Raja Rampal Singh*(1910) 2 Ind Cas 107 (109, 110) 1909 Pun Re No 53, *Yad Ali v Mubarak Ali*(1910) 5 Ind Cas 343 (344) (Mad), *Ramaswamy v Munandi Serois*(1934) A I R 1934 Mad 147 (153 154) 57 Mad 501 154 Ind Cas 990, *Thiruvankatacharyulu v. Secy of State*.(1921) A I R 1921 Bom 182 (183) 45 Bom 597 60 Ind Cas 903, *Chotalal v Vishnu*(1899) 2 Oudh Cas 79 (82 83), *Ashik Ali Khan v Mashar Ali Khan*(1898) 20 All 35 (38) 1897 All W N 193 (F B), *Francis Legge v. Rambaran Singh* (3 All 40, Not followed)(1930) A I R 1930 Bom 61 (63) 54 Bom 4 124 Ind Cas 778 *Krishnaji Annaji v Annaji Dhondaji* (Partition of joint family property—Suit to obtain declaration that property in possession of father is partible after his death)(1916) A I R 1916 Lah 150 (150) 34 Ind Cas 253, *Mangal Singh v Mangal Singh*(1906) 1906 Pun Re No 76 page 289 1906 Pun L R No 125 1906 Pun W R No 113, *Ganpat v Dhani Ram*(1936) A I R 1936 Mad 440 (447 448) 59 Mad 667 163 Ind Cas 712, *Vine swara Rao v Surya Rao*(1926) A I R 1926 Bom 690 (592) 99 Ind Cas 293, *Sursingji, Dayiraj v Secretary of State*(1894) 1894 Bom P J 82 (84) *Krishnaji v Nilo Bhaskar*(1900) 3 Bom L R 420 (421), *Gopal v Krishna* (The starting point for a decision of a Settlement Officer to be set aside or modified is the date when the decision is duly pronounced after notice to the parties and(1898) 25 Cal 49 (52) 2 Cal W N 76, *Gour Mohan Gouls v Dinonath Kar moker*(1928) A I R 1928 All 267 (268) 109 Ind Cas 54 50 All 510, *Mohammad Nasir v Mi Zulaskha*(1898) 22 Bom 430 (434) *Bas Shrinbas v Akarshedji*(1923) A I R 1923 Oudh 101 (102) 74 Ind Cas 195, *Khalil v Mahommed Ismail*(1900) 23 Mad 683 (592), *Commercial Bank of India v Allarooddeen Sahib*(1903) 18 Mad L Jour 267 (268), *Srinivasa Ramanujachariar v Subba chariar*

Article.² Similarly, a suit by a remote reversioner that an alienation

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(1937) A I R 1937 Lah 537 (540) I L R 1937 Lah 209. 171 Ind Cas 189, *Robert Hercules Skinner v R. M. Skinner*. (Suit for declaration on ground of pre decree compromise that decree holder is barred from executing decree)

(1936) A I R 1936 Lah 49 (50) 161 Ind Cas 592, *Bhagwandas v Gian Chand* (Suit by donor to declare gift invalid)

" " " " "

(1929) A I R 1929 Lah 872 (873) 121 Ind Cas 428 11 Lah 99, *Parshotam Singh v Balwant Singh* (Article 120 will apply if suit is treated as one for declaration)

(1929) A I R 1929 Lah 208 (209) 114 Ind Cas 437, *Tuls v Guran Datta*. (A suit for declaration brought after testator's death that the mutation is wrong and void for purposes of Article 1)

(1924) A I R 1924 Oudh 120 (123) 27 Oudh Cas 140 77 Ind Cas 829, *Dwaraka Prasad v Mt Ram Devi*

(1923) A I R 1923 Rang 82 (83) 74 Ind Cas 164, *Mason Ma Khayng v Sewa Ba* (Suit for declaration that a sale is fraudulent)

(1928) A I R 1928 Bom 383 (384) 119 Ind Cas 878, *Chintaman Balwant v Bhagwan Ganpati*

(1914) A I R 1914 Mad 534 (535) 37 Mad 822 18 Ind Cas 770, *Secretary*

(1924) A I R 1924 P C 150 (155) 80 Ind Cas 835 51 Ind App 257 47 Mad 572, *Ambu Nair v Secretary of State*

(1899) 1 Bom L R 873 (878), *Khanderao v Ramji*

2 (1919) A I R 1919 Cal 1050 (1051) 48 Ind Cas 796, *Husan Mea v Naun Mea*

(1918) A I R 1918 Cal 345 (346) 44 Ind Cas 996, *Muhammad Jalil v Secretary of State*

(1916) A I R 1916 Cal 465 (468) 36 Ind Cas 292, *Tarak Nath v Syama Charan*

(1906) 11 Cal W N 186 (189) 4 Cal L Jour 568, *Shyamanand Das v Raj Narain Das*

(1905) 1 Cal L Jour 73 (79, 80), *Mohabharat Shah v Abdul Hamid Khan*

(1893) 9 Cal 163 (166) 11 Cal L R 409, *Dissessur Bhugut v Murti Sahu* (Suit for declaration and confirmation of possession)

(1884) 10 Cal 525 (527), *Luchmon Sahas v Kanchan Oghain*

(1922) A I R 1922 Cal 8 (10) 65 Ind Cas 8, *Jaynarain Sen Ukil v Srikanta Roy*

(1923) A I R 1923 Nag 86 (87, 89) 71 Ind Cas 205 19 Nag L R 11, *Dongar Singh v Vishwanath Singh* (Suit for ascertaining what the titles of the parties are over the lands in the mahal.—Suit is governed by Article 120.—Such a suit cannot be time barred merely because the Revenue Officer declined more than six years before the institution of the suit to proceed with a partition until the question of title had been decided in a Civil Court)

(1916) A I R 1916 Lah 161 (161) 1916 Pun Re No 47 34 Ind Cas 546, *Kalu Khan v Umida*

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by a Hindu widow is not binding on the reversioners is governed by this Article ³

Where the plaintiff seeks further relief than a mere declaration, the relief of declaration is only an ancillary one and the suit would be governed, for purposes of limitation, by the Article governing the suit for such further relief ⁴ Such Article may happen to be this Article itself

Whether a suit is one for a mere declaration or for other relief must be gathered from the circumstances of the case ⁵ If the suit, though framed as one for possession, is really one for a declaration, this Article will govern the case ⁶ A declaratory suit does not cease to be governed by this Article by reason merely of the fact that other reliefs are also asked if such reliefs are unnecessary, superfluous or premature ^{6a}

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- (1892) 6 C P L R 40 (42) *Rodee v Ganapati* (Suit for declaration of proprietary rights in land under Section 88 C P Land Revenue Act, 1881 is governed by Article 120)
- (1934) A I R 1934 Lah 134 (185) 15 Lah 469 152 Ind Cas 100 *Dalip Singh v Mt Tabi*
- (1936) A I R 1936 Lah 835 (836) 165 Ind Cas 149 *Ishar Das v Ghulam Muhammad*
- (1884) 1884 Pun Re No 111 page 319 *Chait Singh v Jswan*
- (1883) 1883 Pun Re No 19 page 60 *Mangal v Bula*
- (1903) 1903 Pun Re No 56 page 247 1903 Pun L R No 93 (F B) *Dheru v Sidhu*
- (1882) 1882 All W N 173 (174) *Jaipal Singh v Mata Bahksh*
- (1883) 5 All 322 (323) 1883 All W N 49 *Sobha Pandey v Sahkodhra*
- (1900) 22 All 90 (93) 1899 All W N 188, *Muhammad Bagar v Mungo Lal*
- (1894) 16 All 78 (75) 1894 All W N 1 *Din Dayal v Har Narain*
- (1935) A I R 1935 All 1018 (1019) 158 Ind Cas 434 *Abdul Ghafoor v Thakur Ram*
- (1931) A I R 1931 Cal 131 (132) 58 Cal 120 130 Ind Cas 278 *Nageswara Nath v Mohini Mohan*
- (1924) A I R 1924 Lah 324 (325) 69 Ind Cas 501 *Sher v Piara Ram*
- (1925) A I R 1925 P C 42 (43) 4 Pat 244 52 Ind App 109 86 Ind Cas 289 (P C) *Saty Niranjan Chakravarty v Ram Lal*
- 3 (1916) A I R 1916 Cal 606 (608) 30 Ind Cas 578 *Sarabjit Pratab v Bhagnat Koers*
(See also (1893) 16 Mad 138 (139) *Puraken v Partathi* (Declaratory suit by reversionary heirs))
- 4 (1916) A I R 1916 Cal 751 (754) 31 Ind Cas 242 *Brojendra Kishore v Bharat Chandra*
- (1912) 15 Ind Cas 545 (547) (All) *Dhanuk Singh v Tulsi Ram*
- 5 See the cases cited in Foot Note (6) below
- 6 (1922) A I R 1922 Cal 419 (420) 65 Ind Cas 200 49 Cal 544 *Pannalal Binsas v Panchu Ruidas*
- (1936) A I R 1936 Ondh 387 (394 395) 164 Ind Cas 118 (124) *Partab Bahadur Singh v Jagatjit Singh*
- 6a (1884) 10 Cal 525 (527) *Luckmon Sahas v Kanchan Ojham* (Prayer to set aside an order which could not be set aside by a Civil Court is a surplusage)
- (1929) A I R 1929 Cal 417 (417, 418) 120 Ind Cas 104 *Profulla Chandra v Kehetra Lal*
- (1935) A I R 1935 Pesh 95 (97) 157 Ind Cas 345 *Moti Ram v Dets. Das*
- (1908) 1908 Pun Re No 61 page 302 1908 Pun W R No 108, *Munshi Ram v Hamra*

Time, for a suit for a declaration, will run from the date *when the right to sue accrues*. The question when a right to sue will accrue in such cases is not one easy of answer. To a certain extent it will depend upon the facts and circumstances of each case.^{6b} In *Peria Aiyar v Shunmugasundaram*,⁷ Mr Justice Sadasiva Aiyar observed in his Order of Reference to the Full Bench as follows

"Section 42 of the Specific Relief Act provides in general terms that any person entitled to any legal character or to any right to property may institute a suit against any person denying, or interested to deny his title to such character or right, and the Court may, in its discretion, make the needed declaration that he is so entitled. Now, if a suit can be instituted not only against the person denying, but even against one merely interested to deny, when does the right to sue accrue for a suit brought against a person who is merely interested to deny? Is it as soon as the defendant becomes interested to deny or the plaintiff apprehends that he may actually deny? And if the cause of action arises only when the denial occurs, should that denial be by a formal act, or can an oral denial made to a third person or a denial made in writing and not communicated to anybody, give rise to a cause of action, and will the plaintiff be barred after six years from such denial? Can the defendant be allowed to say that he wrote a denial in his closet and put it in a box without communicating it to anybody and that six years from that date is the period for bringing the declaratory suit? Further, does each separate denial give rise to a separate cause of action?"

The Full Bench, to which the question was referred, did not, however, answer the question. An examination of the decided cases reveals a conflict of opinion which it is not easy to reconcile. According to one view, a suit for a declaration of title to immovable property is not barred so long as plaintiff's right to such property

(1921) A I R 1921 Cal 786 (788) 70 Ind Cas 525, *Sarat Chandra v Kanai Lal*

6b(1916) A I R 1916 Cal 751 (754) 81 Ind Cas 242 *Brojendra Kishore v Bharat Chandra*

(1922) A I R 1922 Cal 8 (10) 65 Ind Cas 8 *Joy Narain Sen Ukai v Srikantha Roy*

(1933) A I R 1933 Lah 270 (270) 143 Ind Cas 725, *Mahomed Umar v Muhammad Ibrahim*

(1904) 7 Oudh Cas 187 (189) *Thakur Chhatar Dhari Singh v Bhagwan Din* (Limitation for declaratory suit by landlord against tenant after order of Revenue Court cancelling notice of ejectment — Time runs from date of order)

[See also (1917) A I R 1917 Oudh 168 (169) 20 Oudh Cas 126 39 Ind Cas 428 *Bansgopal v Basdeo Singh* (The limitation cannot be deemed to run so long as the adverse order is subject to be challenged)]

See also

7. (1914) A I R 1914 Mad 831 (835) 83 Mad 903 22 Ind Cas 615 (F B)

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is a subsisting right, and the right to bring a declaratory suit is a continuing right, so long as the right to the property itself is subsisting, in other words, that there is no limitation at all to such suits.⁸ This view has not generally been followed.^{8a}

It is generally agreed that the right to sue accrues when the right in respect of which the declaration is sought is denied or challenged.⁹ But, in order to give rise to a cause of action, the denial must be that of the defendant.^{8a} In *Mt Bolo v Mt Koklan*,^{9b} their Lordships of the Privy Council observed: "There can be no right to sue until there is an accrual of the right asserted in the suit and its infringement or at least clear and unequivocal threat

- 8 (1905) 8 Oudh Cas 303 (305-306), *Sripal Singh v Mt Ranj*
 (1886) 8 Suth W R 218 (218), *Hurronath Roy v Jogendur Chunder Roy*
 [See also (1866) 7 Suth W R 96 (96) *Pureesjan Khatoon v Bykant Chunder* (The statute of limitation will not apply to a claim for a declaration of title plaintiff being in possession of the land regarding which the declaration is required)]
- 8a (1916) A I R 1916 Cal 751 (754) 31 Ind Cas 242 *Brojendra Kishore v Bharat Chandra* (20 Cal 906 Not followed)
 (1905) 1 Cal L Jour 78 (81) *Mohabharat Shaha v Abdul Hamid* (20 Cal 906 Dissented from)
- 9 (1920) A I R 1920 Cal 885 (887) 55 Ind Cas 689 47 Cal 881, *Bejoylal Seal v Nayan Munjari Dass*
 (1914) A I R 1914 Oudh 118 (120) 28 Ind Cas 281, *Ram Jiyawan v Abdul Hasan Khan* (Where a Revenue Court held in a suit that the defendants are not ordinary tenants and in the next suit between the same parties held they were under proprietors it was held that cause of action for civil suit to declare that they were not under proprietors arose not with the previous decision but with the entry of the defendants names as under proprietors under the subsequent order of the Court)
 (1914) A I R 1914 Oudh 235 (236) 25 Ind Cas 34, *Mahadeo Singh v Jagmohan Singh* (No denial till 1906—Suit within six years of 1906 not barred)
 (1916) A I R 1916 Lah 390 (390) 34 Ind Cas 958 *Kalu v Ram Lal*
 (1910) 5 Ind Cas 115 (116) (Cal) *Muhammad Mehdi Hasan Khan v Phul Kuar Mahton*
 (1913) 18 Ind Cas 693 (693) 35 All 149, *Dasant Lal v Chidammilal*
 (1882) 1882 Pun Re No 88 page 256, *Futleh Singh v Kharak Singh*
 (1933) A I R 1933 Lah 412 (414) 142 Ind Cas 606, *Sukhdev Singh v Mathra Singh*
 (1910) 8 Ind Cas 357 (357) (Mad), *Anandan Varar v Vasudevan Nambudri*
 (1919) A I R 1919 Cal 1050 (1051) 46 Ind Cas 796, *Husan Mea v Naun Mea*
 (1890) 15 Bom 422 (424) *Tukabai v Vinayak Krishna* (Where A brought a suit against B for a declaration that she was the daughter of C, held that Article 120 applied and that A's right to sue accrued not from the death of C but from the date of B's denial of her status)
 [But see (1876) 1876 Bom P J 252, *Bajabai v Krishnarav* (Limitation for a suit for a declaration of heirship to a Hindu is that provided for in Art 120 and runs from the date of his death)
 (1895) 1895 Bom P J 257 *Vishnu Lazman v Govind Mahadeo*]
- 9a (1900) 1900 Pun Re No 20 page 76 1900 Pun L R No 25, *Natha Singh v Sadig Ali*
 (1937) A I R 1937 Pesh 94 (95) 171 Ind Cas 267, *Albarullah v Hassan Ali Khan*
 (1935) A I R 1935 All 174 (176) 153 Ind Cas 73 *Shiam Lal v Muhammad Ali Anghar Hassan*
- 9b (1930) A I R 1930 P C 270 (272) 11 Lah 657 67 Ind App 325 127 Ind Cas 737 (P C)

to infringe that right by the defendant against whom the suit is instituted." Thus, a mere entry in the revenue papers of the defendant's name as the owner of property, without any act of denial on the part of the defendant, will not furnish a cause of action. A right to sue will arise when the defendant does any act amounting to a denial of the plaintiff's title.^{9c} An entry, however, which is the result of the denial by the defendant will furnish a cause of action.^{9d}

A mere denial is, however, not sufficient to furnish a cause of action, there must be some *overt act* accompanying the denial.¹⁰

- 9c(1922) A I R 1922 Cal 251 (253) 63 Ind Cas 954, *Soroj Kumar Acharys v Umed Ali Hovladar*
 (1919) A I R 1919 Cal 1050 (1051) 46 Ind Cas 796 *Husan Mea v Naun Mea* (Omission of plaintiff's name in register does not give a cause of action)
 (1916) A I R 1916 Cal 392 (393) 34 Ind Cas 702, *Dinanath Das v Rama Nath Das*
 (1929) A I R 1929 All 529 (531) 121 Ind Cas 209 *Aftab Ali Khan v Akbar Ali Khan*
 (1888) 1888 Bom P J 272, *Paratsingys v Amarsingys* (Denial by defendant gives cause of action and not subsequent order based on such denial)
 (1906) 1906 Pan L R No 151 page 502, *Tej v Kanhaya*
 (1935) A I R 1935 All 174 (176) 153 Ind Cas 73, *Shiam Lal v Mohamed Ali Asghar Husain*
 (1919) A I R 1919 Lah 66 (67) 44 Ind Cas 912, *Gokal Chand v Hukam Chand*
 (1927) A I R 1927 All 597 (598) 102 Ind Cas 172, *Fauzdar Singh v Bal Deo Singh*
 (1929) A I R 1929 All 331 (332) 119 Ind Cas 502 *Zorawat Singh v Dip Chand*
 (1933) A I R 1933 Mad 503 (506) 144 Ind Cas 602 *Natesa Ayyar v Mangalathammal* (Fact that the money, in respect of which declaration is prayed for and the plaintiff's right to which was denied was brought into Court will not furnish a fresh starting point)
 (1914) A I R 1914 All 184 (186) 86 All 492 24 Ind Cas 535 *Mt Allah Jilai v Umrao Husain*
 (1929) A I R 1929 Lah 379 (381) 119 Ind Cas 232 *Ballo v Ganeshi Lal*
 (1928) A I R 1928 Lah 516 (522) 9 Lah 493 119 Ind Cas 253 *Fateh Ali Shah v Mahomed Bakhsh*
 (1900) 24 Bom 533 (536) 2 Bom L R 354 *Dattatraya v Pamchandra*
 [See also (1920) A I R 1920 Oudh 9 (10) 55 Ind Cas 893 23 Oudh Cas 46 *Sri Raj Kunwar v Ganga Prasad*
 (1915) A I R 1915 Oudh 224 (225) 28 Ind Cas 307 *Ram Autar v Abdul Hasan Khan*]
 (But see (1913) 18 Ind Cas 463 (464) (All) *Lachmi Bai v Bankey Lal* (Entry by mistake—Held cause of action arose)
 (1913) 19 Ind Cas 751 (751) (All) *Tara Chand v Bots Ram* (Wrong entry in revenue papers—Cause of action arises)]
 9d(1937) A I R 1937 Oudh 291 (293) 166 Ind Cas 774 *Bank of Upper India v Mt Hira Kuer*
 (1914) A I R 1914 All 124 (125) 22 Ind Cas 608 *Buts Ram v Tara Chand*
 (1916) A I R 1916 Oudh 398 (399) 34 Ind Cas 55 *Ali Husain Khan v Mt Bandi Bibi*
 [See also (1927) A I R 1927 All 296 (297) 100 Ind Cas 45 *Bhikam Singh v Bharat Indu*]
 10 (1922) A I R 1922 Cal 8 (10) 65 Ind Cas 8, *Joy Narain Sen Ukil v Sri Kanta Roy*
 (1932) A I R 1932 Lah 81 (82) 135 Ind Cas 501, *Paras Ram v Chetan Das*

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Further, it is necessary that the plaintiff should have knowledge of the denial and time will run only from the date of such knowledge¹¹

There is a conflict of opinion as to whether there may be successive denials of the plaintiff's right so as to furnish successive causes of action for a suit for a declaration. On the one hand, it has been held that it is the first of the series of denials or the first invasion

(1933) A I R 1933 Lah 53 (55) 145 Ind Cas 241, *Shankar Das v Mt Dhan Devi*

(1914) A I R 1914 Lah 70 (71) 23 Ind Cas 458, *Natha Singh v Ishar Singh*

(1938) A I R 1938 Lah 318 (319), *Dasondhi Khan v Jan Mohammad*

(1933) A I R 1933 Oudh 283 (285) 144 Ind Cas 316, *Mt Sukhdas Kuar v Fateh Bahadur Singh*

(1911) 10 Ind Cas 11 (13) (Oudh), *Sarju Singh v Gaya Din Singh*

(1926) 93 Ind Cas 358 (358) (Lah) *Mota Singh v Roda* (Limitation for a suit for declaration of plaintiff's title and correction of revenue entries where the defendant in whose name the entries in question stand has neither paid any revenue nor received any rent, starts from the date of overt act threatening plaintiff's rights)

(1920) 15 Ind Cas 617 (618) (Lah) *Yaqub Khan v Muhammad Rakh*

(1932) A I R 1932 Bom 15 (20) 136 Ind Cas 161, *Dattatraya Pandurang v Lakshman Mahadev* (Suit for declaration of invalidity of alienation — Cause of action arises when the alienation is made and not when the alienation becomes known to the plaintiff)

(1923) A I R 1923 Oudh 27 (28) 74 Ind Cas 340 *Manohar Lal v Achutanand* (Limitation for a suit for a declaration that the plaintiff is an under proprietor runs from the ejectment order and not from decree in rent suit against him, on the ground that he was a tenant especially when he is in possession in spite of the decree and order)

[See (1935) A I R 1935 Oudh 181 (183) 153 Ind Cas 965 *Bhagwati Prasad v Chauhan*]

11 (1916) A I R 1916 Mad 130 (135) 80 Ind Cas 669 *Muruga Chetty v Raja swamy* (A I R 1914 Mad 429 Followed)

(1905) 1 Cal L Jour 73 (82) *Mohabbat Shah v Abdul Hamid Khan*

(1914) A I R 1914 Mad 429 (430) 22 Ind Cas 883, *Thirumala Rao v Durga Shettis*

(1918) A I R 1918 AH 175 (176) 43 Ind Cas 175 *Mahabir Rai v Sarju Prasad* (The denial must be communicated to plaintiff in order to give him a cause of action — Unless so communicated the statute of limitation cannot run against plaintiff)

(1928) A I R 1928 AH 172 (177) 114 Ind Cas 177 50 All 559 (F B), *Faqira v Hardewa* (Per Minkery J)

(1927) A I R 1927 Oudh 21 (21) 98 Ind Cas 750 *Mahabir v Jageshwar*

(1922) A I R 1922 AH 114 (116) 66 Ind Cas 148, *Gopal Das v Ganga Behari*

(1903) A I R 1903 Cal 100 (101) 10 Ind Cas 100, *De Jodel v Manes* which of the

of the plaintiff's right that will furnish the cause of action^{11a} Thus, according to this view, where the plaintiff applies for the registration of his name in revenue papers on the strength of his alleged title but is refused registration on the defendant's objection, the refusal will furnish a cause of action¹² But a fresh application and a fresh refusal will not furnish a fresh cause of action¹³ See also the under-mentioned cases^{13a} to the same effect Similarly, it has been held that where there has been a denial to the knowledge of the plaintiff, a subsequent act in furtherance of the denial cannot furnish a fresh cause of action¹⁴ A contrary view, namely that every denial or invasion of the plaintiff's right would furnish a cause of action on which a suit for declaration could be based, has been held in the undermentioned cases¹⁵ A third view is that where the later invasion of a right is of

11a(1893) 16 Mad 294 (295) 3 Mad L Jour 98, *Balakrishna v Secretary of State*

(1914) A I R 1914 Mad 429 (430) 22 Ind Cas 683, *Thirumala Rao v Durga Shetty*

(1935) A I R 1935 Mad 967 (970, 971) 161 Ind Cas 653 59 Mad 75, *Ponnu Nadar v Kumar Reddy*

(1929) 115 Ind Cas 629 (630) (All), *Kallu Shah v Mahomed Ehsanullah*

(1937) A I R 1937 Oudh 291 (293) 166 Ind Cas 774 (776), *Bank of Upper India v Mt Hira Kuer*

12 (1922) A I R 1922 Mad 194 (195) 67 Ind Cas 600, *Angati Parambath Kan niyallu Ratha v Thekke Illath Neelakhandan*

13 (1922) A I R 1922 Mad 194 (195) 67 Ind Cas 600 *Angati Parambath Kan niyallu Ratha v Thekke Illath Neelakhandan*

(1927) A I R 1927 Oudh 21 (21) 98 Ind Cas 750, *Mahabir Pattak v Jageshar Pattak*

(1909) 1 Ind Cas 557 (557) 81 All 9 *Albar Khan v Turaban*

13a(1925) 91 Ind Cas 605 (607) (Lah), *Jasmat Singh v Chand Singh*

(1918) A I R 1918 Oudh 318 (316) 48 Ind Cas 301, *Jagdamba Bakhsh Singh v Mahadeo Singh* (The subsequent issue of an abortive notice by the landlord does not give a fresh cause of action)

(1927) 99 Ind Cas 988 (989) (Lah), *Hira v Ram Singh*

(1926) 110 Ind Cas 866 (868) (Lah), *Chhankanda Ram v Hakam Khan*

14 See (1917) A I R 1917 Lah 293 (295) 42 Ind Cas 316 1917 Pun Re No 79, *Ghulam Hussain v Saifullah Khan*

15 (1929) A I R 1929 All 331 (332) 119 Ind Cas 502 *Zorawar Singh v Dip Chand* (For a suit for declaration there may be repeated causes of action)

(1913) 18 Ind Cas 235 (237) (All) *Malay Chand v Mahabhar Singh*

(1898) 1898 All W N 215 (216), *Illahi Bakhsh v Harnam Singh*

possession—That in revenue

papers he could afford to ignore it)

(1935) A I R 1935 Mad 193 (195, 199) *Appa Rao v Secretary of State*

(1919) A I R 1919 Oudh 404 (405) 53 Ind Cas 1005 *Parmeshwar Din v Ram Nath* (The mere fact that a Revenue Court refused to partition

(1919) A I R 1919 Lah 66 (67) 44 Ind Cas 912, *Golal Chanda v Hukam Chanda*

(1907) 1907 Pun Re No 140 page 672 1907 Pun W R No 157, *Hakim Singh v Waryaman*

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a different and more serious kind, as a sale following an attachment of property¹⁶ or when the enjoyment though disputed is not actually

- (1919) A I R 1919 Lah 415 (416) 53 Ind Cas 595 1919 Pun Re No 98 *Jahana v Walk*
- (1919) A I R 1919 Lah 425 (426) *Devi Das v Mohamad*
- (1923) A I R 1922 Lah 94 (95) 3 Lah 43 67 Ind Cas 990 *Mahomed Hanif v Ratan Chand*
- (1922) A I R 1922 Lah 125 (126) 65 Ind Cas 124, *Lorind Chand v Allah Bakhsh*
- (1927) A I R 1927 Lah 119 (119) 100 Ind Cas 732 8 Lah 22 *Smail v Bahab*
- (1927) A I R 1927 Lah 887 (887) 109 Ind Cas 169, *Muhammad Bakhsh v Ramzan*
- (1930) A I R 1930 Lah 284 (285) 122 Ind Cas 225 *Ghulam Rasul v Rahim Bakhsh*
- (1933) A I R 1933 Lah 63 (55) 145 Ind Cas 241 *Shankar Das v Mt Dhan Devi*
- (1933) A I R 1933 Lah 920 (922) 146 Ind Cas 186 *Ram Lal v Thakurji Mandir*
- (1918) A I R 1918 All 175 (176) 43 Ind Cas 175 *Mahabir Rai v Sarju Prasad Rai*
- (1919) A I R 1919 All 383 (385) 41 All 509 50 Ind Cas 767 *Kali Prasad Misir v Harbans Misir*
- (1921) A I R 1921 All 40 (41) 62 Ind Cas 695 *Gulsari Lal v Magbool Ahmed* (Two separate and independent attacks on title of person in possession—Time for suit for declaration runs from later attack on title)
- (1929) A I R 1929 All 509 (530) 121 Ind Cas 209 *Aftab Ali Khan v Akbar Ali Khan*
- (1933) A I R 1933 All 663 (864) 145 Ind Cas 728 *Mt Salamat Begam v Sheikh Ikram* (An owner in possession of property acquires a cause of action on each occasion on which his rights are denied)
- (1934) A I R 1934 All 539 (541) 150 Ind Cas 814 *Parjapati v Jot Singh* (A fresh cause of action may arise to a plaintiff and he may bring a suit even though a prior cause of action had arisen to him beyond the period of six years)
- (1935) A I R 1935 All 174 (176) 153 Ind Cas 78 *Shyam Lal v Mohamad Ali Asl gar Husam*
- (1918) A I R 1918 Lah 265 (266) 44 Ind Cas 31, *Harnam Singh v Makhani*
- (1936) A I R 1936 Oudh 387 (394) 164 Ind Cas 118 *Partab Bahadur Singh v Jagatjit Singh*
- (1909) 1 Ind Cas 556 (557) 31 All 10 (Note) *Robert Skinner v Shanker Lal*
- (1909) 4 Ind Cas 159 (159) 12 Oudh Cas 320 *Jiwanand v Beni Madho*
- (1910) 7 Ind Cas 528 (529) (Lah) *Khem Singh v Kesar Singh*
- (1913) 21 Ind Cas 609 (611) (All), *Rahmat Ullah v Shams-ud Din*
- (1919) A I R 1919 All 383 (385) 41 All 509 50 Ind Cas 767 *Kali Prasad Misir v Harbans Misir*
- (1909) 3 Ind Cas 747 (748) 33 Mad 171 *Sriman Madabhush Achamma v Gopeshis Narayanaswamy Naidu*
- (1935) A I R 1935 Pat 33 (36) 13 Pat 517 156 Ind Cas 136 *Muktakeshi Patra v Mudnapur Zamindary Co Ltd* (As long as the title of the plaintiff is not lost by adverse possession on of the defendant each invasion gives him a fresh cause of action)
- [See also (1925) A I R 1925 Lah 417 (418) 86 Ind Cas 117, *Sohawa Singh v Asa Singh*]
- 16 (1912) 13 Ind Cas 96 (96) 36 Mad 383 *Anantarasu Garu v Narayanarasu Garu*

interfered with until a later date,¹⁷ the later invasion will furnish a cause of action. A fourth view is that there may be *optional and compulsory* causes of action, that a party is not bound to sue on an optional cause of action but that he would be bound to sue on a compulsory cause of action, in which case time will run from the date of such cause of action.^{17a} In *Gorind Narain v Shamalal*,¹⁸ their Lordships of the Privy Council observed as follows

"Assuming that Article 120 applies, they think that the expression 'right to sue' in that Article means the right to bring the particular suit with reference to which the plea of limitation is raised, and that the present suit being in respect of Dendua only, the starting point for limitation must be the date when the appellant's rights in Dendua were *first invaded*"

The invasion in that case was the working of coal mines by the defendants in the plaintiff's property, and it was held that the cause of action arose when the mines first began to be worked. In *Jagat Mohan v Pratap Uday Nath*,¹⁹ their Lordships of the Privy Council observed as follows

"A right in the Maharaja to sue arose in the year 1921, quite independent of any right to sue which may have arisen in him at an earlier date"

It would seem to appear from an examination of the cases above referred to, that where there has been an invasion of the plaintiff's right by reason of an act of the defendant, a *repetition of similar acts* would not constitute a fresh cause of action and consequently time would, for a suit for a declaration, run from the first invasion of the right. But where the act constituting the subsequent invasion of the right is not a mere repetition of an earlier act but is *independent*

(1935) A I R 1935 Mad 967 (971) 161 Ind Cas 653 59 Mad 75, *Ponnu Nadar v Kumaru Reddsar*

(1922) A I R 1922 Mad 194 (195) 67 Ind Cas 600 *Angali Parambath Kanayalli Ratha v Thekke Illath Neelakhandan*

(1922) A I R 1922 Cal 8 (10) 65 Ind Cas 8, *Jeynarain Sen v Srikanta Roy* (First denial in written statement—Subsequent mortgage by defendant of property of plaintiff alleging that it was his)

(1923) A I R 1923 Pat 66 (82) 6 Pat 633 106 Ind Cas 399, *Uday Pratap Nath v Jagat Mohan Nath*

(1936) A I R 1936 Pat 323 (332) 15 Pat 151 163 Ind Cas 940, *Kanhya Lal Missir v Mt Hira Bibi*

[See (1919) A I R 1919 All 167 (167, 188) 52 Ind Cas 646, *Mt Imam Bandi v Purn Prasad*]

[See also (1905) 1 Cal L Jour 73 (63) *Mohabbharat Shaha v Abdul Hamid Khan* (Plaintiff's claim rejected on 19-3-1889—Sale held on 22-4-1889—Date of sale gave a cause of action)]

17 (1925) A I R 1925 Lah 391 (392) 6 Lah 132 89 Ind Cas 279, *Bela Singh v Lakshmi Das*

17a (1936) A I R 1936 Mad 318 (315) 58 Mad 141 162 Ind Cas 661, *Parthasarathi Appa Rao v Secretary of State*

(1935) A I R 1935 Lah 627 (629) 16 Lah 659 157 Ind Cas 75, *Prasad Ali v Iqbal Rai*

18. (1931) A I R 1931 P C 69 (94) 58 Cal 1167 131 Ind Cas 753 58 Ind App 125 (P C)

19 (1931) A I R 1931 P C 302 (303) 10 Pat 677 131 Ind Cas 1073 (P C)

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and distinct from the prior act, it would furnish a fresh cause of action and time would run from that date. This solution of the difficulty seems to accord with the two decisions of the Privy Council referred to above and with the decisions of the Indian Courts in general. The view expressed in some cases, however, is inconsistent with this solution.²⁰

Where within six years of the denial of the plaintiff's title there is an adjudication by a Civil Court deciding against the defendant, a subsequent denial of the plaintiff's title is one which will give rise to a fresh cause of action.²¹

Where the act of the defendant constituting the denial is a continuing wrong then, Section 23 will apply and the suit will not be barred. See Note 4 to Section 23, *ante*, and the undermentioned cases.²²

32. Suit for distributive share of deceased's property. — See Note 4 to Article 123, *infra*, for a full discussion.

33. Suit for possession of, and for removal of a person from, office. — Article 124, *post*, applies to suits for possession of an hereditary office.¹ A suit for possession of an office which is *not*

20 (1912) 17 Ind Cas 675 (676) (All), *Sheopher Singh v Deonaram Singh* (At the settlement of 1901, the plaintiffs were recorded in the revenue papers as being in possession of a smaller area of land than they actually held. The plaintiffs remained in possession, and in April 1909, the Collector corrected the entry, but his order was set aside by the Commissioner in August 1909 and thereafter the defendants interfered with the plaintiffs' possession. The latter then sued for declaration of title to the land. Held that whether or not a cause of action had accrued to the plaintiffs in 1901, the Commissioner's order had given rise to a cause of action to the plaintiffs and their suit having been brought within six years of the date of that order, was not barred by limitation.)

(1914) A I R 1914 Mad 429 (430) 22 Ind Cas 883, *Thirumala Rao v Kadekar Durga Shetty* (Denial giving cause of action—Subsequent sale of plaintiff's property in consequence of the denial—No fresh cause of action.)

(1920) A I R 1920 Pat 542 (547) 56 Ind Cas 184 5 Pat L Jour 273, *Prmatha Nath Maha v A J Meek* (This is not consistent with A I R 1931 P O 89.)

21 (1925) A I R 1925 All 421 (423) 47 All 416 87 Ind Cas 647, *Gajadhar Singh v Hari Singh*

(See also (1927) A I R 1927 All 148 (149) 98 Ind Cas 811, *Jagdish Prasad Narain v Jang Bahadur Nark*.)

22 (1905) 1 Cal L Jour 73 (76) *Mohabharat Shaha v Abdul Hamid Khan*

(1916) A I R 1916 Cal 751 (754) 31 Ind Cas 242, *Brojendra Kishore v Bharat Chandra*

(See also (1926) A I R 1926 Cal 1022 (1025) 97 Ind Cas 73, *Rohini Nandan v Jadu Nandan*.)

Note 33

1 (1920) A I R 1920 Cal 800 (803) 60 Ind Cas 165, *Kassim Hassan v Harra Begum*

(1918) 18 Ind Cas 373 (374) (Mad) *Palanisami Madhavaram v Vadamalai Odayan*

hereditary would be governed by this Article² Where lands or emoluments are attached to a non-hereditary office, a suit to recover the lands and the office would be governed only by this Article³ The cause of action for a suit for possession of office governed by this Article is not when the plaintiff's right to possession accrues but when the defendant *adversely possesses it*⁴ The Explanation in column 3 of Article 124 has been held to lay down only a general rule for determining the question of possession in respect of offices and to be therefore applicable to cases governed by this Article also where the claim is, in substance, one to recover possession of an office⁵

Where no suit is brought within the time limited by this Article for possession of a non hereditary office, the right of the owner is extinguished by the operation of Section 28, *ante*⁶

A suit for removal of a person from an office is governed by this Article⁷ The cause of action for such a suit arises when the defendant takes up the office,⁸ or, if the defendant is sought to be removed on the ground of change of religious views, from the date of

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- (1909) 3 Ind Cas 419 (424) 37 Cal 263, *Salimulla Bahadur v Abdul Khayer Mohammad Mustafa*
- 2 (1920) A I R 1920 Cal 800 (803) 60 Ind Cas 165, *Kassim Hassan v Harra Begum*
- (1927) A I R 1927 Cal 130 (135) 93 Ind Cas 205, *Debendra Nath Mitra v Sheikh Sefatullah*
- (1892) 19 Cal 776 (779), *Jagannath Das v Birbhadra Das*
- (1927) A I R 1927 Mad 143 (149) 93 Ind Cas 634, *Muniswami Pillai v Secretary of State*
- (1926) A I R 1926 Mad 1012 (1015) 97 Ind Cas 437, *Parganand Das Goswami v Radhakrishna Das*
- (1903) 26 Mad 113 (115), *Kidambi Raghavachariar v Tirumalai Asari Nallur Raghavachariar*
- (1935) A I R 1935 Mad 449 (452) *Rajagopala Naidu v Ramasubramania Ayyar* (A I R 1926 Mad 1012 Followed)
- (1930) A I R 1930 All 866 (867) 129 Ind Cas 375, *Abdul Alim v Abdul Hamid* (Suit for possession of the office of the mutawalli is governed by Article 120)
- (1909) 3 Ind Cas 419 (424) 37 Cal 263, *Salimullah v Abdul Khayer Mahomed Mustafa*
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- 3 (1880) 2 Mad 283 (285) 4 Ind Jur 622, *Venkatasubramania v Surayya*
- 4 (1926) A I R 1926 Mad 245 (246) 93 Ind Cas 923, *Narayana Mudaliar v Nagappa Mudaliar*
- 5 (1935) A I R 1935 Mad 449 (452), *Rajagopala Naidu v Ramasubramania Iyer*
- 6 (1927) A I R 1927 Cal 130 (135) 93 Ind Cas 205, *Debendranath Mitra v Sefatollah*
- (1903) 26 Mad 113 (115), *Kidambi Raghavachariar v Tirumalai Asari Nallur Raghavachariar* (Right to land appurtenant to office would also be barred)
- 7 (1916) A I R 1918 Mad 1016 (1025) 40 Ind Cas 627, *Kailasam Pillai v Nataraja Tambiran*
- (1909) 2 I C 107 (109, 110) 1909 Pun Re No 53, *Yad Ali v Mubarak Ali*
- 8 (1918) A I R 1918 Mad 1016 (1025) 40 Ind Cas 627, *Kailasam Pillai v Nataraja Tambiran*

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such change⁹

34. Suit by Hindu reversioners.—Article 125, *post*, provides for suits by *immediate* reversioners for a declaration that an alienation of land by the limited female owner is void except for her life or until her remarriage. A suit for a declaration by a reversioner, which does not fall within Article 125, would be governed by this Article. Thus, a suit by a *remote* Hindu reversioner for a declaration that an alienation by the widow is not binding on him or on the reversion, would be governed by this Article¹. Similarly, a suit by a reversioner, not during the lifetime of the limited female owner but *after her death*, for such a declaration would be governed by this Article². So also, a suit by a reversioner for a declaration that a transaction by the limited owner which does not amount to an *alienation of land* would not be governed by Article 125 but would be governed by this Article³. Where, during the minority of a limited Hindu female owner, her guardian, appointed under the Guardians and Wards Act, 1890, alienated the property of the minor

9 (1909) 2 I. C. 107 (109, 110) 1909 Pun. Re. No. 53, *Yad Ali v. Mubarak Ali*

Note 34

1 (1916) A. I. R. 1916 Cal. 606 (608) 30 Ind. Cas. 578, *Sarabjit Pratab Bahadur v. Bhagwat Koers*

(1905) 32 Cal. 473 (478), *Chooramani Das v. Baidya Nath Nask*

(1915) A. I. R. 1915 Mad. 800 (802) 20 Ind. Cas. 625 38 Mad. 396, *Narayana Aiyar v. Rama Aiyar*

(1917) A. I. R. 1917 Mad. 30 (34) 38 Ind. Cas. 270, *Venkata Row v. Tuljaram*

(1905) 82 Cal. 62 (71) 9 Cal. W. N. 25, *Abinash Chandra Majumdar v. Hari Nath Shaha*

(1915) A. I. R. 1915 All. 180 (192) 37 All. 195 26 Ind. Cas. 737, *Kunwar Bahadur v. Bindraban*

(1916) A. I. R. 1916 Lah. 144 (145) 33 Ind. Cas. 161 1916 Pun. Re. No. 15 *Mt. Thakars v. Mt. Ganesh*

(1913) 18 Ind. Cas. 710 (711) (Mad.) *Guntupalli Ramanna v. Guntupalli Annamma*

(1928) A. I. R. 1928 Lah. 242 (243) 108 Ind. Cas. 184, *Mt. Bal Kaur v. Mt. Har Kaur*

(1920) A. I. R. 1920 Lah. 424 (425) 1 Lah. 69 55 Ind. Cas. 924 *Soman Singh v. Uttam Chand*

(1936) A. I. R. 1936 Pat. 535 (536) 165 Ind. Cas. 21, *Damar Mahton v. Jagdish Mahton*

(1890) 14 Bom. 512 (515), *Chhaganram Astikram v. Bai Motigavri*

(1933) A. I. R. 1933 All. 856 (857) 146 Ind. Cas. 977 *Mt. Jagrani v. Gaya*

(1924) A. I. R. 1924 Oudh. 361 (382) 27 Oudh. Cas. 173 63 Ind. Cas. 1055 *Anandi Din v. Ram Sahai*

(1900) " " " " " " " " " " " "

2 (1935) A. I. R. 1935 Pat. 256 (260) 155 Ind. Cas. 244, *Sital Raut v. Adalat Raut*
(1908) 16 Mad. L. Jour. 275 (276) 3 Mad. L. Tim. 819, *Krishna Iyer v. Lakshmi miammal*

(1936) 165 Ind. Cas. 448 (449) (Mad.) *Rajagopala Konar v. Ramanuja*

3 (1927) A. I. R. 1927 Nag. 193 (194) 101 Ind. Cas. 276, *Paiku v. Bhisoa* (Barren der by widow)

(1912) 17 Ind. Cas. 864 (865) 1912 Pun. Re. No. 108, *Mt. Ralli v. Sundar Singh* (Sale of equity of redemption is not alienation)

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cases⁷ that each reversioner gets a separate cause of action or that a subsequently born or an adopted reversioner would get a separate cause of action is no longer good law in view of the decisions of the Privy Council in *Venkatanarayana Pillai v Subbammal*⁸ and *Janaki Ammal v Narayanaswamy*⁹. The fact that the alienee from the limited owner himself alienates the property to a third person, will not furnish a fresh cause of action for the reversioner to impeach the alienation by the limited owner¹⁰. Where a decree was fraudulently obtained against a Hindu widow and the reversioner sued for a declaration that such decree was not binding on the reversion, it was held that the cause of action arose not on the date of the decree but on the date of the attachment in execution of the decree.¹¹

A suit by a reversioner against a limited owner for the appointment of a receiver of the estate for the purpose of preventing waste and for the preservation of the property, is governed by this Article¹².

35. Suit to set aside father's alienation.—A suit by a Hindu governed by the Mitakebara law to set aside his father's alienation of ancestral property is specially provided for by Article 126. It has been held by the High Court of Lahore¹ that where a property, though joint family property, cannot be said to be ancestral property in the sense in which it is ordinarily interpreted in the Hindu law, a suit to set aside an alienation by the father of such property would not be governed by Article 126 but only by this Article. Similarly, where the alienee does not get possession of the property alienated a suit by the son to set aside the alienation by his father is governed by this Article and not by Article 126.² See also the undermentioned

(1900) 22 All 83 (41) 1899 All W N 159 (F B), *Bhagwanta v Sukhi*

See Note 17 to Section 6 ante and Note 7 to Article 125 post

[See also (1890) 14 Bom 512 (515) *Chhaganram v Bai Motigavri*]

7 (1924) A I R 1924 Cal 481 (482) 51 Cal 101 81 Ind Cas 522 *Das Ram Choudhury v Thirtha Nath Das*

(1915) A I R 1915 Mad 800 (802) 20 Ind Cas 625 (626 627) 38 Mad 896 *Narayana Aiyar v Rama Aiyar*

8 (1915) A I R 1915 P C 124 (125) 38 Mad 406 42 Ind App 125 29 Ind Cas 298 (P C)

9 (1916) A I R 1916 P C 117 (118) 39 Mad 634 43 Ind App 207 37 Ind Cas 161 (P C)

10 (1929) A I R 1929 Lah 579 (581) 123 Ind Cas 87, *Sadhu Ram v Bishambar Dial*

11 (1907) 80 Mad 402 (404) 17 Mad L Jour 288 2 Mad L Tim 360 *Sundarappa v Sreeramulu*

12 (1918) A I R 1918 Mad 1198 (1199) 37 Ind Cas 642 *Venkamma v Narasimham*

(1921) A I R 1921 Mad 234 (235) 44 Mad 984 60 Ind Cas 10 *Gokula Venkanna v Gokula Narasimham*

Note 35

1 (1934) A I R 1934 Lah 397 (397, 398) 150 Ind Cas 963, *Gobind Ram v Gopichand*

2 (1927) A I R 1927 All 702 (703) 106 Ind Cas 377, *Dindeshri Upadhya v Sital Upadhya*

case³

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36. Suit impeaching alienation by karnavan of a Malabar tarwad. — The cause of action for a suit by the junior member of a Malabar *tarwad* for a declaration that an alienation by the *karnavan* is not binding on the *tarwad*, accrues on the date of the completion of the document evidencing the alienation and not when the alienation comes to the knowledge of the plaintiff¹

37. Suit for joint possession. — A suit by a co sharer in a property for joint possession of such property is not one governed by Article 127 or Article 144 but is one governed by this Article¹

38. Suit for partition.—Where a partition takes place between members of a family, and the plaintiff, a minor, is represented by his mother and subsequently the minor sues to question the partition, the suit will be governed by this Article¹ Time will begin to run from the date when the plaintiff has knowledge of the facts entitling him to bring such a suit² A suit for the partition of a family business,³ or for partition and possession of moveable property,⁴ would be governed by this Article See also the undermentioned case⁵

39. Suit for customary dues or for yeomiah allowance. — The following suits have been held to be governed by this Article

(1929) A I R 1929 All 750 (751) 119 Ind Cas 90 *Angad Singh v Bahadur Singh*

3 (1929) A I R 1929 Lah 90 (91) 10 Lah 543 113 Ind Cas 907, *Jagoy Ram Richhpai*

Note 36

1 (1910) 5 Ind Cas 698 (699) 33 Mad 81, *Ottappurakkal Thazhate Sooty v Cherichil Pallikal Uppathumma*

Note 37

1 (1906) 4 Nag L R 120 (128), *Ramdayal v Gulabai Bai*

(1928) A I R 1928 Nag 96 (97) 111 Ind Cas 76, *Amarchanda v Ramjiwan*
[See also (1904) 31 Cal 647 (657) 8 Cal W N 446 (F B) *Tomazuddin v Ashrub Ali* (Person claiming a share as lessee)]

Note 38

1 (1921) A I R 1921 Mad 553 (554) 61 Ind Cas 762 *Venkata Reddi v Kuppu Reddi* (Mother is not the guardian of the minor in respect of joint family property hence Article 44 does not apply)

2 (1927) A I R 1927 Nag 350 (350) 104 Ind Cas 493 *Jain v Tukaram*

3 (1937) A I R 1937 Mad 599 (600) 173 Ind Cas 191 *Gundayya v Siddappa*

4 (1915) A I R 1915 All 148 (149) 37 All 318 28 Ind Cas 953 *Parsotam Rao v Radha Bai* (Funds)

5 (1928) A I R 1928 Lah 662 (663) 111 Ind Cas 29 *Gurudas Mal v Bai Nath* (Under a compromise in a suit for partition of joint property, in order to adjust the difference between the prices of the properties which fell to the share of the two contesting parties a certain sum was to be paid by D to B The amount was to be paid after one month B brought a suit to recover the amount D contended that the suit was time barred according to Article 111 Held that it was not a case of sale and amount in suit could not be described as purchase money Therefore Article 111 did not apply but the case was governed by Article 120)

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- 1 A suit for declaration of the plaintiff's right to receive the *yeomiah* allowance payable to the *mutawalli* of a mosque¹
- 2 A suit for arrears of customary dues payable to a *chhatram*²
- 3 A suit for money due to the plaintiff as the holder of an hereditary office as marriage dues³
- 4 A suit for the recovery of *ghariwara* dues⁴
- 5 A suit for the recovery of *zar* or *chaharum*⁵ or *haq* or *chaharum*⁶
- 6 A suit for declaration of plaintiff's right to *malikana* allowance. The cause of action for such a suit arises when a certificate under the Pensions Act is obtained, as until then the plaintiff has no right of action⁷

40. Suit for emoluments of hereditary office. — A suit by persons holding a hereditary office of *diwari* of a temple to recover dues payable to them as emoluments in respect of their services in connexion with the temple is governed by this Article and not by Article 102 or Article 131¹. A claim for such remuneration falling due beyond six years of suit would be barred².

41 Suit to enforce mortgage or pledge. — A suit to enforce a mortgage not governed by Article 132 would be governed by this Article. Thus a suit to enforce a mortgage of a turn of worship is not governed by Article 132, but would be governed by this Article¹. As to a suit to enforce a mortgage executed for loan of *paddy*, see Note 21 to Article 132 *infra*. A suit to enforce a pledge of moveable

Note 39

- 1 (1920) A I R 1920 Mad 447 (447) 58 I C 788, *Ghulam Gouse Saib v Jannia*
- 2 (1893) 16 Mad 305 (307) *Venkataramaiah v District Board of Tanjore* (Suit for arrears of customary dues to *chhatram* is not a suit for rent)
- 3 (1899) 22 Mad 351 (353) *Rathna Mudaliar v Tirutankatachariar*
- 4 (1899) 3 Oudh Cas 203 (204) *Durga Bakhsh Singh v Hasan Ali* (*Gharwara* dues are neither *malikana* allowances nor such fees or *haks* as are contemplated in Article 132. A suit for the recovery of such dues is governed by Article 130)
- 5 (1916) A I R 1916 All 199 (200) 35 Ind Cas 347 *Bindeshwari v Somnath Bhadry*
- (1931) A I R 1931 All 25 (26) 130 Ind Cas 12 52 All 921 *Deo Das v Mahesh Ram Gond*
- 6 (1896) 18 All 430 (431) 1896 All W N 140 *Sham Chand v Bahadur Upadhyay*
- (1878 80) 2 All 358 (361) *Kivatha Chand v Ganesh Prasad*
- 7 (1929) A I R 1929 P O 166 (169) 56 Ind App 267 51 All 439 117 Ind Cas 429 (P O) *Jaggo Bai v Utavatal*

Note 40

- 1 (1926) A I R 1926 Pat 205 (207) 5 Pat 249 94 Ind Cas 826 *Baidya Nath Jiu v Har Dutt*
- 2 (1926) A I R 1926 Pat 205 (207) 5 Pat 249 94 Ind Cas 826 *Baidyanath Jiu v Har Dutt*

Note 41

- 1 (1919) A I R 1919 Cal 671 (672) 46 Cal 455 47 Ind Cas 25 *Narasimha Bana v Prohmodman Tiwari* (Suit to enforce a mortgage of turn of worship)

property would also be governed by this Article² A suit for the recovery of the loan *personally* against the debtor would be governed by Article 57 (see Note 4 to that Article)

Article 120
Notes
41—42

42. Suit to enforce an award.—It was held in some cases of the Allahabad High Court that a suit for the specific performance of the terms of an award was governed by Article 113, *ante* The said view has not been followed even by that High Court in other cases, the general trend of all the High Courts being that Article 113 would not apply to such cases See Note 5 to Article 113, *ante* If such cases do not also fall under any other Article this Article would clearly apply¹ Where the parties sign the arbitrator's award in token of their acceptance and thus merge the award into a new contract between them, a suit for money recoverable under such award may be regarded as one for compensation for breach of contract within the meaning of Articles 115 and 116² This view has not, however, been followed in other cases³ In *Ma Bibi v Abdul Hameed Khan*,⁴ it was held that a suit for possession based on an award would be governed by Article 142 or by Article 144 and not by this Article Rutledge, C J, observed as follows

"It does not seem to us that in every case suits which are based on an award must be governed by Article 120 There is no specific Article of the Limitation Act

2 (1995) 17 All 284 (296) 1995 All W N 46, *Madan Mohan Lal v Kanhaiya Lal*

(1902) 27 Mad 529 (530) 19 Mad L Jour 445, *Mahalinga Nadar v Ganapati Subbien* (The claim to proceed against property pledged is governed by Article 120 and the claim to proceed against the debtor personally is governed by Article 57 Where both rights exist they are concurrent rights and the right to proceed against the property pledged is not merely accessory to the right to proceed against the debtor personally)

(1918) A I R 1916 All 344 (344) 46 Ind Cas 373 40 All 512 *Deeksnandan v Gupta*

(1894) 22 Cal 21 (24) *Nim Chand Baboo v Jagabundu Ghose*

(1917) A I R 1917 All 309 (310) 37 Ind Cas 4 39 All 74 *Jamna Des v Lala Ram*

(1935) A I R 1935 Bom 219 (215) 156 Ind Cas 531, *Percy F Fisher v Ardeshr*

(1906) 30 Bom 218 (219) 7 Bom L R 739, *Yellappa v Desayappa*

(1902) 1 Low Bur Rul 154 (155) *Ma Kyi Kyi v Ma Shwe*

(1902) 24 All 251 (253) 1902 All W N 43, *Sayid Ali Khan v Debi Prasad*

Note 42

1 See the cases cited in Foot Notes to Note 5 of Article 113 *ante*

2 (1912) 16 Ind Cas 804 (806) 1913 Pun Re No 32, *Hardkian Singh v Delhi Cloth and General Mills Co Ltd*

3 (1916) A I R 1916 Lah 163 (164) 1913 Pun Re No 102 32 Ind Cas 88, *Harbhaj Mal v Duran Chand*

(1929) A I R 1929 Sind 168 (169) 117 Ind Cas 153 25 Sind L R 417, *Khubchand v Jethanand*

4 (1929) A I R 1929 Rang 275 (277) 122 Ind Cas 907

Article 120
Notes
42—44

applying to suits for the enforcement of an award. It may be that in many such suits it would be impossible to say that the suits can be classified under any other Article and therefore that Article 120 applies. But had the Legislature intended that in all suits to enforce an award, entirely irrespective of their nature, the period of limitation applicable should be six years, it is extremely unlikely that a specific Article dealing with such suits would not have been inserted in the schedule.

43. Suit for taxes. — A suit for the amount due as tax under a statute is governed by this Article. In *Secretary of State v. Guru Proshad Dhur*,¹ Petheram, C. J., observed as follows:

"The Limitation Act does not prescribe any period of limitation for money due under a statutory liability to pay it, so the suit is, I think, within Article 120, in other words, the period of limitation is six years, which begins to run from the time when a demand for the money is made by persons who could give the receipts required by the Section."

It has thus been held that a suit by a municipality for recovery of a terminal tax² or of a fee charged for issuing a permission for use of municipal land under the provisions of the Municipal Act,³ will be governed by this Article. Similarly, a suit by a municipality to recover a license fee payable in respect of a platform erected by the defendant,⁴ or for house and latrine taxes payable by the defendant,⁵ will be governed by this Article. A suit for recovery of instalments of profession tax under the provisions of the Town Improvements Act, 1871, will be governed by this Article.⁶ A suit for recovery of cess from intermediate land holders under Section 88 of the Madras Local Boards Act, 1920, has been held not to be one for rent or one based on any contract but one to enforce a statutory liability governed by the six years' rule under this Article.⁷

44. Suit by creditor against alienee from devisee. — The creditor of the ancestor or testator may follow the lands into the possession of a purchaser from the heir or devisee with knowledge of

Note 43

1 (1892) 20 Cal 51 (57) (F B)

2 (1938) A I R 1938 Sind 48 (48) 173 Ind Cas 678, *Larkana Municipality v. Kaloomal Pamoomal*

3 (1936) A I R 1936 Sind 184 (184) 30 Sind L R 146 165 Ind Cas 309, *Masand Motiram v. Shikarpur Municipality*

4 (1938) A I R 1938 Pat 192 (193) 175 Ind Cas 86 *Mathura Prasad v. Special Officer, Goya Municipality*

5 (1933) A I R 1933 Pat 65 (67) 141 Ind Cas 792, *Dip Narain v. Additional District Magistrate*

6 (1881) 3 Mad 124 (125) *President of Municipal Commission Guntur v. Shrikakulupu Padmaraju*

7 (1937) A I R 1937 Mad 217 (218) 1 L R 1937 Mad 498 167 Ind Cas 490, (F B), *Rajah of Visianagaram v. Thammanna*

the existence of such debts and with the knowledge that the heir or devisee intended to apply it otherwise than in the payment of such debts. A suit for a declaration that the alienation is void and for consequential relief would be governed by this Article¹

45. Suit by auction-purchaser for refund of purchase-money.—It has been held in some cases that a suit by a court auction purchaser for refund of purchase money on the ground that the judgment debtor had no saleable interest in the property sold (where such suit is maintainable), is governed by this Article¹. As has been shown in Note 19 to Article 62 *ante*, these decisions are not good law, such suits would be governed by Article 62

46. Suit for restitution of conjugal rights.—A suit for restitution of conjugal rights would be governed by this Article. The cause of action for such a suit, namely the refusal of the husband or the wife to live with the other, is a continuing one, inasmuch as such refusal is a continuing wrong within the meaning of Section 23, *ante*¹. As to the law on the subject prior to the present Act, see the discussion in Note 15 to Section 23, *ante*

47. Suit for dissolution of marriage.—Sub section 3 of Section 29, *ante*, provides that nothing in this Act shall apply to suits under the Indian Divorce Act. It follows that a suit for divorce or for dissolution of marriage under the Indian Divorce Act is not governed by the period of limitation prescribed by this Act. Sub section 3 above referred to will not, however, apply to suits for dissolution of marriage by persons who are not governed by the Indian Divorce Act. Such suits would be governed by this Act and, there being no specific Article dealing with such suits, this Article will apply. The cause of action for such a suit would arise when the facts furnishing the grounds for divorce first come into existence¹

Note 44

- 1 (1879) 4 Cal 897 (920) 4 Cal L R 193 4 Ind Jur 267 *Greender Chunder Ghose v Makintosh*

Note 45

- 1 (1923) A I R 1923 Mad 23 (24) 70 Ind Cas 45 *Pakuran v Kandan Kutty* (A I R 1918 P O 151, Followed)

See cases cited in Foot Note (2) to Note 19 of Article 62 *ante*

[See also (1923) A I R 1923 Cal 85 (89) 50 Cal 115 70 Ind Cas 606 *Makar Ali v Sarfaddin*]

Note 46

- 1 (1936) A I R 1936 Bom 289 (290) 164 Ind Cas 629 *Basavanappa Balappa v Balappa Shetappa*
(1891) 13 All 126 (151) 1891 All W N 18, *Binda v Kaunalia*

Note 47

- 1 (1922) A I R 1922 Oudh 109 (111, 112) 65 Ind Cas 452, *Md Hamsdullah Khan v Md Fakhrjahan Begam*

Article 120
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48—49

48. Suit to establish exclusive right of worship — A right to establish the plaintiff's exclusive right to worship a particular idol will be governed by this Article¹

49 Suit to enforce Hindu son's pious obligation to pay his father's debts. — Under the Hindu law, a son is under a pious obligation to pay his father's debts where such debts have not been incurred for illegal or immoral purposes. The question arises whether a suit lies to enforce such obligation and if so what is the period of limitation applicable to such suits. Before the enactment of Section 53 in the Code of Civil Procedure 1908 where a *decree had been obtained* against the father in respect of a debt due by him and on the decree being unsatisfied it was found necessary to enforce the pious obligation of the sons there was a conflict of opinion as to whether such enforcement could be by way of a *suit*. In some cases it was held that a suit would lie and in others that no such suit would lie¹

In cases where a suit was held to lie the Article that was applied was this Article². But the decisions were not uniform as to when the right to sue accrued. In some cases it was held that it accrued

Note 48

- 1 (1879) 4 Cal 683 (685) *Eshan Chander Roy v Monmohini Dass*

Note 49

- 1 *In the following cases it was held that such a suit would lie*
 (1906) 9 Oudh Cas 350 (352) *Mata Parshad v Narendra Bahadur* (The liability of a Hindu son to pay the debt of his father arises from the moment the father has failed to discharge the obligation—Hence the suit having been brought more than six years after the date of the decree was barred by limitation under Article 120)
 (1903) 27 Mad 243 (247 254) 14 Mad L Jour 84 (F B) *Periasami Mudaliar v Seetharam Chettiar* (The suit in such a case is brought on the cause of action arising from the decree against the father)
 (1894) 17 Mad 122 (129) 4 Mad L Jour 52 *Ramayya v Venkataratnam*
 (1901) 23 All 206 (209) 1901 All W N 34 *Narsingh Misra v Lalji Misra*
 (1904) 17 Mad L Jour 261 (261) *Jaganadha Row v Seshayya*
 (1907) 29 All 544 (553) 4 All L Jour 424 1907 All W N 159 *Ram Singh v Sobha Ram*

In the following cases it was held that such a suit would not lie

- (1896) 20 Bom 385 (389) *Umed Hathisingh v Goman Bhaiji*
 (1909) 1 Ind Cas 459 (459 460) 33 Bom 39 *Shiv Ram Dhondur v Sakha Ram Krishna*
 (1910) 5 Ind Cas 967 (968) 34 Bom 354 *Ramakrishna Narayan v Vinayak Narayan*
 (1906) 33 Cal 676 (677 678) 3 Cal L Jour 131 *Chander Pershad v Sham Koer*
 (1907) 34 Cal 642 (647) 11 Cal W N 593 5 Cal L Jour 491 2 Mad L Tim 207 (F B) *Amarchandra Kundu v Sebak Chand*
 (1912) 16 Ind Cas 970 (970) (Cal) *Lachmi Prasad v Basant Lal*
 (1912) 18 Ind Cas 670 (671) (Lah) *Tota Singh v Partab Singh*
 2 (1906) 9 Oudh Cas 650 (352) *Mata Parshad v Narendra Bahadur Singh*
 (1904) 27 Mad 243 (246) 14 Mad L Jour 84 (F B) *Periasami Mudaliar v Seetharama Chettiar*

on the date when the father failed to discharge the debt,³ in others it was held that the decree against the father furnished the cause of action,⁴ in yet another class of cases the death of the father was held to furnish a cause of action.⁵

Where no decree had been obtained against the father, it was held in some cases⁶ that a suit to enforce the debt against the sons on the ground of their pious obligation was governed by this Article. In other cases it was held that the Article applicable was that which would have been applicable had the suit been against the father himself.⁷ But in either case the right to sue was held to accrue from the date when the debt fell due.⁸ It was also held generally that where the suit was barred against the father it would be barred against the son.⁹ In the undermentioned case¹⁰ it was held that a suit against the son would not be barred though a suit against the father would have been barred if a decree had been obtained against a father which was subsisting on the date of the suit against the son.

After the Civil Procedure Code of 1908, where a decree has been obtained against the father for a debt due by him, a suit against the son to recover the debt in enforcement of his pious obligation would

- (1907) 17 Mad L Jour 281 (281) *Delhi Jagannadha Row v Seshayya*
 (1901) 23 All 206 (208) 1901 All W N 34 *Narsingh Misra v Lalji Misra*
 3 (1906) 9 Oudh Cas 350 (352) *Mata Parshad v Narendra Bohadur Singh*
 (1901) 23 All 206 (208) 1901 All W N 34 *Narsingh Misra v Lalji Misra*
 4 (1904) 27 Mad 243 (246) 14 Mad L Jour 84 (F B) *Periasami Mudaliar v Seetharama Chettiar*
 (1907) 17 Mad L Jour 281 (281) *Delhi Jagannadha Row v Seshayya*
 5 (1899) 18 Mad 99 (102) 3 Mad L Jour 1 *Natesayyan v Pennusami* (No longer good law after 27 Mad 243 (F B))
 (1894) 17 Mad 122 (129) 4 Mad L Jour 52, *Ramayya v Venkataratnam* (Do)
 6 (1906) 28 All 508 (516) 1906 All W N 117 3 All L Jour 274 *Maharaj Singh v Raja Balwant Singh*
 (1912) 13 Ind Cas 530 (531) (All) *Champa Lal v Sham Sunder Mali*
 (1900) 27 Cal 762 (767) *Surja Prasad v Golab Chand*
 7 (1904) 27 Mad 243 (246) 14 Mad L Jour 84 (F B), *Periasami Mudaliar v Seetharama Chettiar*
 (1907) 29 All 544 (553) 4 All L Jour 424 1907 All W N 159 *Ram Singh v Sobha Ram* (Article 132 applied)

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Jugala Panda

- (1900) 10 Mad L Jour 248 (248) *Abboys Naidu v Penrangommal*
 8 See the cases cited in Foot Notes (6) and (7)
 9 (1910) 7 Ind Cas 693 (895) 33 Mad 303 *Subramania Aiyar v Gopala Aiyar*
 (1931) A 1 R 1931 Bom 542 (544) 135 Ind Cas 801 *Lalshman Vithoba v Mahableshwar Doda* (Limitation for son's liability to pay debt by father incurred on a promissory note is three years from due date—Such suit is governed by Article 73 and not by Article 120)
 (1900) 10 Mad L Jour 248 (248) *Abboys Naidu v Penrangommal*
 10 (1901) 23 All 206 (208) 1901 All W N 34, *Narsingh Misra v Lalji Misra*

he barred by Section 47 of the Civil Procedure Code¹¹ Where no decree has been obtained against the father, a suit would of course be maintainable to enforce such obligation There is however a conflict of opinion as to the Article applicable to the suit In the undermentioned case¹² this Article was applied The High Court of Bombay has however, held that the same Article as would have applied to a suit against the father will apply to such suits¹³ In either case the starting point would be the date when the money becomes due¹⁴

50 Suit for correction of, or for declaration as to entry in, Record of Rights.—A suit for the correction of an entry in Record of Rights where such a suit lies, will be governed by this Article¹ A right to sue arises either on the date of the entry in the Record of Rights or on the date when such Record was sanctioned² A fresh cause of action may also arise when the plaintiff's right is placed in jeopardy by reason of such entry³ A suit for ejectment on the ground that the defendant is a tenant at will is not one for the correction of the Record of Rights⁴

A suit for a declaration under Section 111 A of the Bengal Tenancy Act, 1885 will be governed by this Article⁵ The cause of action for

- 11 (1923) A I R 1923 Pat 148 (148 149) 62 Ind Cas 905 6 Pat L Jour 451
Sheik Karoo v Rameshwar Sao
(1932) A I R 1932 Pat 281 (264) 11 Pat 445 139 Ind Cas 397 *Chandra Chur Deo v Mt Shyam Kumari*
12 (1916) A I R 1916 Cal 279 (283) 29 Ind Cas 609 42 Cal 1068 (F B) *Bidya Prasad Singh v Bhupnarain Singh*
[See (1921) A I R 1921 Oudh 230 (231) 24 Oudh Cas 395 85 Ind Cas 950 *Ram Chatter v Ram Lal*]
13 (1931) A I R 1931 Bom 542 (544) 135 Ind Cas 804 *Lakshman Vithoba v Mahableshwar Doda*
14 (1921) A I R 1921 Oudh Cas 230 (231) 24 Oudh Cas 395 85 Ind Cas 950
Pam Chatter v Ram Lal
(1931) A I R 1931 Bom 542 (544) 135 Ind Cas 804 *Lakshman Vithoba v Mahableshwar Doda*

Note 50

- 1 See the cases cited in Foot Notes 2 and 3
[See also (1912) 14 Ind Cas 50 (50) (Cal) *Dasarath Panda v Satya badi Ganika*
(1913) 20 Ind Cas 262 (263) (Cal) *Jagat Narain Singh v Udit Narain Singh*
(1919) A I R 1919 All 175 (180) 41 All 492 50 Ind Cas 938 *Bal bhadar Prasad v Prag Datt* (A suit to obtain a declaration of nullity in respect of an adoption and consequent entries in the revenue papers and mutation of names)
(1916) A I R 1916 Cal 594 (595) 30 Ind Cas 61 *Naboghan Badias v Raghunath Babu* (Suit under Section 83 of the Central Provinces Land Revenue Act 1881 is a declaratory one not governed by Article 14 and therefore Article 120 applies)]
2 (1880) 1880 Pun Re No 35 page 75 *Taja v Gulam*
(1879) 1879 Pun Re No 79 *Fazalad Khan v Mehndi*
3 (1930) A I R 1930 Nag 92 (95) 120 Ind Cas 321 26 Nag L R 91 *Sardar Singh v Vishal Singh*
4 (1911) 9 Ind Cas 801 (805) (Cal) *Ustas Naik v Banclandil Salu*
5 (1929) A I R 1929 P C 286 (288) 56 Ind App 388 100 Ind Cas 56 (P C) *Madnapur Zemindary Co Ltd v Secretary of State*

such a suit arises on the date of the final publication of the Record of Rights⁶ and not from the date when the certificate of publication was signed by the Revenue Officer.⁷ A person against whom an entry has been made in the Record of Rights is however not bound to sue for a declaration as to the incorrectness of the entry. He may wait until there is a fresh invasion of his right and then sue for a declaration within six years of such fresh invasion.⁸ It was held in the undermentioned case⁹ that a suit for the correction of the Record of Rights, not under Section 111 A of the Bengal Tenancy Act,

(1923) A I R 1923 Cal 307 (307) 68 Ind Cas 489, *Badaruddin Munshi v. Sarapaddin Bepari*

(1927) A I R 1927 Cal 30 (32) 97 Ind Cas 635, *Abdul Gafur v. Abdul Jabbar* (Suit for declaration that entry is erroneous, that plaintiff has title and for confirmation of possession)

(1907) 11 Cal W N 48 (50) *Ramgulam Singh v. Bishnu Pargash Narain Singh*

(1916) A I R 1916 Pat 408 (409) 35 Ind Cas 433 1 Pat L Jour 78, *Amir-uddin v. Saidur Rahman* (Suit under Bengal Tenancy Act, Section 111 A — Suit for declaration that plaintiff was lakharia rayyat and not liable to pay rent in effect to correct Record of Rights — Limitation is six years from date of final publication)

(1912) 11 Ind Cas 262 (263) (Cal), *Promoda Nath Roy v. Anr ud din Mandal*

(1918) A I R 1918 Pat 678 (679) 42 Ind Cas 897, *Dilam Singh v. Choa Singh*

[See also (1913) 20 Ind Cas 910 (911) (Cal) *Barhamdat Mistr v. Krishna Sahay*]

6 See the cases cited in Foot Note (5) above

7 (1919) A I R 1919 Cal 151 (152) 53 Ind Cas 968 *Rajani Nath Pramanik v. Manaram Mandal*

(1925) A I R 1925 Cal 518 (519) 86 Ind Cas 6 *Produt Kumar v. Bal gobinda* (Entry as permanent tenant in Record of Rights — Suit for declaration that tenure is not permanent)

(1930) A I R 1930 Cal 767 (769) 130 Ind Cas 225, *Jogendra Nath v. Baidya Nath* (Suit under Section 111 B of the Bengal Tenancy Act)

(1929) A I R 1929 Cal 481 (481) 56 Cal 407 119 Ind Cas 121 *Asutosh Bhuyan v. Radhika Lal*

(1937) A I R 1937 Cal 745 (746) 173 Ind Cas 945 *Sarashajalsha Chatterjee v. Karpur Kamini Dedy*

8 (1935) A I R 1935 Cal 801 (803 804) 62 Cal 969 160 Ind Cas 96, *Ahmed Hossein Bepari v. Digendra Narain Singha Roy*

(1934) A I R 1934 Cal 192 (193) 150 Ind Cas 617 *Goddess Pitha Kali Matha Thakurani v. Surendranath Tagore*

(1929) A I R 1929 Cal 417 (417) 120 Ind Cas 104, *Profulla Chandra v. Kshetra Lal Sinha*

(1917) A I R 1917 Pat 547 (547) 41 Ind Cas 11 *Ramji Ram v. Sadhu Saran Lal*

(1917) A I R 1917 Pat 627 (627) 41 Ind Cas 199 2 Pat L Jour 55 *Ala-ud din v. Zafsan Nissa*

(1918) A I R 1918 Pat 609 (611) 45 Ind Cas 432 3 Pat L Jour 361, *Lafafat Hussain v. Kalikar Nand Singh*

9 (1933) A I R 1933 Cal 789 (790) 146 Ind Cas 875, *Dwijendra Nath v. Valendra Nath*

Article 120
Notes
50—51

1885, but under the general law, is not barred by the six years' rule of limitation

A suit for a declaration that an entry in the Record of Rights prepared under the Chota Nagpur Tenancy Act, 1908, is erroneous, is governed by this Article and time runs from the final publication of the Record of Rights¹⁰

Section 45 of the Punjab Land Revenue Act, 1887, empowers any person aggrieved by an entry in the Record of Rights to seek relief under Section 42 of the Specific Relief Act, 1877. Such a suit would be governed by this Article, the cause of action arising when the plaintiff feels aggrieved and not from the date of the entry in the Record of Rights¹¹

A suit specially allowed by Section 179 of the Madras Estates Land Act, 1908, for a declaration of the plaintiff's right, where the plaintiff feels dissatisfied with an entry made in the Record of Rights in pursuance of an order under Section 164 sub section 1 of that Act, is governed by this Article and time runs from the date of the entry in the Record. The fact that the defendant had denied plaintiff's title before the date of such entry to the plaintiff's knowledge will not bar his suit inasmuch as such a right of suit is specially given by statute¹². A suit to compel mutation of the plaintiff's name in the Revenue Register is also governed by this Article, time running from the date when the mutation was refused,¹³ but the refusal must be absolute, negating the plaintiff's right to the property, where the Collector has passed an order "mutation cannot be made unless plaintiff appears," it is only a conditional refusal which does not furnish a starting point¹⁴.

51. Suit for damages. — A suit for damages, for example a claim for interest as damages on money due, which is not governed by any other Article, is governed by this Article¹. A suit for damages for the enticement of the plaintiff's wife,² or for a breach of covenant of title in cases not falling within Article 116,³ or a suit for damages

10 (1933) A I R 1933 Pat 698 (699) 148 Ind Cas 193, *Abay Charan Sekhar v Ibrahim Mian*

(1936) A I R 1936 Pat 129 (131) 161 Ind Cas 465, *Sudhakar Misra v Nilkantha Das*

11 (1936) A I R 1936 Lah 97 (40) 165 Ind Cas 626 *Ghulam Mahomed Khan v Samunder Khan*

12 (1927) A I R 1927 Mad 508 (570) 101 Ind Cas 85, *Suryanarayana v Bullayya*

13 (1892) 15 Mad 350 (351) 1 Mad L Jour 231, *Virasamy v Ramadoss*

14 (1892) 15 Mad 350 (351) 1 Mad L Jour 231 *Virasamy v Ramadoss*

Note 51

1 (1901) 5 Cal W N 355 (360), *Jogeshur Bhagat v Ghansham Dass*

2 (1936) A I R 1936 All 451 (456) 163 Ind Cas 974 58 All 903, *Sobha Ram v Tika Ram*

3 (1930) A I R 1930 All 771 (775) 52 All 604 124 Ind Cas 185, *Muhammad Siddiq v Muhammad Nuh*

against the vendee of property who had undertaken to pay the mortgagee of the vendor but who failed to pay the same with the result that the vendor was damnified,⁴ will be governed by this Article

Where the defendant used the plaintiff's land without permission for non agricultural purposes and in consequence thereof the plaintiff had to pay a fine to the Government, it was held that a suit by the plaintiff for the recovery of the money was governed by this Article and not by Article 11⁵

See also the undermentioned case⁶

52 Suit for money under Section 68 of the Transfer of Property Act. — It has been held in some cases¹ that a suit under Section 68 of the Transfer of Property Act for a personal decree against the mortgagor on the ground of loss or diminution of security would be governed by this Article. According to other cases,² such a suit would be governed by Article 116 or Article 120. As to when the right to sue accrues it was held in the undermentioned case³ that the cause of action arose not on the date of the loss or diminution but on the date when the mortgagee acquires knowledge thereof. A contrary view, namely that the right to sue accrues only on the date of the loss or diminution, has been held in the cases cited below⁴

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- 4 (1932) A I R 1932 All 454 (456) 142 Ind Cas 83 *Mahtab Singh v Collector of Saharanpur*
 (1931) A I R 1931 All 549 (550) 133 Ind Cas 615 53 All 702 *Zaitun Aheer v Sat Ram Singh* (Mortgagor and mortgagee)
 5 (1922) A I R 1922 Bom 257 (257) *Parnamachand Chandriram v Kashinath Deoram*
 6 (1914) A I R 1914 Lah 62 (62) 23 Ind Cas 410 *Rangula Mal v Pheru* (A selling to B—A receiving the sale price from third person but subsequently compelled to refund the same—Suit thereafter for price against vendee—Held Article 120 was applicable)

Note 52

- 1 (1897 1901) 2 Upp Bur Rul 518 (521) *Maung Shwe Dok v Ma Le*
 (1927) A I R 1927 Oudh 148 (149) 100 Ind Cas 729 *Bank of Upper India, Ltd v Jaggan*
 2 (1934) A I R 1934 Oudh 415 (417) 151 Ind Cas 448 *Shambu Dal v Shyam Narain*
 (1936) A I R 1936 Rang 80 (81) 161 Ind Cas 461 *Ma Pura Thein v Ma Me Tha*
 (1931) A I R 1931 Oudh 5 (5) 6 Luck 374 129 Ind Cas 169 *Lalla Singh v Mathur Upadhyay*
 3 (1927) A I R 1927 Oudh 148 (149) 100 Ind Cas 729 *Bank of Upper India v Jaggan*
 4 (1934) A I R 1934 Oudh 415 (416) 151 Ind Cas 449 *Shambu Dal v Shyam Narain*
 (1897 1901) 2 Upp Bur Rul 518 (521) *Maung Shwe Dok v Ma Le*

Article 121

PART VIII — Twelve Years

121.* To avoid incumbrances or under-tenures in an entire estate sold for arrears of Government revenue, or in a patni taluk or other saleable tenure sold for arrears of rent.	Twelve years.	When the sale becomes final and conclusive.
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Synopsis

1. Scope of the Article.
2. "Incumbrances."
3. Under-tenure.
4. Entire estate.
5. Who can sue to avoid incumbrances or under-tenures.
6. Starting point.

1. Scope of the Article.—It is a general principle that on the failure of an owner of a land to pay the Government assessment

* Act of 1877, Article 121
Same as above

Act of 1871

PART VIII — Twelve Years

119 —By an auction purchaser or any one claiming under him to avoid incumbrances or under tenures in an entire estate sold for arrears of Government revenue, the estate being by virtue of such sale, freed from incumbrances and under tenures	Twelve years	When the sale becomes final and conclusive
120 —To avoid incumbrances or under tenures in a <i>patni taluk</i> or other saleable tenures sold for arrears of rent, the taluk or tenure being, by virtue of such sale, freed from incumbrances and under tenures	Ditto	When the sale becomes final and conclusive

Act of 1859—Section 7 and Section 1 clause 12

Computation of period of limitation in suits to avoid incumbrances or under tenures in estates sold for arrears of Government revenue	7 In suits to avoid incumbrances or under tenures in an estate sold for arrears of Government revenue due from such estate, or in a <i>patni taluk</i> or other saleable tenure sold for arrears of rent which, by virtue of such sale becomes freed from incumbrances and under tenures, the cause of action shall be deemed to have arisen at the time when the sale of the estate, taluk or tenure became final and conclusive	— of immovable property which no twelve
Limitation of twelve years Suits for immovable property		

thereon, his estate or interest in the land is forfeited or rather determined, and that on a sale for the recovery of such assessment, what is sold is not the interest of the defaulting owner but the interest of the Crown subject to the payment of Government assessment¹ On the same principle, where a tenure is sold for arrears of rent, it is not merely the interest of the defaulter in the tenure that is sold but the tenure itself. In other words, the estate or the tenure as the case may be, passes to the purchaser free of all incumbrances that might have been created on the estate or tenure by the defaulter or his predecessors in-interest. Under the Rent and Revenue Acts in force in various Provinces it has accordingly been provided that such sales shall be free of incumbrances and under tenures. In some of these Acts, however, it is provided that the purchaser shall have power to annul or avoid the incumbrances. In such cases the incumbrance or under tenure is not *ipso facto* void but is voidable only at the option of the purchaser². Thus, a purchaser at a rent sale under the Bengal Tenancy Act should, if he wants to annul the incumbrance, follow the procedure prescribed by Section 167 of the Bengal Tenancy Act³. A purchaser at a sale under the Bengal Revenue Sale Law must, by some unequivocal act, indicate his intention to avoid the incumbrance if he desires to do so. The election to avoid must be made to the knowledge of the holder of the incumbrance sought to be avoided^{3a}. The institution of a suit itself to avoid the incumbrance would, however, be a sufficient expression of his desire to annul the incumbrance. This Article

Article 121 — Note 1

- 1 (1914) A I R 1914 P C 82 (83) 25 Ind Cas 309 (P C) *Surja Kanta Acharyya v Sarat Chandra*
(1895) 12 Cal 82 (91) *Radhagobind v Rakhal Dass*
(1902) 9 Cal W N 893 (886) *Gopal Chandra v Harasundari Das*
(1867) 8 Suth W R 222 (222) *Moonshee Busloot v Pran Dhun*
(1922) A I R 1922 Cal 544 (548) *Jnanendra Mohan v Umesh Chandra*
(1909) 1 Ind Cas 61 (82) (Cal) *Rahmuddin Munshi v Bhabangana Debye*
- 2 (1883) 9 Cal 693 (687) 12 Cal L R 304 (F B) *Titu Bibi v Mohesh Chunder*
(Overruling 4 Cal 860)
(1907) 6 Cal L Jour 472 (484) *Mir Banruddin v Lala Deoki Nandan*
(1915) A I R 1915 Cal 302 (303) 42 Cal 638 27 Ind Cas 258, *Sahodara Mudiali v Sardosobha Das*
(1926) A I R 1926 Pat 416 (420) 5 Pat 726 95 Ind Cas 575 *Chandra Mouleshwara Frasad v Hem Nalini Deb*
- 3 (1922) A I R 1922 Cal 82 (34) 69 Ind Cas 611 *Sital Chandra Majhi v Parbati Charan Chakrabarti*
(1922) A I R 1922 Cal 544 (548) *Jnanendra Mohan v Umesh Chandra*
(1922) A I R 1922 Cal 331 (331) 69 Ind Cas 219 *Ishan Chandra Bakshi v Saftula Sildar*
(1924) A I R 1924 Cal 306 (397) 71 Ind Cas 251 *Jatindra Mohan Chakrabarti v Bijoy Chand Mahatab*
- 3a (1915) A I R 1915 Cal 302 (303) 42 Cal 638 27 Ind Cas 258 *Sahodara Mudiali v Sardosobha Das*
(1923) A I R 1923 Cal 195 (196) 68 Ind Cas 449 *Kula Miah v Varu Miah*
(Mere fact of purchaser creating a *patti* himself is not sufficient to show that the option has been exercised.)

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Notes
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will apply to such suits for annulment of incumbrances and under-tenures⁴

Under certain enactments, such as the Putni Regulation (B C 8 of 1819), a sale of the tenure renders all incumbrances void, in such cases there is no necessity for any suit to annul the incumbrances and no occasion for the applicability of this Article arises⁵

The Article does not apply to a suit by a person who is not a purchaser at a *revenue or rent sale*⁶ Nor does it apply where the suit is not one to annul any incumbrance⁷

2. "Incumbrances."—An "incumbrance" is defined in Whartons Law Lexicon as "a claim, lien, or liability attached to property Bonvier in his Law Dictionary defines an "incumbrance" as "any right to, or interest in, land which may subsist in a third person to the diminution of the value of the land and not inconsistent with the passing of the fee in it by a deed of conveyance" Thus, a mortgage on the land will be an incumbrance¹ so also a perpetual allowance charged on the lands² Where the proprietor creates a *mukarrari* by grant and then an intermediate tenure between himself and the *mukarraridar*, such tenure will be an incumbrance on the estate³ But the mere possession of a tenant, however long it has continued, is not an incumbrance⁴

The question has arisen whether an interest not directly created by the owner of the estate or by the tenure holder, as the case may be, but allowed to grow up by his sufferance and negligence, as in the case of adverse possession, is an incumbrance on the estate or the tenure The general trend of opinion is that it is an incumbrance⁵

4 (1930) A I R 1930 Cal 69 (75) 57 Cal 434 124 Ind Cas 167 *Manmohan Chowdhury v Turner Morrison & Co* (Position of purchaser at rent and revenue sales compared)

5 (1913) 20 Ind Cas 654 (657) (Cal) *Krishna Pramada Das v Duarakanath Sen*

6 (1899) 26 Cal 460 (463) *Gobindanath Shaha v Surjakanta Lahiri* (Private purchaser—Suit by—Article does not apply)

7 (1923) A I R 1923 Cal 870 (872) 115 Ind Cas 606 *Baikuntha Nath Das v Sheikh Abdullah*

Note 2

1 (1927) A I R 1927 Pat 53 (55) 6 Pat 235 97 Ind Cas 309, *Hargobind Das v Ramchandra Jha*

2 (1926) A I R 1926 Cal 552 (553) 91 Ind Cas 411, *Manohar Das v Brojendra Lal*

3 (1922) A I R 1922 Pat 339 (390) 1 Pat 33 63 Ind Cas 183 *Shahzada Begam v Mt Kokila*

4 (1921) A I R 1921 Cal 754 (755) 61 Ind Cas 469 *Monmocha Nath Mitter v Anath Bundha Pal*

5 (1898) 25 Cal 167 (171) *Nuffer Chandrapal Chowdhry v Rajendralal Goswami*

A contrary view was held in the undermentioned cases⁶ In *Bipradas Pal v Kamini Kumar*,⁷ their Lordships of the Privy Council observed as follows

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"The case proceeded in the Courts below upon the footing that an interest not directly created by the *taluqdar*, but allowed to grow up by his sufferance and negligence, is an incumbrance within the definition given to that word in Section 161 of the Act. There is apparently a current of decisions in India to this effect and their Lordships have, for the purpose of their judgment, assumed, as the Judges in the High Court assumed for their judgment, that this is correct. But it must not be taken that their Lordships have expressed a final opinion upon the point, it being unnecessary that they should do so."

In order however that adverse possession may amount to an incumbrance, it must have been perfected *before* the revenue or rent sale.⁴

An incumbrance or under-tenure to be avoided must be one which has been created *subsequent* to the creation of the estate or the tenure sold^o and the onus is on the plaintiff seeking to annul it.

- (1915) A I R 1915 Cal 675 (676) 26 Ind Cas 436, Kalkinanda Mukerjee v
Bypro Das Pal Chowdhry
- (1916) A I R 1916 Cal 612 (613) 43 Cal 779 31 Ind Cas 801, Prasanna
Kumar Dutt v Jananendra Kumar Dutt
- (1921) A I R 1921 Cal 754 (759) 61 Ind Cas 469, Monmotha Nath Mitter v
Anath Bundhu Pal
- (1922) A I R 1922 Cal 544 (548) Jnanendra Mohan v Umesh Chandra
- (1929) A I R 1929 Cal 218 (220) 119 Ind Cas 123, Durganath Bhattacharyya
v Harkishare Chakrabarty
- (1910) 7 Ind Cas 849 (851) (Cal), Mouzuddi Biswas v Ishan Chandra Das
- (1911) 11 Ind Cas 453 (454, 456) (Cal), Gokul Bagdi v Debendra Nath Sen
- (1912) 14 Ind Cas 849 (350) (Cal), Arsadulla v Munseb Ali (Following 11 Ind
Cas 453)
[See also (1871) 15 Suth W R 552 (554), Thakoor Dass Roy v Nubeen
Kishen Ghose
(1874) 22 Suth W R 413 (413), Mahomed Askur v Mahomed Wasuck]
- G (1909) 12 Cal W N 529 (530), Kumar Kalanand Singh v Syed Sarafat
Hossein
- (1909) 1 Ind Cas 81 (82) (Cal), Rahimuddin v Dhahngana Debya
- (1917) A I R 1917 Cal 219 (216) 44 Cal 412 39 Ind Cas 213, Mohan
Chandra v Pyari Lal (Following 1 Ind Cas 81 and 12 Cal W N
529)
7. (1922) A I R 1922 P C 48 (50) 49 Cal 27 66 Ind Cas 674 48 Ind App 499
(P C)
- B (1921) A I R 1921 Cal 754 (755) 61 Ind Cas 469 Monmotha Nath Mitter v
Anath Bundhu Pal
- (1912) 15 Ind Cas 869 (870) (Cal), Satish Chandra v Munjanali Devi
- " " " " " : " " " 499
- " " " " " " " "
- " " " " " " " "

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to make this out¹⁰

3. Under tenure. — Under Section 3 sub-section 18 of the Bengal Tenancy Act, "tenure" is defined as meaning the interest of a tenure holder or under tenure holder. Section 5 of the Act defines a "tenure-holder" as meaning primarily a person who has acquired from a proprietor or from another tenure holder a right to hold land for the purposes of collecting rents or bringing it under cultivation by establishing tenants on it, and as including also the successors in interest who have such a right.

It has been held in the undermentioned case¹ that an under-tenure may also be regarded as an incumbrance.

4. "Entire estate." — An entire estate is an estate regarded in the Collector's rent roll with a separate number and with a separate revenue assessed upon it.¹ Compare also the definition of the word "estate" given in the Explanation to Section 7 (v) of the Court-fees Act. The mere fact that a portion of the lands of that estate is joint with those of other estates cannot stand in the way of its being an entire estate.²

5. Who can sue to avoid incumbrances or under-tenures. — The power to annul incumbrances under the Bengal Revenue Sales Act (XI of 1859) is not limited to the purchaser personally but is transmissible to his heirs and assigns.¹ The power can be transmitted even to a putnidar, and a putnidar of even a portion

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- (1865) 3 Suth W R 69 (70), *A J Forbes v Sheikh Meah Jan*
 (1873) 11 Beng L R 71 (73) 14 Moo Ind App 247 2 Bar 784 2 Suther 491
 (P C), *Kooldeep Narain Singh v Government of India*
 10 (1922) A I R 1922 P C 48 (50) 49 Cal 27 66 Ind Cas 674 48 Ind App 499
 (P C), *Dipradas Pal v Kamini Kumar*.
 (1915) A I R 1915 Cal 675 (677) 26 Ind Cas 436, *Kalkhananda Mukerjee v Dipradas Pal Choudhury*
 (1921) A I R 1921 Cal 764 (758) 61 Ind Cas 469, *Monmotta Nath Miller v Anath Bundhu Pal*
 (1926) A I R 1926 Pat 416 (418) 96 Ind Cas 575 5 Pat 725, *Chandra Mouleshwara Prasad Singh v Hem Nalini Devi*.
 [But see (1865) 3 Suth W R 182 (183), *Sham Lal Ghose v Sekundar Khan*
 (1866) 6 Suth W R 58 (59), *Sristeedhur Sawant v Romdhan Rakhit*]

Note 3

- 1 (1883) 9 Cal 683 (687) 12 Cal L R 304 (F B), *Titu Bibi v Mohesh Chunder*.

Note 4

- 1 (1896) 2 Cal W N 229 (232, 233), *Kamal Kumari Chowdhury v Kiran Chandra Roy*
 2 (1896) 2 Cal W N 229 (232, 233), *Kamal Kumari Chowdhury v Kiran Chandra Roy*

Note 5

- 1 (1905) 2 Cal L Jour 87 (90) 9 Cal W N 795, *Harek Chand v. Bejoy Chand*
 (1908) 12 Cal W N 1029 (1032), *Wakid Ali v. Nahat Ali*
 (1874) 22 Suth W R 29 (30), *Koylas v. Jubur*.

of the property purchased in auction can sue, if the whole of the undertenure sought to be set aside lies within his *putni*.²

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If the purchaser is barred under this Article from suing to avoid an incumbrance, it is clear that his heirs and assigns would also be barred from doing so.³

6. Starting point.—The starting point under the Article is the date when the sale becomes final and conclusive. The reason is that the cause of action for the purchaser to avoid the incumbrance arises on his purchase.¹

Under the Revenue Sale Law (Act 11 of 1859 B C) a sale becomes final and conclusive at noon on the 60th day from the day of sale, reckoning the day of sale as the first of the 60 days, and a sale against which an appeal shall have been preferred becomes final and conclusive from the date of such dismissal of the appeal if more than 60 days from the date of the sale, or if less, then at noon of the 60th day as above provided (see S 27 of Act 11 of 1859). It has been held under that Section that the appeal must have been preferred *in time* and that otherwise the date of the dismissal is not the date of the sale becoming final and conclusive.²

Where the defendant pleads that the suit is barred under this Article, the plaintiff must show when, as a fact, the sale became final and conclusive.³

122.* Upon a judgment obtained in British India, or a recognisance.	Twelve years.	The date of the judgment or recognisance.
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Article 122

Act of 1877, Article 122 and Act of 1871, Article 121

Same as above

Act of 1859—Section 1 clause 11

<i>Limitation of twelve years</i>	<i>Suits for specialty debts</i>	To suits in cases governed by English law upon all debts and obligations of record and specialties the period of twelve years from the time the cause of action arose
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2 (1902) 1 Cal L Jour 579 (582), *Narayan Chandra Kansabanik v Kanswar Roy*

3 (1867) 7 Suth W R 91 (92), *Tara Chand Dutt v Mt Bahnoonissa Bibee*

Note 6

1 (1868) 10 Suth W R 15 (19), *Womesh Chandra Goopta v Raj Narain Roy*
(1872) 17 Suth W R 407 (407), *Brojo Sundar Mitter v Futteelchunder Roy*

2 (1907) 6 Cal L Jour 472 (481), *Mir Waziruddin v Lala Deoki Nandan*

3 (1919) A I R 1919 Cal 811 (312) 51 Ind Cas 50, *Murali Dhar Aditya v Thalur Das Mondal*

Article 122
Note 1

Synopsis

1. Scope of the Article.
2. Suit on judgment must be against parties thereto or their representatives.
3. "Judgment," meaning of.
4. "Obtained in British India."
5. "Recognisance."
6. Extension of period of limitation.
7. Starting point of limitation.

1. Scope of the Article. — Under the English Common Law, actions on judgments lie whether the remedy by execution is available or not ^{1a} In *Williams v Jones*,¹ Baron Parke observed as follows

"Where a Court of competent jurisdiction has adjudicated a certain sum of money to be due from one to another, a legal obligation arises to pay that sum on which an action of debt to enforce the judgment may be maintained. It is in this way that judgments of foreign and colonial Courts are supported and enforced and the same rule applies to inferior Courts in this country, and applies equally whether they be Courts of Record or not."

The same principle was recognised in Civil Law, where the action founded on the prior judgment was known as *actio iudicata*. The principle so widely stated by Baron Parke, as above, has however been qualified by later decisions in England and it has been held that though an action lies on a judgment finally establishing a debt, it is an abuse of the process of Court to bring an action on an English judgment, if it can be enforced in some other way, as by execution.²

In this country, it is provided by S 9 of the Civil Procedure Code that the Courts shall have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either *expressly or impliedly barred* and S 47 of the same Code provides that all questions

Article 122 — Note 1

- 1a (1925) A I R 1925 Mad 279 (280) 85 Ind Cas 991 48 Mad 482, *Ramasamy Nathan v Aluthia Chetty*
- 1 (1845) 13 M & W 628 (633) 67 R R 767 (769) 14 L J Ex 145 2 Dowl & L 680
- 2 (1899) 47 W R (Eng) 577 (579) L R 2 Q B D 428 81 L T 206 68 L J Q B 801, *Pritchett v English Colonial Syndicate Ltd*
- (1883) 58 L J Q B 68 (69) 13 Q B D 802 49 L T 645 32 W R (Eng) 239 *Grant v Easton*
- (1858) 6 W R (Eng) 686 (686) 28 L J Q B 61 4 Jur (Ns) 506, *Hodson v Baxter*
- (1889) 39 W R (Eng) 581 (582) L R 15 A C 1 59 L J Ch 337 62 L T 189, *Nouvion v Freeman*
- (1899) 47 W R (Eng) 854 (856) L R 1 Ch 781 68 L J Ch 281 80 L T 399 15 T L R 211, *Pemberton v Hughes*

arising between the parties to the suit or their representatives and relating to the execution, discharge or satisfaction of the decree shall be determined by the Court executing the decree and not by a separate suit

An executable judgment, therefore, in India, cannot be sued upon.³ In cases, however, outside the prohibition of Section 47⁴ or where a decree becomes, owing to subsequent events, incapable of execution,^{4a} a suit on the judgment will be maintainable, and would, for the purposes of limitation, be governed by this Article

- 3 (1868) 3 Agra 381 (382) *Dobee Singh v Jowkee Ram*
(1870) 2 N W P H C R 382 (389 391) *Ram Jus Rao v Ram Narain*
(1916) A I R 1916 All 163 (164) 35 Ind Cas 601 38 All 509, *Dhanraj Singh v Mt Lakhrans Kuar*
(1921) A I R 1921 All 369 (372) 43 All 170 59 Ind Cas 632 *Ramanand v Jai Ram*
(1869) 4 M H C R 453 (459) *Sanjeeviah v Nanjiah*
(1870) 5 Mad H C R 185 (188), *Muttutelu Pillai v Vasthilinga Pillai*
(1870) 5 Mad H C R 375 (377) *Rangaswamy v Shappan Asari*
(1870) 6 Mad H C R 13 (15) *Sungara Narayana Pillai v Sandira Pillai*
(1894) 17 Mad 122 (129) 4 Mad L Jour 52, *Ramayya v Venkataratnam*
(1904) 27 Mad 243 (249) 14 Mad L Jour 84 (F B) *Pernasamy Mudaliar v Seitharama Chettiar*
(1876) 26 Suth W R P C 82 (85) 3 Ind App 241 3 Sar 648 3 Suther 330 (P C) *Mirza Mohamed Aga Ali Khan Bahadur v The widow of Bal mukund*
(1925) A I R 1925 P C 84 (85) 52 Ind App 79 52 Cal 314 86 Ind Cas 245, *San Sekhaheshwar Roy v Lalit Mohan Maistra*
(1889) 6 Bom H C R A C 231 (235) *Manchharam Kallindas v Bakshe Sahab*
(1878) 10 Bom H C R 433 (434) *Kisan Nandram v Anandaram Declaji*
(1880) 5 Bom 382 (385) *Sayad Nasrudin v Venkatesh Prabhu*
(1898) 22 Bom 267 (270), *Madhavrao v Bom Rao*
(1884) 8 Bom 1 (13) *Meerwanji Netrooji v Ashaba*
(1922) A I R 1922 Cal 73 (75) 70 Ind Cas 300, *Lalit Mohan Maistra v San Sekhaheshwar Roy Bahadur*
(1871) 3 N W P H C R 62 (63) (F B) *Sheikh Golam Husam v Mt Alla Rukhee*
(1868) 9 Suth W R 399 (401) *Sandes v Jomir Shaikh*
(1880) 5 Cal 294 (299) 4 Cal L R 477 *Moonshi Golab Arab v Currumbuz Shaikjee*
[See (1897) 24 Cal 473 (488 490) *Jogemaya Dassi v Thackomoni*]
See also Section 94 of the Presidency Small Cause Courts Act 1882 under which no suit will lie in any Court on a decree of a Court of Small Causes
In view of this Section the decisions in 6 Bom 7 and 6 Bom 292 are no longer good law
[But see (1864) 1864 Suth W R Gap 301 (301) *Ranee Eamamun v Hurdoyal Singh* (A suit will lie for recovery of the unsatisfied balance due under a decree destroyed during the Mutiny)]
4 (1916) A I R 1916 Cal 661 (663 664) 30 Ind Cas 874, *Kali Charan Nath v Sukhada Sundars Debi*
[See also (1882) 7 Cal 74 (75) 9 Cal L R 35 4 Shome L R 192 *Attorney v Hurry Dass* (It was however assumed in this case that there was no bar Sect on 244 of the Civil Procedure Cod. of 1882 was not adverted to)]

4a (1879) 3 Fem 193 (195) *Sekharan Dikshit v Garesk Salhe*

Article 122
Note 1

Thus, a suit on the judgment has been held to be maintainable in the following cases and this Article applied —

1 A suit to enforce an order passed by the High Court in its Insolvency Jurisdiction, awarding costs. It was held that S 244 of the old Civil Procedure Code, 1882, corresponding to S 47 of the present Code did not bar the suit.⁵

2 A suit to enforce an order declaring the plaintiff's right to the payment of money from the defendant when there is no provision made for the execution of that order.⁶

In *Ramaswamy v Muthayya Chetti*,^{6a} Mr Justice Ramesam observed as follows.

"Ordinarily the Indian Courts pass judgments which are to be enforced in execution, and even when they create new relation involving fresh rights and obligations, they provide for working out the rights in execution. Rarely do they create a new obligation without providing for its execution and indicating a suit as the only method of enforcing it. But when they do, as in this case, the suit is maintainable."

Where by virtue of Section 47 of the Civil Procedure Code, or of some other prohibition, a suit on a judgment is not maintainable, this Article will not enable such suits to be maintained.⁷ "The intention of the Limitation Act is not to give a right where there is not one, but only to interpose a bar, after a certain period, to a suit to enforce an existing right."⁸

Where A obtained a decree for money against B, but execution against the family properties of B in the hands of his sons was refused, and thereupon A sued the sons of B on their pious obligation to pay the decree against B, it was held that the suit was not one "on a judgment" but a suit to enforce the pious obligation of a Hindu son to pay his father's debt.⁹

5 (1905) 33 Cal 560 (563, 564) 9 Cal W N 952 *Annoda Prasad Banerjee v Nabo Kossory Poy*

6 (1925) A I R 1925 Mad 279 (280, 281) 85 Ind Cas 991 48 Mad 482 *Ramaswamy v Muthiya Chetty*

(1934) A I R 1934 Mad 665 (666) 156 Ind Cas 264 *Rathan Chand Kumari v Amichand*

(1867) 2 Agra 28 (24) *Nauazish Ali Beg v Vilaytee Khanuman*

6a (1925) A I R 1925 Mad 279 (280, 281) 85 Ind Cas 991 48 Mad 482

7 (1879) 3 Bom 207 (209) 3 Ind Jur 566 *Jiva v Ramji*

(1901) 29 Cal 37 (46) 5 Cal W N 195, *Surajamoni v Kals Kanta Das*

(1901) 25 Bom 644 (649, 654) 3 Bom L R 371 (F B) *Dhanjibhoj v Hira Bai*

(1891) 13 All 126 (141) 1891 All W N 18, *Binda v Kaunsila*

8 (1894) 21 Cal 8 (16) 20 Ind App 163 6 Bar 334 17 Ind Jur 481 (P C), *Harinath v Mofhur Mohun*

[See also (1911) 10 Ind Cas 477 (478) 33 All 356 39 Ind App 67 (P C), *Khanna Lal v Gobind Krishna Nardin*]

9 (1904) 27 Mad 243 (246, 253, 254) 14 Mad L Jour 81, *Periasamy Mudaliar v Seetharama Chettiar*

2. Suit on judgment must be against parties thereto or their representatives. — A suit upon a judgment can be brought only against the *parties* to the judgment or their representatives so interest. A suit against a person not a party to the judgment cannot be considered to be one on a judgment and this Article would have no application to such cases ¹

3. "Judgment," meaning of. — It has been seen in Note 3 to Article 117 *ante*, that the word "judgment" as used in that Article means the "decree" or order of the Court and not the "statement of reasons" given by the Judge as the grounds of his decision. It is conceived that this interpretation would equally apply to the word "judgment" as used in this Article. A suit to enforce a "judgment" cannot possibly mean a suit to enforce "the statement of reasons" given by the Judge as the grounds of his decision.

The following are "judgments" within the meaning of this Article

- 1 An order of the High Court, passed in the exercise of its Insolvency Jurisdiction ¹
- 2 A *solanamah* or compromise agreement filed in Court, and accepted by it, but no decree drawn up with the usual provision for execution ²
- 3 A report of the Commissioner in a prior suit for dissolution and accounts of a partnership, accepted by the Court in awarding profits to one of the partners ³
- 4 A garnishee order absolute ⁴

An arbitration award, which is not filed into Court or incorporated in a decree of Court will not be a judgment see the undermentioned case ⁵

4. "Obtained in British India." — Suits on foreign judgments are provided for in Article 117 *ante*, and this Article is restricted to judgments obtained in British India. As to whether judgments of Courts of Native States in India are "foreign judgments" or could be considered to be obtained in British India, see Notes to Article 117

(1894) 17 Mad 122 (129) 4 Mad L Jour 52, *Ramayya v Venkataratnam*
(1900) 23 Mad 292 (297) (F B), *Mallesam Naidu v Jugala Panda*

Note 2

- 1 (1900) 23 Mad 292 (293) (F B) *Mallesam Naidu v Jugala Panda*
[See also (1894) 17 Mad 122 (129) 4 Mad L Jour 52, *Ramayya v Venkataratnam*
(1904) 27 Mad 243 (246 249) 14 Mad L Jour 84 (F B), *Periasamy Mudaliar v Seetharama Chettiar*]

Note 3

- 1 (1905) 33 Cal 560 (564) 9 Cal W N 952, *Annoda Prasad Danerjee v Noto Aissore Roy*
2 (1865) 4 Suth W R S C C R 7 (~), *Chunder Narain Ghose v Goura Nath Bose*
3 (1934) A I R 1934 Mad 665 (667) 156 Ind Cas 264 *Eathan Chand Kumari v Amichand*
4 (1893) 47 W R (Eng) 577 (579) L R 2 Q B D 423 63 L J Q B 601 61 L T 206, *Pritchett v English and Colonial Syndicate*
5 (1916) A I R 1916 Mad 353 (544) 29 Ind Cas 49, *Muthukumarappa Kere v Iyerabhadra Kere*

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Notes
5—7

5. "Recognisance." — A recognisance is "an obligation of record entered into before a Court or other officer conditioned on the performance of some particular act required by law, or the refraining from some particular act forbidden by law, and which is therein specified"¹ Thus, bonds executed under the Criminal Procedure Code are recognizances² Where default is made in the performance of the acts stipulated therein, the bond becomes forfeited and the obligation becomes absolute

At Common Law, a recognisance, when it is filed, is in the nature of a conditional judgment, which after forfeiture on breach of the condition becomes equivalent to a final enforceable judgment³ It is in this view that a recognisance has been treated in this Article on the same footing as a judgment

6. Extension of period of limitation. — As to whether the time spent in prosecuting an application for execution of a decree can be deducted in computing the period of limitation under this Article for a subsequent suit on the judgment, see Notes to S 14 *ante* and the undermentioned case¹

7. Starting point of limitation. — The starting point of limitation, under the third column, is the "date of the judgment or recognisance," as the case may be In the case of a decree for money payable by instalments, it has been held that the command of the Judge prescribes a term for the performance of the several parts of his order, and is to be construed as becoming a judgment for purposes of limitation as to each instalment only on the day when the payment is to be made In other words, "the date of the judgment in respect of a particular instalment is the date on which the instalment falls due"¹ On the same principle, in a suit on a recognisance, "the date of the recognisance" would, it is conceived, be the date on which the recognisance becomes forfeited If this construction is not adopted, it will lead to the result that time will begin to run even before the amount under the recognisance falls due by forfeiture, i e even before the cause of action accrues This, as has been seen in Notes to Section 9 *ante*, is opposed to the general principles of the law of limitation and cannot be deemed to have been intended by the Legislature

Note 5

1 See Corpus Jurisprudence (1931 Edition) Vol 53 p 558

2 See Forms V, VI and VII of Sch V of the Code of Criminal Procedure See also marginal note to S 513 of the Criminal Procedure Code

3 See Corpus Jurisprudence (1931 Edition), Vol 53, pp 569 570 and 575

Note 6

1 (1885) 1885 Bom P J 196 *Haribhai Gangadas v Balaji Pandurang*

Note 7

1 (1879) 8 Bom 193 (197, 198) *Sakharam Dikshit v Ganesh Salhe*

(1887) 12 Bom 65 (67) *Lakshmbai Dapuji v Madharao Dapuji*

[See also (1894) 17 Mad 122 (129) 4 Mad L Jour 52, *Ra na ji v Venkataratnam*

(1885) 1885 Bom P J 22 *Pamappa v Krishnappa*]

123. For a legacy or for a share of a residue bequeathed by a testator, or for a distributive share of the property of an intestate.	Twelve years.	When the legacy or share becomes payable or deliverable.	Article 123
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Synopsis

1. Legislative changes.
2. Scope of the Article.
3. Applicability of the Article to administration suits.
4. Suit between co-heir for share of inheritance.
5. Suit by Hindu reversioners.
6. Suit by heir against person in wrongful possession.
7. Suit for accounts against executor.
8. Executor, if a trustee within the meaning of Section 10.
9. "Legacy."
10. "Distributive share."
11. Starting point.
12. Application of Section 20 to suits for legacy.
13. Applicability of Section 6 to suits under the Article.

Other Topics

Executor <i>de son tort</i>	See Note 2, Pt 6	Note 7, Pt 4
Hindu heirs		See Note 4
Mahomedan heirs		See Note 4
Payable and deliverable	See Note 2	Note 11, Pts 1, 2
Person in possession claiming adversely to the estate of deceased		See Note 6

1. Legislative changes.

- 1 Clause 11 of Section 1 of the Act of 1859 provided a period of limitation of 12 years for suits for recovering a legacy, from the accrual of the cause of action,¹ and the cause of action was held to arise when the legatee became entitled to receive it, and not when his claim was resisted by the executor.² Suits

* Act of 1877, Article 123
Same as above

Act of 1871, Article 122

122 — For a legacy or for a distributive share of the moveable property of a testator or intestate	Twelve years	When the legacy or share becomes payable or deliverable
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Act of 1859, Section 1 clause 11

To suits for the recovery of any legacy—the period of twelve years from the time the cause of action arose

Article 123 — Note 1

1 (1867) 2 Ags 171 (171), *Nana Narain Rao v. Dadas Nund*

2 (1870) 13 Suth W R 351 (355), *Premanno Chunder Roy v. Gyan Chander Dose*

Article 123

Notes

1—2

for a distributive share in the immovable property left by an intestate were held governed by clause 12 of that Act corresponding to the present Article 144³

2 Article 122 of Act 9 of 1871 was limited only to suits for legacy or for a distributive share in the "moveable property" of a testator or intestate. Suits for a share in the immovable property were held governed by Article 145 of that Act (corresponding to Article 144 of the present Act)

3 Act 15 of 1877 introduced two changes in Article 122 of the Act of 1871. The word "moveable" in the first column was omitted. The words "or for a share of a residue bequeathed by a testator" were newly added after the word "legacy."

2. Scope of the Article. — The words "payable" and "deliverable" in the third column of the Article indicate that there must be somebody who is under a duty to pay the legacy or to deliver the distributive shares.¹ It has accordingly been held by their Lordships of the Privy Council in *Ghulam Muhammad v. Sheikh Ghulam Hussain*,² approving of a long series of decisions in India,³ that the Article applies only where the suit is brought against some person who is legally charged with the duty of paying the legacy or distributing the estate.

An executor or administrator is a person charged with such a duty and a suit against him for the reliefs specified in the first column will be governed by the period prescribed by this Article.⁴ A person to whom property has been bequeathed with a direction to pay a certain legacy is a person "charged with the duty of paying such legacy" and a suit against him for the legacy would be governed by this Article.⁵ An executor *de son tort*, i. e. a person who intermeddles with the estate of a deceased person in such a way that he would be bound to deal with it as the estate of the deceased is a

8 (1876-77) 2 Cal 45 (55), *Treepoorasoodery Dossee v. Debendronath Tagore*

Note 2

1 (1929) A I R 1929 All 467 (471) 111 Ind Cas 809 51 All 101 (F B) *Rustam Khan v. Mt. Janaka*

2 (1932) A I R 1932 P C 81 (87) 59 I A 74 136 I C 454 54 All 93 (P C)

3

Wilayat

Ali Khan

(1911) 6 Ind Cas 50 (51) 34 Mad 511 (F B) *Kadersa Hajee Bapnu v. Puthen Veetil Aynssa*

(1894) 21 Cal 157 (164) 20 Ind App 155 6 Sar 374 17 Ind Jur 484 R & J 133 (P C) *Mahammad Rasat Ali v. Hasin Banu*

See also the cases cited in Foot Notes (5) and (9) to Note 3

4 (1921) A I R 1921 Bom 56 (57) 45 Bom 519 59 Ind Cas 780 *Nurudin Najbudin v. Bu Umrao*

(1930) A I R 1930 Bom 30 (34) 100 Ind Cas 612 *Shrinubas Dinshaw v. Naoroji Pestonji*

5 (1935) A I R 1935 All 239 (212) 56 All 711 155 Ind Cas 890 *Shrinathji v. Mt. Panna Kunuar*

person charged with such a duty and consequently a suit against him for a legacy, etc. would be governed by this Article⁶

It has been held by the High Court of Rangoon⁷ that this Article will apply only to the distributive shares of the *corpus* of the estate as left by the intestate, that subsequent *profits* of the estate do not form part of the property of the intestate, and that some other Article should apply to a claim for such subsequent profits

3. Applicability of the Article to administration suits.—The Limitation Act does not explicitly provide a period of limitation for an administration suit. In England, actions for administration of the estates of deceased persons can only be instituted by persons whose claims to recover are not barred by limitation. The same principle has been held applicable to India also. If the claim for legacy or share has become barred under this Article, a suit for administration would also be equally barred¹. Where the suit for legacy entails administration of the testator's estate, the suit for administration has been held to be governed only by this Article and not by Article 120².

4. Suit between co-heirs for share of inheritance.—In the case of persons dying intestate, governed by Indian Succession Act, the administrator represents the estate, and is the person liable to distribute the shares between the heirs: a suit against him for a legacy, etc. would be governed by this Article. But the provisions of the Indian Succession Act as to probate and administration do not apply to Hindus, Muhammadans, Buddhists and Karen Christians in Burma³. Where persons not governed by such provisions die intestate, the estate vests in the heirs and the question has arisen as to the applicability of this Article to suits by one heir against his co-heirs in possession for recovery of his share of the inheritance

6 (1922) A I R 1922 Mad 457 (462, 464, 479), 46 Mad 190, 70 Ind Cas 639 (F B) *Zamindar of Bhadrachalam & Padaravancha v Venkataswami Appa Rao* (Confirmed in A I R 1923 P C 165)

(1926) A I R 1926 Mad 681 (683), 95 Ind Cas 33 *Gopala Chetty v Narayana swamy Chetty*

(1924) A I R 1924 Lah 561 (562), 75 Ind Cas 931 *Gurbaksh Singh v Bhagwan Singh*

(1929) A I R 1929 Lah 753 (756, 758), 122 Ind Cas 467, 11 Lah 325 *Harry Persnal Robson v Administrator General of Punjab*

[See also (1903) 28 Mad 351 (353) *Narayanaswamy Pillai v Esa Abbaya Sastri*

(1926) A I R 1926 Cal 825 (825), 96 Ind Cas 695 *Satyaj Rangan Poy v Sarat Chandra*]

7 (1921) A I R 1921 Rang 155 (157), 1 Rang 405, 76 Ind Cas 655 *Maung Po Lin v Maung Shwe Dya*

Note 3

1 (1907) 9 Bom L R 316 (319), *Handlal Chunsilal v Gopalal Marulal*

2 (1902) 25 Mad 361 (364), 12 Mad L Jour 153 *Rajamannar v Venkatas Krishnayya*

(1911) 12 Ind Cas 702 (702, 703), 35 Bom 111 *A'ali Kader v Dasi Safabai*

Note 4

1 (1925) A I R 1925 Rang 233 (234), 83 Ind Cas 609 *Ma Nan Thia v Ma Shwe Ma*

Article 123
Note 4

In the case of a Hindu dying intestate, the heirs (if they constitute members of a joint family), take the estate jointly and if one of them is excluded subsequently, his suit against the other heirs for partition and possession of his share is governed by Article 127. (See Notes to that Article, *post*) It has been held that Article 127 is not applicable to suits by a Muhammadan heir against the other heirs, even though they constitute one family, because under Muhammadan law there is no such thing as joint family property, within the meaning of Article 127² Similarly, it has been held that Article 127 will not apply to Buddhists also³ Where, therefore, in such cases, the plaintiff-heir alleges that he was in joint possession of the property with the defendants (co heirs), and that he was excluded subsequently, it has been considered in a very large number of cases whether the suit would be governed by this Article Before the decision of the Privy Council in *Maung Tun Tha v Ma Thit*,⁴ in the year 1916, it was held in the undermentioned cases⁵ that

- 2 (1917) A I R 1917 Bom 254 (256), 41 Ind Cas 761 41 Bom 588 (F B),
Isap Ahmad v Abhramaj Ahmadaj;
(1923) A I R 1923 Lah 519 (520) 78 Ind Cas 425 4 Lah 402, Ml Zarnab v
Ghulam Rasul
(1909) 2 Ind Cas 15 (16) 5 Nag L R 41, Daud Khan v Govinda
(1892) 15 Mad 57 (59) 1 Mad L Jour 757n, Patcha v Mohidin
(1892) 15 Mad 60 (62) 1 Mad L Jour 754, Kamsi v Ayishamma
(1903) 7 Cal W N 155 (157), Poyran Bibi v Lakhlu Khan Bepari
[But see (1903) 5 Bom L R 355 (364), Abdul Kadir v Mohamed
Ibrahim,
(1891) 1891 Bom P J 212, Hays Fakir Abdul Rahim v Mohammad
Hasan]
3 (1903) 1903 Cal 17 (18), 20 Ind Cas 100 (101), 20 Ind Cas 100 (101),
20 Ind Cas 100 (101), 20 Ind Cas 100 (101), 20 Ind Cas 100 (101),
(1897 1901) 2 Upp Bur Rul 454 (456), Maung Shwe Min v Ma Cho
4 (1916) A I R 1916 P C 145 (146) 44 Cal 379 88 Ind Cas 809 44 Ind App
42 9 Low Bur Rul 56 (P C)
5 (1883) 9 Cal 79 (81), Issur Chunder Doss v Juggut Chunder Shaha
(1890) 14 Bom 236 (240), Keshav Jegannath v Narayan Sahharam
(1894) 21 Cal 157 (163) 20 Ind App 155 6 Sar 374 17 Ind Jur 494 R &
J 133 (P C), Mahomed Riasat Ali v Hassan Banu (Suit not for a
distributive share — Article not applicable — Moveable property —
Article 120 applied)
(1911) 6 Ind Cas 50 (51) 34 Mad 511 (F B), Khadersa Hayee Bappu v
Puthen Veetil Ayssa
Dabu Din
1 Cas 45, Ans
(1916) A I R 1916 Mad 1207 (1210) . 29 Ind Cas 275, Marian Beeviammal v
Kadir Meera Sahib Taragan,
(1910) 6 Ind Cas 579 (580) . 34 Mad 74, Syed Noonsleen Saib v. Syed Ibra-
him Saib
(1893) 16 Mad 61 (63) 2 Mad L Jour 200 (F B), Abdul Kader v. Aishamma
(1894) 8 Mad L Jour 78 (Jour) (Critical Note on 16 Mad 61, Abdul Kadir v
Aishamma)

this Article would not apply to such suits on two grounds, viz that the suit is not for a "distributive share," within the meaning of the Article (see also Note 9 *infra*), and secondly, that the possession of one heir is possession on behalf of all so that the character of the suit is not for a share of inheritance but only for recovery of property from which the plaintiff has been excluded. These decisions applied Article 144 where such suits were with reference to immovable property, and Article 120 where the suits were with reference to moveable property. On the other hand, the following decisions⁶ applied Article 123 to such suits. In *Maung Tun Tha v Ma Thit*,⁷ which was a suit by a Burmese Buddhist, claiming his share of the property of his father against his mother and brothers and which was resisted by the defendants on the ground that under Burmese law the plaintiff as the eldest son should exercise his option of claiming a share during the lifetime of the mother within a reasonable time after the father's death, their Lordships of the Privy Council observed that he was entitled to exercise his right of claiming his share at any time within the period fixed by Article 123. This decision was regarded in the undermentioned cases⁸ as overruling

(1911) 10 Ind Cas 413 (414) (All) *Inayat Hussain v Ans Banno*

(1917) A I R 1917 Lah 181 (182) 40 Ind Cas 374 1917 Pun Re No 92 *Mohamed Hamid Ullah Khan v Mohamed Majid Khan* (Article 120 applied in the case of moveable property)

(1917) A I R 1917 Mad 214 (216 217) 32 Ind Cas 83, *Abdul Rahman v Pathummal Bibi* (Do)

(1897) 19 All 169 (170) 1897 All W N 34 *Umardaras Ali Khan v Hidayat Ali Khan* (Do)

(1897) 7 Mad L Jour 230 (Jour) (Critical Note on 19 All 169 *Umardaras Ali Khan v Hidayat Ali* (Do))

(1914) A I R 1914 Lah 161 (161) 1914 Pun Re No 31 21 Ind Cas 919, *Joti Parshad v Sant Lal* (Do)

(1915) A I R 1915 All 253 (253) 37 All 431 29 Ind Cas 347, *Abdul Gaffur v Nur Jahan Begum* (Article 62 applied to a suit by a Mahomedan heir to recover his share of a debt due to the deceased realised by the other heirs)

(1915) A I R 1915 All 12 (13) 37 All 233 27 Ind Cas 712 *Uf Amina Bibi v Uf Najmunissa Bibi* (Article 62)

(1924) A I R 1924 Cal 142 (143) 50 Cal 610 74 Ind Cas 1010 *Abdunnissa Bibi v Isuf Ali Khan* (Article 62)

6 (1892) 15 Mad 60 (61) 1 Mad L Jour 751 *Kasmi v Ayishamma*

(1916) A I R 1916 Mad 1192 (1193) 32 Ind Cas 1002 33 Mad 1099 *Mohi deen Bee v Meer Sahab*

(1906) 4 Mad L Jour 43 (45) *Immu v Kunhunn Menon* (Suit between different branches of a Malabar tarwad for recovery of shares of one branch becoming extinct)

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- - - - - *Myat Tha Zan*

(1893 1900) 1893 1900 Low Bur Rul 625 (626) *Aleathan v Ma Tha Ta U*

(1903 1904) 2 Low Bur Rul 110 (110) *Maung Pa Min v U Shwe Lu*

(1892 1896) 2 Upp Bur Rul 457 (457) *Ma Thau v Maung Pyin Thu*

7 (1916) A I R 1916 P C 145 (146) 44 Cal 379 44 Ind App 42 9 Low Bur Rul 56 30 Ind Cas 603 (P C).

8 (1924) A I R 1924 Rang 155 (155) 76 Ind Cas 555 I Rang 405, *Maung Po Ein v Maung Shwe Lya*

Article 123
Note 4

the Indian decisions applying Article 144 to suits between co-heirs and as applying Article 123 to such suits, though other decisions considered the Privy Council ruling as not having any such effect. It has now been definitely laid down by their Lordships of the

(1918) A I R 1918 Bom 54 (58 59) 43 Bom 945 51 Ind Cas 203, *S. v. Ratanbai*

Maung Shwe An v Maung

(1919) A I R 1919 Low Bur 148 (149) 9 Low Bur Rul 176
Cas 139 *San Pe v Ma Shwe Zin*

(1925) A I R 1925 Rang 228 (229) 3 Rang 77 92 Ind Cas 4
Tok v Ma Yin

(1925) A I R 1925 Rang 233 (234) 88 Ind Cas 609, *Ma Nan
Me Shwe Me*

(1926) A I R 1926 Rang 95 (96) 95 Ind Cas 514 *Mg San
Mg Maung*

(1923) A I R 1923 Rang 6 (6, 7) 5 Rang 582 106 Ind C
Maung Shwe An v Maung Tok Pyu

(1923) A I R 1923 Rang 110 (111) 77 Ind Cas 53 4 Upp B
140 *Maung Lu Gale v Maung Lu Po*

(1927) A I R 1927 Rang 143 (144) 5 Rang 125 101 Ind C
Maung Kyaw Za v U De Bi

9 (1928) A I R 1928 All 467 (469) 111 Ind Cas 809 51 All 101 (F.B) *F
Khan v Mt Janki*

(1921) A I R 1921 Bom 56 (56) 45 Bom 519 59 Ind Cas 780 *I
Naybudin v Umrav Bu*

(1920) A I R 1920 Bom 28 (26) 58 Ind Cas 42 44 Bom 948 *Kallan
Nagan Gouda Patil v Dibishaya Shah Mohamed Khan*

(1929) A I R 1929 Bom 141 (142 144) 118 Ind Cas 785, *Bas Jiva
Bidanboo*

(1930) A I R 1930 Sind 193 (194) 126 Ind Cas 748 *Niamat v
Rahman*

(1933) A I R 1933 Lah 784 (786) 14 Lah 794 148 Ind Cas 1143 *Mt G
Bibi v Mt Sarwar Bibi*

(1929) A I R 1929 Lah 549 (550) 117 Ind Cas 803 11 Lah 29 *J
Narsingh Das*

(1923) A I R 1923 Lah 519 (520) 73 Ind Cas 425 4 Lah 402 *Mt
v Gulam Rasul*

(1922) A I R 1922 Lah 193 (193) 77 Ind Cas 257 *Hasham Ali v
Hayat*

(1921) A I R 1921 Lah 197 (193) 59 Ind Cas 316 *Murad Bibi v
Balsh*

(1919) A I R 1919 Lah 271 (271) 50 Ind Cas 746, *Mangal Singh v Mt
Kari*

(1924) A I R 1924 Lah 561 (562) 75 Ind Cas 934, *Gurbaksh S
Bhagwan Singh*

(1926) A I R 1926 Cal 480 (480) 91 Ind Cas 725 *Sauraj Bibi v Abb
Biswas*

(1927) 1927 Mad WN 696 (697) *Arogyaswamy v Palerni Ammal*

(1930) A I R 1930 Rang 72 (73) 7 Rang 744 121 Ind Cas 785 *Ma
Ma Khatoon*

(1925) A I R 1925 Oudh 241 (242) 78 Ind Cas 262 *Abdul Shakur A
Muhammad Ali Khan*

(1920) A I R 1920 Sind 92 (93) 63 Ind Cas 685 14 Sind L R 137 *Pa*

Council in *Ghulam Muhammad v Sheikh Ghulam Husain*,¹⁰ that Article 123 will not apply to such suits and that the observation in *Maung Tun's case*⁷ was never intended to overrule the decisions in India to the contrary. The ratio of the decision is that the co heirs in possession in such cases cannot be regarded as persons who are by law charged with any duty of distributing the estate. The law, therefore, is now definitely settled that suits between co heirs of a person dying intestate taking as tenants in common are not governed by this Article.¹¹

Article 123
Notes
4-6

6. Suit by Hindu reversioners.—Article 141, *post*, applies to suits by Hindu reversioners for recovery of *immovable property* on the death of a Hindu widow. As regards the moveable property belonging to the husband and held by the widow during her lifetime, that Article will not apply. Nor would this Article apply inasmuch as the suit is not against any person charged with the duty of distributing the estate. It was contended in *Ganpatrao v Vamanrao*,¹ that a suit by reversioners for recovery of moveable property would fall under this Article, and that the same would become deliverable on the death of the widow. The learned Judges negatived the contention and applied Article 120 to the suit on two grounds, viz. (i) that Article 123 was never meant to be applied to cases of reversioners suing to recover property which has been held for some intervening time by a widow, and (ii) that the suit by the reversioners would not be one for a "distributive share, within the meaning of this Article."

6. Suit by heir against person in wrongful possession.—As already explained in Note 2 *supra*, the suit governed by this Article must be one against some person legally charged with the duty of distributing the estate of the deceased. A person in possession of the property of the deceased but who claims *adversely* to such estate is neither an executor nor administrator nor even an executor *de son tort* and is not legally charged with the duty of distributing any estate. A suit against such a person for property to which the

(1922) A I R 1922 All 525 (525) 44 All 214 61 Ind Cas 974, *Mt Dahir un nissa Bibi v Abdul Fakhan*

10 (1932) A I R 1932 P C 81 (82) 59 Ind App 74 136 Ind Cas 454 54 All 93 (P C)

11 (1934) A I R 1934 Rang 318 (319) 12 Rang 403 152 Ind Cas 763, *Ma Pura Thein v U Nyo*

(1933) A I R 1933 Lah 784 (786) 14 Lah 794 145 Ind Cas 1143 *Mt Ghulam Bibi v Mt Sarwar Bibi*

(1933) A I R 1933 Cal 253 (257) 113 Ind Cas 402 *Swarnamovee Das v Probodh Chandra Sarkar*

[See however (1935) 159 Ind Cas 118 (119) (Rang) *U Tun Hlung v Maung Sein Hlung* (A I R 1916 P C 145 seems to have been followed)]

(1936) A I R 1936 Rang 850 (8 9) 164 Ind Cas 555 *Ma Pura v Tasudut*]

Note 5

Article 123
Notes
6—7

plaintiff has become entitled by virtue of a bequest under a will or by virtue of heirship, cannot be said to be one "for a legacy or for a distributive share of the estate" and is not governed by this Article¹ Where after the death of the owner a person not an heir was in possession, and such person was succeeded by others claiming to be the heirs of the original owner, and it was found that all the persons in possession were merely trespassers, a suit by the real heir for recovering the property was held to be governed by Article 144 and that the successive trespassers could not tack on their periods of adverse possession so as to defeat the claim of the heir²

But where the person in possession takes out letters of administration, the heirs must sue for their shares within the period prescribed by this Article³

7. Suit for accounts against executor.—In a suit for account, the plaintiff is not ordinarily entitled to go beyond six years before suit¹ If the administration of the estate had ceased six years before suit, a legatee is not entitled to any account from the executor² But where a residuary legatee sues the executor for recovery of his share granted under the will he is entitled to get such an account from the executor as is necessary for the purposes of ascertaining what the residuary share is, and such a suit will be governed by this Article and the executor will be liable to render accounts for the

Note 6

- 1 (1932) A I R 1932 Rang 55 (56) 10 Rang 82 187 Ind Cas 200 *Muhammad Chooloo v Abdul Hamid Khan*
 (1914) A I R 1914 All 207 (207) 23 Ind Cas 521, *Mt Hulasao v Salamat Khan*
 (1926) A I R 1926 Rang 95 (96) 95 Ind Cas 514, *Yg San Shin v Yg Maung*
 (1880) 5 Cal 692 (696) 5 Cal L R 505 3 Shome L R 81, *Kally Churn Shaw v Dukhee Bibee*
 (1890) 17 Cal 187 (143) 16 Ind App 148 1890 Pun Re No 23 5 Sar 412 13 Ind Jur 830 (P C) *Mahammad Amanulla Khan v Badan Singh*
 (1889) 16 Cal 473 (479) 16 Ind App 23 5 Sar 321 (P C) *Mohama Chunder Moroomdar v Mohesh Chunder Neoghi*
 (1878) 2 Cal L R 10 (12) *Trilochun v Nubokishore*
 (1909) 2 Ind Cas 381 (383) (Cal) *Lalu Sahu v Ghunaria Uraon*
 (1918) A I R 1918 Low Bur 119 (119) 42 Ind Cas 121, *Hla Gyaw v Aung*
 possession is

50 11 Ind
to Kay]

- 2 (1917) A I R 1917 Nag 7 (12 13) 43 Ind Cas 943 14 Nag L R 82 *Ganno v Beni*
 (1916) A I R 1916 Oudh 50 (57) 33 Ind Cas 371 18 Oudh Cas 293 *Ghiss Singh v Gayraj Singh*
 3 (1899) 23 Bom 80 (86), *Narajo Manokj, Wadia v Perozbas*

Note 7

- 1 (1880) 5 Cal 910 (914) 6 Cal L R 195, *Siroda Pershad Chattopadhyay v Brojo Nath Bhattacharjee*
 (1892) 8 Cal 789 (807) 11 Cal L R 370 7 Ind Jur 17, *Hemangini Das v Nobin Chand Ghose*
 2 (1896) 19 Mad 425 (431) *Cursetjee Pestonjee v Dadabhoj Eduljee*

full period of twelve years³ This rule will apply also to executors *de son tort*, who will be liable to account to the administrator for the rents and profits received by them for twelve years before suit⁴

Article 123
Notes
7—9

8 Executor, if a trustee within the meaning of Section 10 — As has been seen in the Notes to Section 10 *ante*, an executor of a will is not as such a 'trustee for a specific purpose' within the meaning of that Section¹ Hence a suit against him will not be governed by Section 10 and will not be exempt from the bar of limitation under this or some other appropriate Article² The same principle will apply to suits against administrators or other persons legally charged with the duty of distributing the estate of a deceased person

Where however, an executor is also *expressly* made a trustee under the provisions of the will a suit against him in respect of such trusteeship will not be barred by any length of time³ Similarly, where an executor by his own act constitutes himself as an *express trustee*, there will be no bar of time for a suit against him⁴

9 "Legacy." — A legacy, according to Wharton's Law Lexicon is a "gift of personality by will Under the Indian Succession Act 1925 the word has been used to cover both *moveable* and *immovable*

8 (1915) A I R 1915 Cal 219 (220) 41 Cal 271 25 Ind Cas 370 *Khetramani*

14 *same same same*

[Contra (1910) 8 Ind Cas 189 (190) (Bom) *Gajanan Vinayak v Waman Shamrao* (Account for six years only)]

4 (1929) A I R 1929 Lah 53 (758) 122 Ind Cas 467 11 Lah 325 *Harry Percival Robson v Administrator General Punjab*

Note 8

1 (1899) 47 W R (Eng) 664 (665 666) 2 Ch 149 68 L J Ch 488 60 L T 706 *In re Lucy*

2 (1929) A I R 1929 Lah 53 ("5") 122 Ind Cas 467 11 Lah 325 *Harry Percival Robson v Administrator General Punjab*

(1910) 8 Ind Cas 189 (190) (Bom) *Gajanan Vinayak v Waman Shamrao*

(1915) A I R 1915 All 12 (14) 37 All 233 27 Ind Cas 712 *Mt Amina Bibi v Mt Najmunnissa*

(1870) 13 Suth W R 351 (353) *Prasanno Chunder Roy Choudhury v Gyan Chunder Bose*

(1915) A I R 1915 Mad 1181 (1189) 27 Ind Cas 849 *Ramanathan Chetty v Rajammal*

(1891) 39 W R (Eng) 677 (678) 3 Ch 119 61 L J Ch 65 65 L T 123 *Evans v Moore*

(1897) 2 Ch 491 (495) 40 W R (Eng) Col Dig 177, *Pe Barker*

3 (1922) A I R 1922 P C 912 (214) 49 Ind App 37 103 Ind Cas 832 *Khat Sim Tek v Chuah Hock Choh Neoh*

(1860) 9 H L C 1 (15) 131 R R 1 (6) 3 L T (N S) 194 *Dullock v Downes*

(1915) A I R 1915 Mad 1184 (1189) 27 Ind Cas 849 *Ramanathan Chetty v Rajammal*

(1902) 50 W R (Eng) 164 (165) 1 Ch 176 71 L J Ch 119 63 L T C 2 *Re Timmins*

4 (1837) 2 W & Cr 309 (315) 45 R R 63 (64) *Phillips v Mannin, &c*

(1861) 30 R R 364 (366) 132 R R 370 (371) *Tyler v Jackson*

(1869) 18 W R (Eng) 105 (106) 1 R R 9 L J 37 24 L T 57 *Calhoun v Smith*

Article 123
Notes
9—10

property¹ A testator may grant, as a legacy, an annuity,² or maintenance allowance to be paid out of particular properties,³ or a sum of money,⁴ or a debt due to the testator,⁵ or an estate,⁶ and suits to recover these will be governed by this Article

Where a legacy is *charged* on property and the charge is sought to be enforced, Article 132 and not this Article will apply⁷

Where a debt due to the testator is given as a legacy, a suit by the legatee against the debtor is not within the Article⁸ The words "or for a share of the residue bequeathed by a testator" were absent in the Act of 1871 It has been held by Baron Alderson in *Prior v Hornblow*,⁹ that the term "legacy" in the corresponding provision of limitation in English law, Sec 40 of Statute 3 & 4 Will IV, c 27, would include also a share in the residue of property bequeathed by a testator This decision was adopted in *Treepoorasundari v Debendranath*,¹⁰ a decision under Article 122 of Act 9 of 1871 The words referred to above were newly added in 1877 The term "legacy" in the present Article will not now include such residuary share In English law, though a legacy and a share in the residue are equivalent for purposes of limitation, they differ in one respect A legacy given to an executor who has not proved the will is forfeited by him, while he will not be deprived of a share of the residue given to him even if he does not prove the will¹¹

10. "Distributive share." — The word "distributive" in the first column must be given its natural meaning The word, according to Webster's International Dictionary, means "dealing to each his proper share" This would imply, as in the case of the words "payable" and "deliverable," that there is somebody whose duty is

Note 9

- 1 See Sections 119 to 121 of the Indian Succession Act, 1925 and the illustrations and the marginal notes thereto
- 2 (1850) John 112 (117) 123 R R 42 (44), *In Re Ashwell's Will*
- 3 (1885) 16 L R Ir 264 34 W R (Eng) (Dig) Col 108, *Dower v Dower*
- 3 (1931) A I R 1931 Cal 670 (671) 132 Ind Cas 684, *Harī Charan Bhungya v Kamal Kumari Das*
- (1929) A I R 1929 Lah 834 (835) 123 Ind Cas 535, *Mt Ali Begam v Ismail Hussain*
- 4 (1902) 25 Mad 361 (363) 12 Mad L Jour 183, *Rajamannar v Venkata Krishnaswami*
- 5 (1904) 7 Oudh Cas 176 (178), *Ahmad Raza Khan v Mirza Ali Husain*
- 6 (1924) A I R 1924 Lah 561 (562) 75 Ind Cas 934, *Gurbakhsh Singh v Bhagwan Singh*
- 7 (1883) 15 Cal 66 (69) 14 Ind App 137 5 Bar 78 11 Ind Jur 432 (P O) *Girish Chunder v Anundmoy Deb*
- [See also (1867) 2 Agr 171 (171) *Nana Narain Roy v Rama Nund*]
- 8 See (1918) A I R 1918 Mad 526 (528) 41 Ind Cas 605, *Lakshminarayana v Venkata Subba Rao*
- 9 (1836) 2 Y and C Ex 200 (206) 47 R R 399 (399)
- 10 (1876 77) 2 Cal 45 (55).
- 11 (1841) 12 Sim 264 (269) 56 R R 53 (60), *Christin v Devereux*

Article 123
Notes
11—12

In English law, though a legacy becomes payable on the death of the testator, for purposes of limitation, the Courts have adopted the general rule that an executor or administrator is allowed one year to complete the administration, and the period of limitation is reckoned only from the expiry of one year from the death of the testator,⁴ and this applies also to suits for recovery of share in the property of an intestate.⁵ In Ireland, however, this rule is not followed, and a legacy is held to be payable immediately on the death of the testator and not on the expiry of the "Executor's year".⁶ In India, the English rule is enacted in Section 337 of the Indian Succession Act and consequently a legacy or share in cases governed by the Succession Act becomes payable or deliverable only on the expiration of one year from the death of the testator or intestate.⁷

In the case of legacies payable annually, the starting point for each year a payment is the date on which it is payable. In a suit for arrears of such payments, arrears for twelve years before suit can be obtained under this Article.⁸

Where under the Chinese Customary Law by which the parties were governed, the widow of the intestate deceased had control of the inheritance during her lifetime, it was held that time for a suit by the heir for recovery of the estate ran, under Article 123, from the death of the widow.⁹

12. Application of Section 20 to suits for legacy. — Under the first paragraph of Section 20 *ante*, payment of interest as such on a legacy by the person liable to pay the legacy starts a fresh period of limitation under this Article. It would appear from the omission of the word "legacy," from the second paragraph of Section 20, that part payment of a legacy will not give rise to a fresh period of limitation.

[See (1907) 9 Bom L R 316 (319), *Nandlal Chumilal v Gopilal Mansilal*]

- 4 (1806 07) 13 Ves 325 (333, 334) 9 R R 185 (189) 33 E R 316, *Wood v Penoyre*
 (1857) 24 Beav 448 (450) 116 R R 185 (186) 6 W R 451 27 L J Ch 545 3 Jur (N S) 1237, *Earle v Bellingham*
 (1822) 5 Madd 358 (359) 23 R R 245 (246, 247), *Brook v Lewis*
 5 (1855) 33 WR(Eng) 502 (503) 29 Ch D 964 52 L T 682 *In re Johnson Stij v Blake*
 6 (1905) 1 Ir Rep 416, *Waddell v Harshaw*
 7 (1896) 19 Mad 425 (432), *Gursetjee Pestonji v Dadabhai Eduljee*
 (1905) 2 Cal L Jour 93n (Critical Note on (1905) 1 Ir Rep 416 *Waddell v Harshaw*)
 (1922) A I R 1922 Mad 457 (476) 46 Mad 190 70 Ind Cas 639 (F B) *Zamin dar of Bhadrachalam v Venkatadri Appa Rao*
 8 (1935) A I R 1935 All 239 (242) 56 All 711 155 Ind Cas 390, *Sri Nathji v Mt Panna Kunwar*.
 (1931) A I R 1931 Cal 670 (671) 193 Ind Cas 631, *Hari Charan Bhunya v Kamal Kumari Das*
 (1929) A I R 1929 Lah 834 (835) 123 Ind Cas 535, *Mt Ali Begam v Inail Hussain*
 9 (1937) A I R 1937 Rang 354 (357) 172 Ind Cas 550 *K'loo Soo Cheng v Ts Ma Shue Zin*

13. Applicability of Section 6 to suits under the Article. —**Article 123
Note 13**

A legacy given to a minor is deliverable on the death of the testator, and is not postponed to the date of his attaining majority even though there is a direction in the will that the executor shall have powers of management during the legatee's minority¹ But the minor has the benefit of Section 6, *ante*, and can sue within three years of attaining majority² Where, however, an heir to the deceased person died without claiming his share in the estate, the minor heir of such heir cannot claim the benefit of Section 6 and he must sue within the period fixed by this Article³

124.* For possession of an hereditary office.

Twelve years.

When the defendant takes possession of the office adversely to the plaintiff.

Article 124

*Explanation :—*An hereditary office is possessed when the profits thereof are usually received, or (if there are no profits) when the duties thereof are usually performed

* Act of 1877, Article 124
Same as above

Act of 1871, Article 123

123—For possession of an hereditary office

Twelve years

When the defendant or some person through whom he claims took possession of the office adversely to the plaintiff

*Explanation—*An hereditary office is possessed when the profits thereof are usually received or (if there are no profits) when the duties thereof are usually performed

Act of 1859
No corresponding provision

Note 13

- 1 (1896) 23 Cal 563 (5-2) 23 Ind App 18 6 Mad L Jour 71 6 Sar 667 (P C)
Narendra Nath Sircar v Kamalabannu Dan.
- 2 (190*) 9 Bom L R 316 (319), *Nandlal Chavulal v Gopalal Manilal*
[See also (1912) 17 Ind Cas 4 (5) 36 Mad 5-5 *Ganpathi Iyer v Saramalai*]
- 3 (191*) A I R 1917 Low Bur 100 (102) 42 Ind Cas 609 *Hawng Po Ka v Ma Ku*

Synopsis

1. Legislative changes.
2. Scope of the Article.
3. What is an office.
4. Hereditary office.
5. Article applies only to snits for possession of the office.
6. Defendant mnst have been in possession adversely to plaintiff.
7. Taaking of predecessor's possession.
8. Explanation.
9. Co-trnstees and adverse possession.
10. Defendant obtaining letters of administration as heir to the office cannot plead limitation against real heir.
11. Suit for property attached to office.
12. Snit for office and property attached thereto, based on title by adoption.
13. Starting point.
14. Section 28 and this Article.
15. Bar against office-holder will bar his successors also.

Other Topics

More receipt of emoluments . .	See Note 8, Pts 2 to 3a
Non-hereditary office — Article not applicable . .	.. See Note 2, Pt 2
Permissive possession is not adverse possession	See Note 6 Pts 2 3
Right to possession of office barred — Right to possession of property is also barred	See Note 11, Pts 1 to 3
Section 10 and this Article . .	See Note 2, Pts 7, 8, Note 11 FN 1
Suit for declaration of right to office	See Note 5, Pts 2, 8 6
Suit for property	See Note 2

- ### 1. Legislative changes.

1 There was no provision corresponding to this Article in the Act of 1859 and snits of the nature contemplated by this Article were held to be governed by the six years' rule of limitation under Section 1 clause 16 of that Act.¹ But where under Hindu law and usage a particular office was regarded as immovable property, a snit for such office was held governed by clause 12 of Section 1.²

Article 124 — Note 1

Article 129 — Note 1

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- 2 The distinction between suits for hereditary offices regarded by Hindu law as immovable property and suits for other hereditary offices was done away with by the Act of 1871 and the period of limitation for suits for all hereditary offices was fixed at twelve years.
- 3 The third column under Article 123 of the Act of 1871 corresponding to this Article prescribed the starting point as the date "when the defendant, or some person through whom he claims took possession of the office adversely" to the plaintiff." Article 124 of the Act of 1877 omitted the words "or some person through whom he claims", the reason being that a new definition of the word "defendant" was introduced in that Act under which "defendant" included any person from or through whom a defendant derived his liability to be sued. The present Article simply re-enacts Article 124 of Act of 1877.

2. **Scope of the Article.** — This Article applies to suits for possession of *hereditary offices*¹ A suit for the possession of an office which is *not* hereditary is not governed by this Article, but will fall under Article 120² The intention of the Article is to treat hereditary offices like land for the purpose of barring suits for possession of office and extinguishing the right to the possession thereof after a certain period³

The nature of the suit contemplated by this Article is one for possession by the plaintiff who claims to be entitled to the office, against one who, at the time, *holds the office himself*⁴ It follows that a suit for possession of trust property against an alienee thereof who claims to hold it *in his right as owner*, is not governed by this Article⁵

Note 2

- 1 (1920) A I R 1920 Cal 600 (803) 60 Ind Cas 165, *Kasim Hassan v Hazara Begum*
 (1931) A I R 1931 Mad 505 (511) 133 Ind Cas 193, *Muthukumaraswami Pillai v Subbaraya Pillai*
 (1915) A I R 1915 Mad 1196 (1198) 29 Ind Cas 1 39 Mad 456 *Aarayanan Chettiar v Lakshmanan Chettiar* (Office of trustee of a temple)
 (1918) A I R 1918 Mad 675 (677, 679) 41 Mad 4 42 Ind Cas 22, *Raja of Palghat v Raman Unni* (Suit by a Malabar Stani to recover Devasswom and its properties)
- 2 (1920) A I R 1920 Cal 600 (803) 60 Ind Cas 165 *Kasim Hassan v Hazara Begum*
 (1902) 26 Mad 113 (115) *Raghava Chariar v Nallur Raghavachariar*
 (1935) A I R 1935 Mad 449 (452), *Rajagopala Naidu v Ramasubramania Ayyar*
- 3 (1932) A I R 1932 Cal 791 (794) 60 Cal 452 141 Ind Cas 514 (F B) *Menchar Mukherjee v Bhupendra Nath Mukherjee* (Per Rankin, C J)
- 4 (1928) A I R 1928 Mad 377 (378) 109 Ind Cas 771, *Thathachariar v Singarachariar*
 (1911) 10 Ind Cas 573 (574 575) (Mad) *Kamala'kammal v Aris'na Pillai*
- 5 (1890) 13 Mad 277 (280) *Mahomed v Ganapa's*
 (1902) 27 Bom 303 (305) 4 Bom L R 745, *Dattaguru v Dattarayya*
 (1883) 7 Mad 65 (86) 7 Ind Jur 595, *Papaya v Ramana*
 (1890) 14 Mad 153 (162), *Nidalandan v Padmanabha* (10 Ind App 90, Full)

Article 124
Notes
2—3

Where a suit is governed by this Article, the general Article 141 will not apply ⁶

A suit for possession of an office of trustee and of the property attached to it against the defendant who claims to be a trustee in possession of such property, is not governed by Section 10 of the Act, but is one which may be barred by limitation⁷ either under this Article if the office is a hereditary one, or by Article 120 if it is a non hereditary one. In *Balvantrao v Puranmal*,⁸ it has been held by the Privy Council that Section 10 of the Act might apply where property is sought to be recovered for the trusts of an endowment but not where the plaintiff sues for his own personal right to manage the trust against the defendant who admits he is a trustee and there is no question of recovering the property for the trusts.

3. What is an office.—An office is a position which has some duties attached to it¹. The existence of an office, therefore, involves the existence of some duties to be performed by the holder of the office,² and which are enforceable by law, custom or usage³. In the absence of any such duties, there can be no office for which a suit will lie in a Civil Court⁴. It is not essential that the office need be

- (1841) 6 Suth W R 3 (9) 2 Moo Ind App 390 (P C) *Jeuun Dass Sahoo v Shah Kubeer ood deen*
(1879) 20 Suth W R 471 (472) *Mohunt Burm v Khashee*
(1921) A I R 1921 Mad 595 (596) 70 Ind Cas 477, *Subramania Gurukul v Annimakannu Annmal*
(1924) A I R 1924 Mad 201 (202 204) 77 Ind Cas 566, *Majavath Alls v Mujafar Alls*
G (1918) A I R 1918 Pat 570 (575) 47 Ind Cas 290 3 Pat L Jour 327, *Nalhe Pujari v Radha Binode Naik*
7 (1883) 7 Mad 417 (418) *Karimshah v Nattan Bivi*
(1915) A I R 1915 Mad 1003 (1021) 26 Ind Cas 841 *Ambalathana Pandara sannadhi v Minakshi Devasthanam* (Confirmed by the Privy Council A I R 1921 P C 97)
8 (1883) 6 All 1 (10) 10 Ind App 90 13 Cal L R 39 7 Ind Jur 329 4 Bar 435 (P C)

Note 3

- 1 See the Concise Oxford Dictionary
2 (1916) A I R 1916 Mad 379 (380) 28 Ind Cas 459, *Mahomed Sahib v Syed Sahib*
(1917) A I R 1917 Pat 97 (39) 42 Ind Cas 478 2 Pat L Jour 705 *Lachman Lal Pathak v Baldeo Lal Thathwari*
(1928) A I R 1928 Mad 377 (378) 109 Ind Cas 771, *Thathachariar v Singarachariar*
(1927) A I R 1927 Mad 131 (136) 93 Ind Cas 229 *Rangachariar v Paritha sarathy*
(1919) A I R 1919 Mad 1026 (1028) 45 Ind Cas 959, *Venkatachariar v Ponappa Ayyengar*
(1931) A I R 1931 Bom 273 (274) 132 Ind Cas 410 *Shankar Sadashiv v Malhar Shankar*
3 (1917) A I R 1917 Pat 37 (39 40) 42 Ind Cas 478 2 Pat L Jour 705 *Lachmanlal Pathak v Baldeo Lal Thathwari*
4 (1910) 32 All 527 (540) 6 Ind Cas 223 *Channu Dai Vyas v Dibu Nandan*
(1904) 28 Mad 29 (25) 14 Mad L Jour 171, *Subbaraya Mudaliar v Venkatachariar*
(1895) 19 Mad 62 (64) 5 Mad L Jour 209, *Tholappalachariar v Venkatachariar*

one which brings in any profit to those claiming it⁵ or one to which any fees or emoluments are attached as of right⁶ and this is so whether the office is a secular or a religious one. In *Chinnasamy Thathachariar v Singarachariar*⁷ Mr Justice Srinivasa Iyengar observed that an office in connexion with temples and other such institutions must be regarded as a bundle of duties liable to be performed by the same persons under a particular designation and *carrying with it certain emoluments*. It is submitted that though such offices usually carry emoluments with them the existence of the emoluments is not an absolutely necessary factor in an office.

4 Hereditary office — A hereditary office is one the right to which descends on the death of the holder in accordance with the law of inheritance. Where succession to the office is by *nomination* or *appointment*, and there is *no right to the office independent of such nomination or appointment* the office is not hereditary¹. It is the common practice in the Madras Presidency for *Pandarasanni dhis* to appoint their successors to the office². In such cases the office is not a hereditary one. But where the founder of a religious endowment nominates a particular person to the office of a *shebait* but does not provide for further succession thereto the shebaitship after the death of the nominee vests in the founder's heirs and

5 (1887) 15 Cal 159 (162) *Yamat Ram Dayan v Dapu Ran Alai*

6 (1888) 13 Bom 429 (433) *Sayad Hashim Sahab v Huseinsha*

(1927) A I R 1927 Cal 783 (785) 54 Cal 614 105 Ind Cas 188 *Debendra Narain v Satya Charan*

7 (1928) A I R 1928 Mad 877 (378) 109 Ind Cas 771

Note 4

1 (1892) 19 Cal 776 (779) *Jagannath Das v Birbhadra Das*

(1909) 3 Ind Cas 419 (424) 37 Cal 263 *Sahmulla Bahadur v Abdul Khayar Mohammad Mustafa*

(1927) A I R 1927 Cal 180 (135) 99 Ind Cas 205 *Debendranath v Sheik Sefatulla*

(1898) 25 Cal 354 (364) *Jagannath Prasad v Ranjit Singh*

(1920) A I R 1920 Cal 800 (803) 60 Ind Cas 165 *Kassim Hassan v Hasra Begum*

(1903) 26 Mad 113 (115) *Kidambi Ragaiachariar v Thirumalai Azari Nallur Ragaiachariar*

(1917) A I R 1917 Mad 407 (407) 35 Ind Cas 646 *Siddalinga v Ramachandra*

(1918) A I R 1918 Mad 1016 (1020) 40 Ind Cas 627 *Kailasam v Nataraja*

(1926) A I R 1926 Mad 245 (246) 93 Ind Cas 993 *Narayana v Nagappa*

(1926) A I R 1926 Mad 1012 (1013) 97 Ind Cas 437 *Paramananda v Radhakrishna*

(1927) A I R 1927 Mad 148 (149) 99 Ind Cas 631 *Muniswami Pillai v Secretary of State*

(1913) 18 Ind Cas 873 (874) (Mad) *Palaniyandi Malararayan v Vadamalai Odayan*

(1893) 3 Mad L Jour 32 (Jour) (Critical Note on 19 Cal 776) *Jagannath Das v Birbhadra Das*

(1909) 2 Ind Cas 107 (107) 1909 Pan Re No 53 *Yad Ali v Mubarak Ali*

(1937) A I R 1937 Ondh 33 (36) 168 Ind Cas 593 *Chandrika Bakhsh Singh v Bhola Singh*

2 (1874) 1 Ind App 209 (225) 3 Sar 344 (P C) *Rajah Muthu Ramalinga Setupati v Perianayagam Pillai*

Articles 124
Notes 4

becomes, in their hands, a hereditary office³ In *Sree Mahant Parmananda v Radhakrishna Das*,⁴ the succession to the office of *mahant* of a *math* was in question and, according to the usages of the particular *math*, the *mahant* for the time being had to nominate his successor from among his *chelas*. It was contended that a *chela* was the heir, under the Hindu law, of his spiritual *guru* and that the succession to the office was therefore hereditary. In negating the said contention, Krishnan, J., observed as follows:

"Where succession is by nomination by the holder in office of his successor, it seems to me impossible to contend that it is a hereditary succession. Hereditary succession is succession by the heir to the deceased under the law, the office must be transmitted to the successor according to some definite rules of descent which, by their own force designate the person to succeed. There need be no blood relationship between the deceased and his successor but the right of the latter should not depend upon the choice of any individual. If the rule were that the senior living *chela* of the *guru* succeeds to his office on his death, that might be a case of hereditary succession even if the *guru* nominated him as his successor, when no rights flowed from such nomination. But where the right to succession is based solely on nomination, I agree with my learned brother that the succession cannot be treated as hereditary.

But where a person gets a right to the office by reason of the fact that he is the heir under the rules of inheritance governing the parties, the mere fact that he is also to be appointed by the Revenue Authorities would not make the office a non hereditary one⁵. Thus a *maharkat vatan* in Bombay and Central Provinces and the offices of *karnam*, *monigar* and certain other village offices in Madras descend according to the law of inheritance but the appointment is made by Revenue Authorities who are bound to choose the person in accordance with such rules of inheritance. These offices are consequently hereditary offices⁶.

The office of *samudayi* of a Hindu temple in Malabar is a hereditary office⁷. So also is the office of a Malabar *stanom*⁸. The office of a *shebast* of a Hindu idol becomes, under certain circumstances, vested in the founder of a worship of an idol and his heirs⁹.

3 (1937) A I R 1937 Oudh 379 (376) 169 Ind Cas 593, *Chandrika Baksh v Dhola Singh*.

4 (1926) A I R 1926 Mad 1012 (1014, 1015) 97 Ind Cas 437.

5 (1937) A I R 1937 Nag 84 (84) 168 Ind Cas 351 I L R 1937 Nag 151 *Moti Ram v Shenu*.

6 See also (1937) A I R 1937 Nag 151 *Moti Ram v Shenu*.

15 of Act 2 of 1891

7 (1918) A I R 1918 Mad 183 (186) 44 Ind Cas 630 *Raman v Kunhu Kutti*.

8 (1918) A I R 1918 Mad 675 (677, 679) 41 Mad 4 42 Ind Cas 22 *Piya of Dalghat v Raman Unni* (Distinguishing A I R 1915 Ms 1217).

9 See Mulla's Hindu Law, 8th Edition S 421 p 459.

[See also (1890) 17 Cal 3 (20) 16 Ind App 137 5 Sar 350 13 Ind Jur 211 (P C) *Gossams Sri Gridharji v Romanlalji Gossams*.

and is hereditary in their hands¹⁰

The membership of a Devasthanam Committee appointed by the Government under the Religious Endowments Act (20 of 1863) is not a hereditary office¹¹ Nor is the office of *mutawallis* of *wakf* property a hereditary one unless it is made hereditary by the founder of the *wakf*¹²

An entirely new office which is created for the first time is not a hereditary office though it will or may become, hereditary in the hands of the holder, if and when appointed. Thus when a new office is created under Section 15 of Madras Act 2 of 1894 it is not a hereditary office when created but will become hereditary in the hands of the person who is first appointed to it¹³

See also the undermentioned case¹⁴

5 Article applies only to suits for possession of the office.

—This Article does not apply unless the suit is one for possession of a hereditary office¹ A suit for a declaration that the plaintiff is entitled to an office is not one for possession and is not governed by this Article² Similarly, a suit for the declaration of the plaintiff's

- (1698) 25 Cal 354 (304) *Jagannath Prasad Gupta v Jangit Singh*
 (1900) 8 Ind Cas 408 (413 414) (Cal) *Sital Das Babaji v Pertap Chunder Sarma*
 (1870) 13 Suth W R 396 (397) 5 Beng L R 181 *Peet Koonwar v Chuttur Dharee Singh*
 (1918) A I R 1918 Mad 12 8 (1281) 40 Mad 612 41 Ind Cas 589

id L Jour
Pandara

- (1932) A I R 1932 Cal 791 (813 814) 60 Cal 452 141 Ind Cas 544 (F B) *Monohar Mukherjee v Bhupendra Nath*
 (1930) A I R 1930 Cal 180 (182) 126 Ind Cas 36 *Panethanan Banerji v Surendra Nath*
 11 (1917) A I R 1917 Mad 407 (407) 35 Ind Cas 646 *Siddalinga Swamulu v Ramachandra Charlu*
 12 (1927) A I R 1927 Cal 130 (135) 99 Ind Cas 205 *Debendra Nath v Sefatulla*
 (1909) 8 Ind Cas 419 (424) 37 Cal 263 *Sahmulla Bahadur v Abdul Khayer Muhammad Mustafa*
 (1909) 2 Ind Cas 107 (109) 1909 Pun Re No 53 *Yad Ali v Mubarak Ali*
 13 (1927) A I R 1927 Mad 148 (149) 99 Ind Cas 634 *Muniswami Pillai v Secretary of State*

NOTES LA 3 1

NOTE 5

- 1 (1914) A I R 1914 P O 72 (74) 42 Cal 244 24 Ind Cas 501 41 Ind App 267 (P O) *Jalandhar Thakur v Jharula Das*
 2 (1894) 17 Mad 395 (396) 3 Mad L Jour 237 *Lakshminarayanaappa v Venkataratnam*
 (1917) A I R 1917 Mad 407 (407) 35 Ind Cas 646 *Siddalinga Swamulu v Ramachandra Charlu*

Article 124
Note 6

right to the office and for the recovery of the emoluments thereof received by the defendant is not within this Article.³ A suit for an injunction restraining the defendant from obstructing the plaintiff in the enjoyment of his office, or directing the defendants to produce their accounts, is not one for possession of the office and is not governed by this Article.⁴ In *Jalandhar Thakur v Jharula Das*,⁵ the defendant who was a *Beldar* by caste, and who was not therefore competent to hold or to provide for the performance of the duties of the office of the *shebait* of a temple, went on receiving and appropriating the income from the offerings to the temple under a claim of right. It was held by their Lordships of the Privy Council that the defendant could not be said to be in possession of the office within the meaning of this Article and that the plaintiff's suit for a declaration of right to such offerings on the ground that he was the *shebait* was not a suit for the possession of the office. Their Lordships observed as follows:

"The appropriation from time to time by Jharula Das of the income derivable from the 3½ annas share did not deprive Mussammal Grihment or, after her death, Bhanu Thakur, of the possession of the office of *shebait*, although that income was receivable by them in right of the *shebaitship*. The right to the office of *shebait* did not arise from or depend upon the receipt of a share of the surplus daily income from the offerings to the temple, although the right to receive daily a share of the net income from the offerings to the temple was attached to and dependent on the possession of the right to the *shebaitship*.

A suit for a declaration of the plaintiff's right to an office and for possession would be governed by this Article though a declaration has been asked for, the reason is that the declaration in such cases is merely ancillary to the possession claimed.⁶

The question whether a particular suit in respect of office is one for possession of such office depends upon the relief claimed in the plaint and the circumstances of the case. If, in substance, the suit must be regarded as one for possession of a hereditary office this Article would apply.⁷ X obtained a decree for money against the *shebait* of a temple and in execution thereof purchased three and half annas share of the profits which the defendant was entitled to receive as *shebait*, and began to receive the profits. X, however,

(1927) A I R 1927 Mad 143 (148) 99 I C 934, *Muniswami v Secy of State*
3 (1928) A I R 1928 Mad 377 (378) 109 Ind Cas 771, *Chinnaswamy Thatha chariar Singarachariar*

[See also (1899) 9 Mad L Jour 173 (161) *Subbier v Ranga Aiyangar*]
4 (1917) A I R 1917 Mad 407 (407) 35 Ind Cas 616 *Sidalinga Swamulu v Ramachandra Charlu* (Injunction directing defendants to produce accounts for inspection)

5 (1914) A I R 1914 P O 72 (74) 42 Cal 244 41 I A 267 211 C 501 (P C)

6 (1896) 21 Cal 83 (90) *Sarkari Abu Torab Abdul Wahab v Rahman Dakh*

7 (1896) 21 Cal 83 (90) *Sarkari Abu Torab Abdul Wahab v Rahman Dakh*
(1901) 21 Mad 32 (42) *Sadashra v Anayya* (The suit cannot be thrown out on the ground that a declaration ought to have been prayed for)

not being a Brahmin, could not hold the office of *shebait* of the temple. The reversioner of the defendant *shebait* who became entitled to the office filed a suit against X for a declaration of his right to receive the three and a half annas' share of the profits. It was held by their Lordships of the Privy Council that the suit was not one for possession of an office within the meaning of Article 124.⁸ In *Raghunathachariar v Thiruvengada Ramanujachariar*,⁹ the plaintiff sued the defendant for a declaration of his right to the office of First Thirthakar and for an injunction restraining the defendant from enjoying the honours and emoluments of the office. The High Court of Madras assumed that the suit was one for possession of the office governed by this Article. It did not appear that in that case the defendant could not hold the office by receipt of emoluments, as was the case in *Jalandhar Thakur v Jharula Das*,¹⁰ referred to above. In the undermentioned case,¹¹ the plaintiff alleging that he was in possession of an hereditary office, prayed for a declaration of his right to the office and for an injunction restraining the defendants from obstructing the plaintiff from doing the duties of his office. It was held by Madhavan Nair, J., that the suit was maintainable and that the plaintiff was not bound to ask for possession. That learned Judge, however, held that the suit was governed by Article 124. This it is submitted, cannot be accepted as correct.

6. Defendant must have been in possession adversely to plaintiff.—In order that this Article may apply, it is necessary that the defendant or some person through whom he claims should be in possession *adversely* to the plaintiff. The plaintiff's right to recover a hereditary office could not be barred unless the defendant is found to have been in adverse possession for twelve years,^{1a} the fact that the plaintiff did not have possession of the office at any time within twelve years of the suit is not efficient in itself to bar the claim.¹

A *permissive* possession of the office is not adverse possession.² Thus, where the defendant performs the duties of an office but does not assert a claim to the office hostile to the plaintiff, this Article will not apply.³

8 (1914) A I R 1914 P C 72 (74) 42 Cal 244 41 Ind App 267 24 Ind Cas 501 (P C) *Jalandhar Thakur v Jharula Das*

9 (1909) 3 Ind Cas 123 (123) (Mad)

10 (1914) A I R 1914 P C 72 (74) 42 Cal 244 41 I A 267 24 I C 501 (P C)

11 (1931) A I R 1931 Mad 505 (510) 183 Ind Cas 193 *Muthukumaraswami Pillai v Subbaraya Pillai*

Note 6

1a (1916) 2 Ind Cas 216, *Arunachallam Chetty*

yurubhagum Pillai v Madavar

1 (1909) 3 Ind Cas 123 (123) (Mad) *Raghunathachariar v Thiruveng Ramanujachariar*

2 (1916) A I R 1916 Mad 642 (644) 28 Ind Cas 842 *Subbayya v Chenna*

3 (1899) 9 Mad L Jour 93 (94) *Ambalatana Dengar v Bappu Row Ja*

Article 124
Notes
6—8

The question whether the defendant's possession in any particular case has been adverse to the plaintiff is one of fact ⁴

A decree that a person in possession of an office has no title thereto does not interrupt the running of time in favour of such person ⁵

A person in possession of an office can prescribe for only such interest as he claims in the office. A person merely in possession as trustee cannot get a prescriptive right to a hereditary trusteeship. He can, however, acquire such a right if he was in possession as a *hereditary trustee* to the knowledge of the real owner of the property ⁶

7 Tacking of predecessor's possession. — Under Section 2 sub section 4 *ante* "defendant" includes any person from or through whom a defendant derives his liability to be sued. The third column of this Article shows that time will begin to run from the date when a person through whom the defendant claims takes possession of the office adversely to the plaintiff. In other words the defendant is entitled to tack on the adverse possession of his predecessor to that of his own in establishing a plea of prescription ¹. But the possession of one independent trespasser cannot be tacked on to that of another ²

8 Explanation. — The Explanation in the third column states that an hereditary office is possessed when the profits thereof are received or if there are no profits, when the duties thereof are usually performed. Where the defendant performs the duties of the office and also receives the profits thereof it is clear that the defendant is in possession of the office ¹. Where the profits are received but the duties of the office are not performed by the defendant can he be said to be in possession of the office? In *Kamalathammal v Krishna Pillai* ² it was held that mere receipt of emoluments without reference to the performance of duty of the office is not possession of the office. As regards the Explanation which appears to suggest that in order to possess an office it is enough to receive

4 (1923) A I R 1923 Mad 88 (89) 46 Mad 525 70 Ind Cas 994 *Singarathu Mudaliar v Chokka Mudaliar*

5 (1910) 8 Ind Cas 893 (884) (Mad) *Baghunathachariar v Tiruvengada Ramanujachariar*

(1923) A I R 1923 Mad 88 (89) 46 Mad 525 70 Ind Cas 994 *Singarathu Mudaliar v Chokka Mudaliar*

6 (1928) A I R 1928 Mad 268 (271) 103 Ind Cas 199 *Pichai Pillai v Lingam Iyer*

Note 7

1 (1919) A I R 1919 Mad 292 (293) 49 I C 393 *Krishnaswamy v Veeraswami*

2 (1912)

(1935)

Note 8

1 (1909) 8 Ind Cas 8 (8) (All) *Dharma Nand v Khema*

2 (1911) 10 Ind Cas 573 (574 575) (Mad) (This is the decision in the same case as 8 Ind Cas 998 after remand)

its profits without the performance of the duties of the office their Lordships observed as follows

Article 124
Notes
8-9

An Explanation is attached to the clause in the third column that the office is possessed when the emoluments are received in cases where the emoluments are attached. The Explanation is not attached to the words in the first column. Nor does it say that mere receipt of the emoluments without reference to any performance of the duties will enable the recipient to claim possession of the office if the duties are being performed by another. To hold otherwise would mean when two different persons perform the duties of the office and enjoy the emoluments of the office for the statutory period the latter acquires the right to the office in conclusion which appears to us to be manifestly absurd nor can the conclusion be avoided when the emoluments are taken by several persons in severalty without any of them doing the duties that they have all acquired a right to the office.

In the undermentioned case³ it was found that the defendant had been getting and enjoying the income of the office for over twelve years prior to the institution of the suit and it was held that he was in adverse possession of the office. Unless it is assumed that the defendant in that case performed also the duties of the office (the facts of the case do not make this clear) it is submitted that the decision cannot be accepted as correct. An office as has been seen in Note 3 *ante* involves the existence of some duties to be performed by the holder of the office so that a person cannot be said to be in possession of an office at all if he does not perform the duties thereof^{3a}.

Where the defendant is performing the duties of the office he must it is conceived be deemed to be in possession of the office even though he may not have been receiving its profits⁴.

The Explanation only lays down a general rule for the determination of the question of possession of an office and may be taken to be applicable even to cases covered by Article 120 also where in substance the claim is for the possession of a non hereditary office⁵.

9 Co-trustees and adverse possession — In *Ramanathan Chetty v Murugappa Chetty*¹ the management of a temple was vested in two branches of a family who managed it by rotation

3 (1910) 8 Ind Cas 883 (684) (Mad) *Raghunathachariar v Thiruvengada*

Article 124)

4 See (1935) A I R 1935 Mad 449 (452) *Rajagopala v Ramasubramania*

5 (1935) A I R 1935 Mad 449 (452) *Rajagopala Naidu v Ramasubramania*
(1913) 18 Ind Cas 373 (374) (Mad) *Palaniyandi Malatarayan v Vadamalai Oodayan*

Note 9

1 (1904) 27 Mad 192 (197) 13 Mad L Jour 341

Article 124
Notes
9—11

The junior branch subsequently discontinued possession and the members of the senior branch were managing the temple for a period of 19 years adversely to the members of the junior branch. It was held that the rights to the office of the junior branch were barred and extinguished by such adverse possession. As between the members of the senior branch itself, it was held that each of the members must be deemed to have discharged the office on behalf of himself and on behalf of the other members of the senior branch, and as such, the management of one was not adverse to the other. On appeal to the Privy Council, their Lordships affirmed the said decision.²

10. Defendant obtaining letters of administration as heir to the office cannot plead limitation against real heir.—Where a person obtains letters of administration as heir to the *shebait* of a Hindu temple, his possession is only for the purpose of administering the estate of the deceased office holder, the grant of the letters is not a determination of the right of inheritance or of the right to be appointed *shebait*. Such a person, if he is not the real heir, stands in a fiduciary position towards the person who is really legally entitled to the office, and cannot set up the bar of limitation under this Article against the latter.¹

11. Suit for property attached to office.—Where the right to the possession of immovable property is attached to the office, the one cannot be separated from the other, and if the right to the possession of the office is barred, the right to the possession of the immovable property also would be barred under this Article.¹ In

- 2 (1906) 29 Mad 283 (288, 289) 33 Ind App 139 10 Cal W N 825 9 All L Jour 707 8 Bom L R 493 4 Cal L Jour 189 16 Mad L Jour 265 1 Mad L Tim 327 (P C) *Ramanathan Chetti v Murugappa*

Note 10

- 1 (1897) 25 Cal 354 (369, 370), *Jagannath Prasad Gupta v Kunji Singh*

Note 11

- 1 (1900) 23 Mad 271 (279) 2 Bom L R 597 4 Cal W N 329 27 Ind App 69 10 Mad L Jour 29 7 Sar 671 (P C) *Gnanasambanda Pandara Sannadhi v Velu Pandaram*
(1917) A I R 1917 All 49 (51) 39 All 636 42 Ind Cas 77, *Ram Pears v Nand Lal*
(1903) 26 Mad 113 (115) *Raghavachariar v Nallur Raghavachariar*
(1871) 6 Mad H C R 321 (303) *Tammasasu Ramasogi v Pantina Narsiah*
(1880) 2 Mad 283 (286) 4 Ind Jur 622 *Venkatasubbaramayya v Surayya*
(1905) 28 Mad 197 (200) *Jagannadha Row v Rama Dass Patnaik*
(1935) A I R 1935 Mad 449 (452) *Rajagopala Naidu v Ramasubramanian Ayyar*

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*Gnanasambanda Pandara Sannadhi v Velu Pandaram*³ the guardian of the manager of a charity who was a minor, alienated the right of management of the charity and the property attached to the office to another person who was, from that date, in adverse possession of such office and property. Their Lordships observed as follows:

Article 124
Note 11

"The law of limitation applicable to the case is Article 124 of the Second Schedule to the Act 15 of 1877 which says that in a suit for possession of an hereditary office the period of limitation is twelve years, which begins to run when the defendant takes possession of the office adversely to the plaintiff or any person from or through whom he derives his right to sue. Chockalinga attained majority in 1860 and had by Article 44 of the Act three years for entering to set aside the sale by his guardian. He did not do so and by S. 28 of the Limitation Act his right became extinguished. Their Lordships are of opinion that there is no distinction between the office and the property of the endowment. The one is attached to the other, but if there is, Article 144 of the same schedule is applicable to the property. That bars the suit after twelve years' adverse possession."

The principle of the decision in *Gnanasambanda's case*² would be applicable also to cases where a right to receive profits is attached to an hereditary office, where the right to such office is barred: the plaintiff cannot recover any profits that might have accrued within the period of limitation³. In the undermentioned case⁴ it was, however, held that the acquisition, by adverse possession, of an office does not entitle the person who has acquired it to receive the profits attached to such office. It is submitted that the decision cannot be accepted as correct.

In *Balantrao v Puranmal*,⁵ where the plaintiff sued for possession of an hereditary office and for the property attached to such office, their Lordships of the Privy Council observed that the suit may fall within Article 124 or Article 144, but they did not decide the point as, in any case, the suit was barred. In *Jadunath Prasad v Girdhar Das*⁶ the High Court of Allahabad held, purporting to

declaration by the plaintiff that he is by right of inheritance a chief manager of the services in a temple and its properties would fall either under Article 124 or Article 144.)

(1914) A I R 1914 Mad 477 (481) 14 Ind Cas 168 (172) 37 Mad 373
Pattabkara Manakal Kuppen v Choralakapatti Munde Kottai]

2 (1899) 23 Mad 271 (279) 2 Bom L R 597 4 Cal W N 329 27 Ind App 69
10 Mad L Jour 29 7 Sar 671 [P C]

3 (1872) 9 Bom H C R 260 (265) *Madala Cinapa v Bhagvanta Devji*
(1884) 7 Mad 337 (339) *Kannan v Nilakandan* [Article 144 was however applied in this case]

4 (1915) A I R 1915 Mad 554 (555) 25 Ind Cas 685 *Chandrakantam v Subbarayudu*

5 (1883) 6 All 1 (10) 13 Cal L R 39 10 Ind App 90 7 Ind Jur 329 4 Sar 435 (P C)

6 (1905) 27 All 513 (516) 1905 All W N 69 2 All L Jour 304

Article 124
Notes
11—12

rest its decision on *Balvantrao's case*⁶ that so far as the claim to office was concerned the suit would be governed by Article 124 and so far as the property was concerned by Article 144. It is submitted that this view is not correct and that both the claims would be governed only by this Article.

Where the right to the possession of the immovable property is not attached to the office but only a right to a share of the revenues of such property the office holder is not entitled to the possession of the property. It was so held by their Lordships of the Privy Council in *Ambalavana Pandara Sannadhi v Sri Minakshi Devasthanam*⁷. Lord Moulton observed as follows:

The property of an endowment may consist partly or wholly in the right to enjoy the revenues of property which is in the possession of persons who have the right and the duty to manage the property, collect the revenue and hand it over when collected to be used in the proper manner for the purposes of the endowment. Such persons may even have certain rights of apportionment of the revenue so handed over by them among the several purposes of the endowment. All this is compatible with there being a general trustee of the whole endowment including the revenues when so collected and handed over. But in such a case the general trustee would not be entitled to the possession of the properties out of which this portion of the revenue comes. His rights do not commence until after the collection of the revenues by and under the management of those who hold possession. It must be remembered that after all the general trustee is only a representative of the idol who is a juridical personage and who is the true owner and there is nothing legally incongruous in that personage having other subordinate representatives who have the right to manage certain special portions of his property and pay over the income so collected to the endowment and even to some degree to control its use. Such rights would as has been said not be inconsistent with the existence of a general trustee but they would be fatal to his claim to possession of the properties from which these revenues are derived. Possession would be in the hands of those entitled to manage these special properties and their possession would be adverse to his.

12 Suit for office and property attached thereto, based on title by adoption — Article 119 *ante* applies only to suits for a declaratory decree as to the validity of an adoption. A suit for the possession of immovable property attached to the office of *shebait* of a temple is governed by this Article even though the plaintiff bases his title to the office on an adoption to an heir of the founder⁸.

⁷ (1921) A I R 1921 P C 97 (99) 48 Mad 665 47 Ind App 191 56 Ind Cas 730 (P C) (Confirming A I R 1915 Mad 1003)

Note 12

⁸ (1897) 25 Cal 354 (364) *Jagannath Prasad Gupta v Runjit Singh*

13. **Starting point.**—Time, under this Article, runs from the date when the defendant takes possession of the office adversely to the plaintiff¹ and the plaintiff's right to the office would be barred after the expiry of twelve years from that date.² Time, however, as has been seen in Note 2 to Section 17 *ante*, will not run where there is no person competent to sue. Where, therefore, there is no proper person entitled to an office and competent to sue, the mere fact that the defendant is in possession of the office is not sufficient to start time running.³

14. Section 28 and this Article. — Where suit for possession of an office is barred under this Article, the right to the office itself would be extinguished under Section 28 of the Act and cannot be revived subsequently by re entry into possession.¹ The corresponding effect of this is that the person in possession would acquire a prescriptive right to such office.²

15. Bar against office-holder will bar his successors also.—It has been seen in Note 6 to Section 2 sub section 8, that where a right to sue accrues in favour of a person in a representative capacity, the right would be derived by any person on whom the representative capacity devolves afterwards. On this principle, where the rights of an office holder are barred by adverse possession of the defendant, the successors of the former would also be barred, in the absence of

Note 13

- 1 (1905) 27 All 518 (516) 1905 All W N 69 2 All L Jour 304, *Jadunath Prasad v Girdhar Das*
2 (1912) 18 Ind Cas 225 (232) (Mad), *Veeraragata Thathachariar v Srinivasa*
(1918) A I R 1918 Pat 570 (573, 575) 3 Pat L Jour 327 47 Ind Cas 290,
Nathe Pujari v Padma Binode Nath
(1875) 12 Bom HC R 172 (174) *Girsapa v Jakana*
3 (1918) 18 Ind Cas 578 (575) (Mad) *Palaniyandi Malatarayan v Vadamalai*
Oodayan (Non hereditary office)
(1928) A I R 1928 Mad 509 (514) 51 Mad 549 111 Ind Cas 210 *Ammalu*
Amma v Narayanan Nair

Note 14

- 1 (1900) 23 Mad 271 (279) 4 Cal W N 829 27 Ind App 69 10 Mad L Jour
29 2 Bom L R 597 7 Sar 671 (P C) *Gnanasambanda Pandara
Samaradiv v Velu Pandaram*
(1917) A I R 1917 All 49 (51) 39 All 636 42 Ind Cas 77, *Ram Piar v
Nand Lal*
v Hazra
v Ayyar
v Surendra
(1877) 1 Mad 343 (348) 2 Ind Jur 249, *Kesavaraya v Vaidelinga*
2 (1918) A I R 1918 Mad 183 (188) 44 Ind Cas 630 *Raman Somayajipad v
Kunhu Kutta Kottamma* (A hereditary Samudayi of a Malabar
Devaswom can acquire prescriptive title as against the uralsas)
nder Sarma
290, Nathe
(1918) 18 Ind Cas 475 (476) (Mad) *Iyyadurai Gurukkal v Ramaswamy*
(The right to perform worship in a temple such as *siaparanam*,
netethuvan, *deeparathanam*, can be acquired by prescription)

Article 124

Notes

13-15

Article 124

Note 15

fraud or collusion, from claiming any right to the office¹ Where a trusteeship devolves on a Hindu widow and the office is adversely possessed against her by the defendant, the reversioner does not get a fresh right to sue the person in adverse possession on the analogy of Article 141 In *Pydigantam Jagannadha Row v Rama Doss Patnaik*,² one Jagayya dedicated a temple to the public and acted as trustee thereof during his lifetime He died childless and his widow succeeded him as trustee In 1885 she transferred the right of trusteeship together with certain temple properties to the defendant, and in 1897 she died The plaintiffs as the persons entitled to be trustees in succession to her instituted a suit in 1900 for recovery of the office and the lands It was held that the suit was barred under this Article Their Lordships observed as follows

"On the other hand, her (the widow's) position as trustee possesses a distinction from that occupied by her with reference to her husband's estate vesting in her by inheritance beneficially which makes it apparent that the case is not really one within the scope of the said rule As regards property inherited by a widow beneficially, the reversioner cannot claim relief by way of possession so long as she is alive, and a transfer by her would, at all events, be valid till her death It is different in both respects here Her powers of transfer are precisely those of a male trustee

In other words, notwithstanding that the office would not, after the death of the female trustee, descend to her heir, the trust estate during her incumbency for all other purposes resides in her as fully and effectually as it does in a male trustee The reason for the rule on which Article 141 is founded being thus inapplicable, the adoption of the principle of that rule here would not be warranted The mere fact that the devolution after her death is not to one who is her heir in the strict sense of the term, could not, by itself, be held to be an adequate reason for treating her successor as not claiming from or through her in connexion with limitation'

(1911) 9 Ind Cas 155 (156) (Mad) *Pallithara Vayal v Abhi Kesava Vadhyar* (Urauna right)

(1911) 9 Ind Cas 156 (157) (Mad), *Abbikesava Vanthiar v Kesavan Nambudri* (Do)

(1898) 21 Mad 278 (287) *Alagirisami Naicker v Sundareswara Ayyar* (10 Ind App 90 (P C) Followed)

Note 15

1 (1900) 23 Mad 439 (440) 9 Mad L Jour 8 *Chidambaram Chetti v Minammal*

(1900) 10 Mad L Jour 114 (115) *Veerabhadra Varaprasada v Venkataadri*

(1921) A I R 1921 Mad 595 (596) 70 Ind Cas 477, *Subramania Gurukkal v Annakannu Annal*

(1931) A I R 1931 Mad 505 (511) 133 Ind Cas 193, *Muthukumaraswami Pillai v Subbaraya Pillai*

(1918) A I R 1918 Mad 675 (679) 41 Mad 4 42 Ind Cas 22 *Raja of Palghat v Raman Unni* (Stannom office—Adverse possession—Bar operates against successors also A I R 1915 Mad 217, Not followed)

-2 (1905) 28 Mad 197 (200, 201)

125.* Suit during the life of a Hindu or Muhammadan female by a Hindu or Muhammadan who, if the female died at the date of instituting the suit, would be entitled to the possession of land, to have an alienation of such land made by the female declared to be void except for her life or until her re-marriage.	Twelve years.	The date of the alienation.	Article 125
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Synopsis

1. Legislative changes.
2. Scope of the Article.
3. Conditions for the applicability of the Article.
4. "Hindu female."
5. "By a Hindu or Muhammadan."
6. Right of reversioners to challenge an alienation made by a limited female owner.
7. A declaratory suit by the reversioner is a representative suit.
8. Suit by a remote reversioner — Applicability of the Article
9. Who may bring a declaratory suit.
10. Suit by an adopted son.
11. Legal disability of a reversioner.
12. "Land."
13. Alienation, meaning of.
14. "Made by the female."
15. Alienation made by a female by way of mortgage.
16. Alienation by the guardian of a minor.
17. Alienation made by a female in the Punjab.
18. Limitation runs from the date of the alienation.
19. Relief in declaratory suit dependent upon another relief which is time-barred.

* Act of 1877, Article 125

Same as above

Act of 1871, Article 124

124.—Suit, during the life of a Hindu widow by a Hindu entitled to the possession of land on her death, to have an alienation made by the widow declared to be void except for her life.	Twelve years	The date of the alienation
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Act of 1859

No corresponding provision

Article 125

Notes

1—2

Other Topics

Alienation by widow before adoption — Suit by adopted son	See Note 10, Pt 1
Confirmation by female of past alienation not made by her is not alienation	See Note 14, Pt 1
Female in possession by virtue of grant or transfer independent of status — Article is not applicable	See Note 5, Pt 2
Sale in execution of decree is not alienation	See Note 14, Pt 3
Suit must be by presumptive reversioner	See Note 2, Pt 5, Note 7

1. **Legislative changes.** — The Act of 1877 introduced the following changes in the Article as it stood under the Act of 1871 —

- 1 For the words "of a Hindu widow" the words "of a Hindu or Muhammadan female" were inserted (See Note 5)
- 2 For the words "by a Hindu entitled to the possession of land on her death" the words "by a Hindu or Muhammadan, who, if the female died at the date of instituting the suit, would be entitled to the possession of land" were substituted (See Note 8)
- 3 The words "such land" were added after the word "alienation"
- 4 The words "or until her re marriage" were added at the end of the first column

2. **Scope of the Article.** — Section 42 of the Specific Relief Act, 1877, provides that any person entitled to any legal character, or to any right as to any property may institute a suit against any person denying, or interested to deny, his title to such character or right, that the Court may, in its discretion, make therein a declaration that he is so entitled, and that the plaintiff need not in such a suit ask for any further relief And illustration (c) to that Section runs as follows —

The widow of a sonless Hindu alienates part of the property of which she is in possession as such The person, presumptively entitled to possess the property if he survive her may, in a suit against the alienee, obtain a declaration that the alienation was made without legal necessity and was therefore void beyond the widow's lifetime

The provisions of the Section read with the Illustration clearly show that a reversionary heir governed by the Hindu law, even though having only an expectancy of succession (*spes successionis*) is recognised by the substantive law as having a right to demand that the estate inherited by a limited female owner under the Hindu law be kept free from danger during its enjoyment by such owner for life¹ The object of allowing a reversioner to bring a declaratory suit is the protection of the interest of the person or persons who

Article 125 — Note 2

1 See Note 6 *infra* and cases cited therein

27 Oudh Cas
Dakish
1 43 Ind Cas

may eventually turn out to be the heir or heirs and the object of the legal proceedings is really the perpetuation of testimony which, owing to lapse of time, might not be available for the heir when the succession actually opens²

But a reversioner is *not bound* to sue for a declaration, during the lifetime of the female, that her alienation is void³ He has two courses open to him He may sue for a declaration as mentioned above or he may wait till the female is dead and thereafter sue for the recovery of possession of the property by avoiding the sale⁴

This Article prescribes a period of twelve years for a declaratory suit brought by a Hindu or Muslim (see Note 5 *infra*) presumptive reversioner, that is, by a person who if the female died at the date of instituting the suit would be entitled to the possession of land alienated by the female⁵ It is only when the conditions in the Article are satisfied that the declaratory suit would be governed by this Article A declaratory suit not falling within this Article, even though brought by a reversioner, would be governed by Article 120 and not by this Article⁶ (See also Note 8 *infra*)

- 2 (1906) 29 Mad 390 (402) 1 Mad L Tim 163 16 Mad L Jour 807 (F B), *Chirucolu Punnamma v Chirucolu Perrasu*
- (1919) A I R 1919 Mad 911 (915, 916) 41 Mad 659 46 Ind Cas 202 (F B) *Varamma v Gopaladasayya*
- (1924) A I R 1924 P C 247 (249) 46 All 831 51 Ind App 381 82 Ind Cas 962 *Kesho Prasad Singh v Sheo Pargash Ojha* (On the death of the widow much of the relevant evidence 'will no longer be available')
- (1884) 10 Cal 1003 (1008) 9 Ind Jur 149, *Ram Pershad v Johhoo Roy* [See (1904) 28 Mad 57 (63) 14 Mad L Jour 209, *Govinda Pillai v Thayammal* (Per Davies, J)]
- 3 (1918) A I R 1918 Mad 659 (660) 42 Ind Cas 540, *Venkatramanayya v Dejjappa*
- (1906) 29 Mad 390 (408) 1 Mad L Tim 163 16 Mad L Jour 807 (F B) *Chirucolu Punnamma v Chirucolu Perrasu* (A presumptive reversioner whose right to sue for a declaratory decree under Article 125 is barred can nevertheless under Article 141 maintain a suit for possession if he survives the qualified owner)
- (1907) 30 Mad 402 (404) 17 Mad L Jour 286 2 Mad L Tim 360 *Sundarappa v Sreeramulu*
- (1905) 12 Cal W N 857 (859) *Mt Vesraw v Gurjanundan Tewari*, (A reversioner whose suit under Article 125 has been barred may still sue for possession if he survives the widow)
- (1920) A I R 1920 Lah 600 (601) *Nand Singh v Mt Dhan Kaur* [See (1925) A I R 1925 Bom 9 (11) 48 Bom 654 84 Ind Cas 374 *Hanangowda Shibgowda v Irgowda Shibgowda*
- (1922) A I R 1922 Pat 615 (617) 2 Pat 125 68 Ind Cas 700 (S B) *Ram Sumran Prasad v Gobind Das*
- (1923) A I R 1923 Pat 180 (181) 2 Pat 171 70 Ind Cas 290 *Raghubir Singh v Jethu Mahlon*]
- 4 (1937) A I R 1937 Pat 105 (107) 168 Ind Cas 326 *Baldeo Das v Raghu nandan Das*
- 5 (1878) 20 Suth W R 1 (2) 11 Beng L R App 1 *Bishonalh Surnah v Sreemuty Shosha Mookhee*
- 6 (1933) A I R 1933 All 856 (858) 146 Ind Cas 977 *Mt Jagrani v Gaya* (Gift of property by widow to her daughter who was the next reversioner and to a stranger — Stranger held to be transferee from daughter—Reversioner next in succession to daughter brought a declaratory suit—Held Article 120 applied)

Article 125
Note 3

3. Conditions for the applicability of the Article.—In order that this Article may apply, the following conditions are necessary to be satisfied —

- 1 The suit must be brought *during the life* of the female alienating the land ¹ A suit for declaration brought *after her death* will not be governed by this Article ²
- 2 The suit should be instituted by a Hindu or Muhammadan who if the female died at the date of instituting the suit, would be *entitled to the possession* of the alienated land As a remote reversioner is *not so entitled* to the possession of land, even though he is under certain circumstances allowed to bring a declaratory suit, the suit will not fall within the scope of this Article (See Note 8 *infra*) Similarly, where on the death of a Hindu female the property is to go *absolutely* to another female, a third person who under the Hindu law is in the position of a reversioner to the former female, cannot sue for a declaration of the invalidity of her alienation and such a suit if brought will not be governed by this Article ³

Except in the Bombay Presidency, two or more daughters of a class inherit their father's estate jointly with right of survivorship Any one daughter may alienate her life interest in the property but not so as to affect the right of survivorship of the other daughter If any one of such daughters alienates the property so as to affect the right of survivorship of the other daughter, the latter may bring a suit for declaration and such a suit will be governed by the limitation under this Article ⁴

As to persons who would be entitled to possession as reversioners see the undermentioned cases ⁵

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- (1930) A I R 1930 Bom 545 (546 553) 51 Bom 837 124 Ind Cas 897
Shankarbhai v Bai Shu
- (1893) 20 Cal 906 (925) *Chukkun Lal v Lolit Mohan*
- (1894) 22 Cal 354 (359) *Heir Chunder v Sarnanoy Deb* (Enlargement of the estate of the widow)
- (1902) 26 Mad 468 (490) *Ramaswami Naich v Thayammal*
- (1907) 80 Mad 402 (404) 17 Mad L Jour 298 2 Mad L Tim 360 *Sundarappa v Sreeramulu*
- (1927) A I R 1927 Nag 193 (194) 101 Ind Cas 275 *Paiku v Bhiwa*

Note 3

- 1 (1902) 1902 Pun L R No 116 p 473 (475) 1902 Pun Re No 84 *Atar Kaur v Sohan Singh*
- 2 (1915) A I R 1915 Mad 800 (802) 20 Ind Cas 625 (626) 38 Mad 906 *Narayana Aiyar v Rama Aiyar*
- 3 (1918) A I R 1918 Mad 1299 (1301) 40 Mad 618 38 Ind Cas 223 *Muthuswami Iyer v Kalyani Ammal*
- 4 (1922) A I R 1922 Cal 459 (460) 76 Ind Cas 915 *Jagabandu Saha v Haris Chandra Sil*
- 5 (1928) A I R 1928 Lah 242 (243) 103 Ind Cas 184 *Bal Kaur v Har Kaur*
(1936) A I R 1936 Lah 652 (655) 166 Ind Cas 753 *Ranjeshwar v Mi Gan pati Dett*

3 The suit should relate to an alienation made by the female (See Note 14, *infra*)

4 The suit should be one to have the alienation declared to be void except for the life of the female who made the alienation. A suit for any other relief is not governed by this Article⁶

A suit brought by an adopted son to impeach an alienation made by his adopted mother before the adoption, is not a suit for declaration but is one for possession. Hence this Article will not apply to such a suit (See Note 10, *infra*)

4. "Hindu female." — Jains are subject to Hindu law in matters of alienation except where a special custom is proved. Hence, ordinarily, the term "Hindu female" will include a Jain widow¹

5. "By a Hindu or Muhammadan." — The High Court of Lahore is of opinion that the Article covers every case where the female making the alienation is a Hindu or Muhammadan and the person who brings the suit also professes the same faith. According to that High Court the *personal law*, by virtue of which the Hindu or Muhammadan female holds the land or under which a Hindu or Muhammadan person desires to impeach the alienation, need not be taken into consideration.¹ But, according to the Patna High Court, the Article refers to cases in which the claim of the Hindu or Muhammadan is based upon his right as a *Hindu or Muhammadan* to avoid an alienation by a female who is in possession of the property as a *Hindu or Muhammadan* and not to cases where the possession and the claim are independent of the *status* of the parties. Thus, where the possession of the female is by virtue of a grant or transfer made *inter vivos* or by virtue of a bequest, or, in other words, when her possession is in virtue of a right irrespective of her being a Hindu or Muhammadan female as such, this Article, according to the Patna High Court, has no application.² The view taken by the Patna High Court is it is submitted correct. Where a guardian appointed under the Guardians and Wards Act, 1890, alienated, without the permission of the Court, the property of her grand daughter who had inherited the property from her father, it was held by the High Court of Calcutta that the alienation was voidable at the instance of any person affected thereby (Section 30 of that Act), that a reversioner was a person so affected, that he

⁶ See (1912) 16 Ind Cas 547 (549) (Cal) *Lokenath Puth v Chintamoni Tripathi* (If the deed is attacked on specific grounds, then Art 91 or Art 92 may apply)

Note 4

1 (1923) A I R 1923 Lah 53 (54) 70 Ind Cas 638 *Chhajju Val v Kundan Lal*

Note 5

1 (1927) A I R 1927 Lah 198 (190) 8 Lah 215 100 Ind Cas 84, *Mt Nandan v Wazira*

2. (1936) A I R 1936 Pat 323 (331) 15 Pat 151 163 Ind Cas 840, *Kanhaya Lal Measir v Mt Hira Bibi*

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was entitled to bring a suit for a declaration that the alienation was void, but that this Article did not apply inasmuch as the right under which the suit was filed was a *statutory right* and not a right arising under the *personal law* of the reversioner as a Hindu or Muhammadan³ The fear expressed by the Lahore High Court that the acceptance of such an interpretation would make the Article superfluous so far as Muhammadans are concerned, as under the Muhammadan law a female never succeeds to a life estate, appears to be groundless, for, even among the Muhammadans, those who are governed by customary laws (as in some cases in the Punjab and the cases of Muhammadans who are governed by the Hindu law, as for instance the Khojas of Bombay), females do take a life interest in the property of their husbands⁴ It was in order to bring the law into conformity with the law governing the Hindus that the word 'Muhammadan' was added by the Act of 1877⁵

6. Right of reversioners to challenge an alienation made by a limited female owner. — A reversionary heir, although having only those contingent interests which are differentiated little, if at all, from a *spes successionis*, is recognised by the Courts of law as having a right to demand that the estate be kept free from waste and free from danger during its enjoyment by the widow or other owner for life¹ Thus, the law permits to the reversioner the institution of a suit in the *lifetime* of the female owner for a declaration that an alienation effected by her is not binding against the inheritance² The purpose that is achieved in bringing such a suit is to remove a common apprehended injury to the interests of all the reversioners, presumptive and contingent alike

(1936) A I R 1936 Pat 535 (536) 165 Ind Cas 21, *Damar Mahton v Jagdeep Mahton*

3 (1924) A I R 1924 Cal 481 (482) 51 Cal 101 81 Ind Cas 522, *Das Ram Chowdhury v Tirtha Nath Das*

4 (1893) 21 Cal 157 (161) 20 Ind App 155 6 Bar 374 17 Ind Jur 481 R & J 133 (P C), *Mahomed Riasat Ali v Hasin Banu*

(1922) A I R 1922 Lah 98 (100) 2 Lah 5 58 Ind Cas 833, *Mt Amir Begum v Mt Hussam Bibi*

5 (1936) A I R 1936 Pat 323 (332) 15 Pat 151 163 Ind Cas 940 *Kanhaya Lal v Mt Hira Bibi*

Note 6

1 (1916) A I R 1916 P C 117 (118) 89 Mad 634 43 Ind App 207 37 Ind Cas 161 (P C) *Janaki v Narayanaswami*

(1904) 32 Cal 62 (65) 9 Cal WN 25 *Abinash Chandra v Harinath Shaha*

(1919) A I R 1919 All 175 (179) 41 All 492 50 Ind Cas 938 *Balbhader Prasad v Prag Datt*

[See also (1917) A I R 1917 P C 95 (97) 45 Cal 590 45 Ind App 35 44 Ind Cas 408 (P C) *Amrit Narayan Singh v Gaya Singh*]

2 (1915) A I R 1915 P C 121 (125) 38 Mad 406 42 Ind App 125 29 Ind Cas 298 (P C) *Venkatanarayan v Subbammal*

(1924) A I R 1924 P C 56 (60) 47 Mad 181 51 Ind App 145 79 Ind Cas 951 (P C) *Kondama Naicker v Kandasami Goundar*

(1893) 10 Cal 324 (332 333) 10 Ind App 150 13 Cal L R 418 7 Ind Jur 557 4 Bar 459 (P C) *Isri Dutt Keer v Hansbally Koerain*

It is the common injury to the reversionary rights which entitles the reversioners to sue³

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7. A declaratory suit by the reversioner is a representative suit. — As has been seen in Note 17 to Section 6 *ante*, the Privy Council decisions in *Venkatanarayana Pillai v Subbammal*¹ and *Janaki Ammal v Narayanaswamy*² have now clearly established the proposition that a suit by a reversioner impeaching an alienation by a Hindu widow is a *representative* one on behalf of all the reversioners, and that all of them have but a *single cause of action*, arising on the date of the alienation^{2a}. Hence, there is only one starting point of limitation in the case of all reversioners and not a fresh start of limitation as each successive reversioner becomes entitled to sue³. Where therefore, the next reversioner fails to bring

3 (1915) A I R 1915 P C 124 (125 126) 39 Mad 406 42 Ind App 125 29 Ind Cas 298 (P C) *Venkatanarayan v Subbammal*

(1925) A I R 1925 P C 272 (276) 47 All 883 23 Oudh Cas 352 52 Ind App 398 91 Ind Cas 370 (P C) *Mata Prasad v Nageshar Sahai*

(1919) A I R 1919 Mad 911 (920, 921) 41 Mad 659 46 Ind Cas 202 (F B)

3 Cal L R
v Hans
by gifting

away property)

(1936) A I R 1936 Mad 605 (607) 167 Ind Cas 296 53 Mad 1052
Desu Reddiar v Srinivasa Reddi

(1927) A I R 1927 Mad 530 (531) 100 Ind Cas 639 *Ramayya v Harayya*

(1927) A I R 1927 Mad 429 (431) 100 Ind Cas 580 *Karuppa Pillai v Irulayee*

(1925) A I R 1925 Mad 1267 (1263) 91 Ind Cas 401 48 Mad 933,
Sundaraswami Row v Vayyamma

(1896) 6 Mad L Jour 189 (190), *Venkataswamy v Ranianna*]

Note 7

1 (1915) A I R 1915 P C 124 (126) 39 Mad 406 42 Ind App 125 29 Ind Cas 298 (P C)

2 (1916) A I R 1916 P C 117 (118) 39 Mad 634 43 Ind App 204 37 Ind Cas 161 (P C)

2a (1924) A I R 1924 P C 247 (249) 46 All 831 51 Ind App 331 82 Ind Cas 962 (P C) *Kesho Prasad v Sheo Pargash*

(1925) A I R 1925 P C 272 (276) 47 All 883 23 Oudh Cas 352 52 Ind App 398 91 Ind Cas 370 (P C) *Mata Prasad v Nageshar Sahai*

(1922) A I R 1922 All 301 (303 307, 308) 44 All 19 64 Ind Cas 248 (F B)
Kesho Prasad Singh v Shiva Prasad Ojha

(1906) 23 Mad 390 (408) 1 Mad L Tim 183 16 Mad L Jour 307 (F B)
Chirutolu Punnasima v Chirutolu Perrasu (13 Mad L Jour 359
Not followed)

(1926) A I R 1926 Mad 508 (509) 96 Ind Cas 132 *Viraraghavayya v*

(1890) 14 Bom 512 (515) *Chhaganrao v Bai Motigauri*

[See (1883) 10 Cal 374 (383) 10 Ind App 150 13 Cal L R 418 7 Ind
Jur 557 4 Sar 453 (P C) *Isri Dutt Koer v Hansbuthi Koerain*]

3 (1919) A I R 1919 Mad 911 (920 921) 46 Ind Cas 202 41 Mad 659 (F B)
Paramma v Gopaladasayya (23 Mad 57 36 Mad 570 A I R 1915
Mad 800 and A I R 1917 Mad 80 Overruled)

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a declaratory suit within the limitation allowed by this Article, the cause of action for such a suit expires at the end of the period, and is not revived in favour of one who is since born ⁴

In view of the above Privy Council decisions, the undermentioned cases⁵ should be treated as having been overruled. As to the right of minor reversioners under the Punjab Customary Law to sue to challenge an alienation by a limited owner where the major reversioners omit to challenge it within the period of limitation, see the undermentioned cases ⁶

8. Suit by a remote reversioner — Applicability of the Article. — The right to bring such a suit as is contemplated by this Article vests in the first instance in the *presumptive* reversioner, that is to say, in the person who would succeed if the widow or other limited owner were to die at the time the suit is brought. The addition made by the Limitation Act of 1877 in the Article that the

- (1936) 44 Mad L W 208 (210) 165 Ind Cas 448, *Rajagopala Konar v Ramaswaja*.
- (1915) A I R 1915 All 130 (181) 37 All 195 26 Ind Cas 787, *Kunwar Bahadur v Dindran* (Failure by the presumptive reversioner to bring a declaratory suit within twelve years of limitation does not *ipso facto* create a cause of action for the next reversioner)
- (1890) 14 Bom 512 (516) *Chhaganram v Bai Motigauri* (The cause of action is not revived in favour of the contingent reversioner on the death of the presumptive reversioner)
- (1905) 12 Cal W N 837 (858), *Mt Mesraw v Girjanundan Tewari*
 [See (1925) A I R 1925 Lah 654 (656) 6 Lah 405 90 Ind Cas 1022
Chiragh Din v Abdullah
 (1901) 24 Mad 405 (407), *Ayyadoras Pillai v. Solas Ammal*
 (1908) 18 Mad L Jour 275 (276) 8 Mad L Tim 319, *Krishna Iyer v Lakshmi Ammal*]
- 4 (1919) A I R 1919 Mad 363 (364) 53 Ind Cas 171, *Somarasu v Venkiah*
- (1938) A I R 1938 Lah 524 (527) 149 Ind Cas 696 *Gajinder Singh v Balwant Kaur* (The minority of the plaintiffs does not help them as the period of limitation begins to run against the whole body of reversioners some at any rate being majors when the alienations were effected)
- (1907) 1907 Pun W R No 21, page 43 (45), *Mohan Singh v Dewa Singh*
- (1907) 1907 Pun W R No 196 1907 Pun Re No 109 *Inayat Khan v Shabu* (Alienation in 1878—Person entitled to bring the declaratory suit born in 1888—Suit brought in 1904—Held suit was barred)
- (1871) 15 Suth W R 1 (1) *Pershad Singh v Chedee Lall*
 [See (1925) A I R 1925 Lah 654 (656) 6 Lah 405 90 Ind Cas 1022
Chiragh Din v Abdullah
 (1908) 18 Mad L Jour 275 (276) 8 Mad L Tim 319, *Krishna Iyer v Lakshmi Ammal*]
- 5 (1899) 22 All 33 (43, 44) 1899 All W N 159 (F B), *Bhagwanlal v Sukhi*
- (1904) 27 Mad 588 (589), *Sakyahani Ingle Rao Sahab v Bharani Bhai Sahib*
- (1904) 32 Cal 62 (70) 9 Cal W N 25 *Abinash Chandra v Hari Nath*
- (1905) 2 Cal L Jour 87 (93) 9 Cal W N 795, *Harek Chand Babu v Bijoy Chand Mahatab*
- (1924) A I R 1924 Cal 481 (482) 51 Cal 101 81 Ind Cas 522 *Das Ram Chowdhury v Tirtha Nath*
- 6 (1938) A I R 1938 Lah 1 (8) I L R 1937 Lah 769, *Harnam Singh v Anis*
- (1937) A I R 1937 Lah 653 (654, 655) 172 Ind Cas 218, *Jati Khubs v Matu*

suit is to be instituted by one "who, if the female died at the date of instituting the suit, would be entitled to the possession" is in accordance with this principle. The reversioner next after the presumptive reversioner is not entitled to bring the suit except in certain cases. Thus, he may bring such a suit if the presumptive reversioner refuses without sufficient cause to sue or precludes himself from suing by his own act or conduct, or colludes with the widow, or has concurred in the act alleged to be wrongful¹. According to one view, he may bring such a suit also, where the next reversioner is herself a female entitled to a limited estate^{1a}. However there is nothing to preclude a remote reversioner from joining or asking to be joined in the action brought by the presumptive reversioner, or even obtaining the conduct of the suit on proof of laches on the part of the plaintiff reversioner or collusion between him and the widow or other female whose acts are impugned².

The Act makes no express provision for the rare cases in which a declaratory suit is permitted to be brought by a remote reversioner. The result is that such a suit must necessarily be referred to Article 120, under which it should be instituted within six years from the date of the alienation³.

Note 8

- 1 (1880) 8 Ind App 14 (22-23) 6 Cal 764 (772) 8 Cal L R 881 4 Sar 195 4 Bombe L R 78 5 Ind Jur 161 (P C) *Rani Anund Koer v Court of Wards*
- (1925) A I R 1925 P C 55 (56) 52 Ind App 100 47 All 158 27 Oudh Cas 884 91 Ind Cas 250 (P C) *Fateh Singh v Jagannath Baksh Singh*
- (1887) 9 All 441 (444) 1887 All W N 91 11 Ind Jur 431 *Jhula v Kante Prasad*
- (1871) 14 Moo Ind App 176 (193) 10 Beng L R 1 2 Suther 474 2 Sar 722 (P C) *Koor Goolab Singh v Rao Kurun Singh*
- (1873) 10 Bom H C R 351 (352), *Bhikaji Apaji v Jagannath Yethal*
- (1919) A I R 1919 Mad 911 (923) 41 Mad 659 46 Ind Cas 202 (F B) *Varamma v Gopaladasayya*
- (1926) A I R 1926 All 216 (218) 50 All 678 118 Ind Cas 737, *Mt Deoki v Jawala Prasad*
- (1924) A I R 1924 Oudh 381 (382) 27 Oudh Cas 173 88 Ind Cas 1055 *Anandi Din v Ram Sahai* (Intervening widow in collusion with the alienor—Remote reversioner is entitled to bring a declaratory suit)
- [But see (1905) 32 Cal 62 (66) 9 Cal W N 25 *Abinash Chandra v Hari Nath Saha*
- (1925) A I R 1925 Lah 156 (156) 79 Ind Cas 497, *Jawahara v Datta Ram*
- (1902) 5 Oudh Cas 360 (365) *Uda v Durga Din*]
- 1a See Mulla's Hindu Law, 8th Edition Pages 222-223
- 2 (1915) A I R 1915 P C 124 (126) 38 Mad 406 42 Ind App 125 29 Ind Cas 298 (P C) *Venkatamarayana Pillai v Subbammal*
- 3 (1915) A I R 1915 All 180 (182) 37 All 195 26 Ind Cas 737, *Kunwar Bahadur v Bindaban*
- (1933) A I R 1933 All 856 (858) 146 Ind Cas 977 *Mt Jagrani v Gaya* (Widow gifting away property to her daughter the next reversioner, and to a stranger—Stranger in this case held to be transferee from daughter—Reversioner next in succession to daughter brought a declaratory suit—Held Article 120 applied and that the suit was barred)
- (1904) 32 Cal 478 (478), *Chooramani Das v Baidya Nath*

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In the undermentioned case⁴ where a widow alienated along with the mother of her husband, a certain property, and the reversioner sued to declare it void it was held that Article 125 applied to the case even though the mother who joined with the widow in the alienation was the person who would have succeeded if the widow had died at the time of the institution of the suit

9 Who may bring a declaratory suit — The Article will apply to any person who is a Hindu or Muhammadan who will be entitled to possess the property on the death of the female alienor. It is not necessary that such person should be one entitled to succeed to the absolute estate¹

See also Note 8 *supra*

10. Suit by an adopted son — An alienation before the adoption made by a widow without legal necessity or consent of the reversioner may be impeached by a son adopted by the widow to her husband after such alienation. In the undermentioned

- (1914) A I R 1914 Lah 403 (410) 1914 Pun Re No 70 25 Ind Cas 463
Dev Raj v Shio Ram
- (1916) A I R 1916 Lah 144 (145) 33 Ind Cas 161 1916 Pun Re No 15 *Mt Thakari v Mt Ganeshi*
- (1920) A I R 1920 Lah 424 (424 425) 1 Lah 69 55 Ind Cas 924 *Soman Singh v Ullam Chand*
- (1925) A I R 1925 Lah 654 (656) 6 Lah 405 90 Ind Cas 1022 *Chiragh Din v Abdullah*
- (1928) A I R 1928 Lah 242 (243) 103 Ind Cas 184 *Mt Bal Kaur v Mt Har Kaur* (The daughters sons are under Hindu law not entitled to succeed in the lifetime of their mothers and therefore are not the immediate reversioners of the alienor. Consequently a suit for declaration by them is not governed by Article 125)
- (1928) A I R 1928 Lah 932 (933) 111 Ind Cas 203 10 Lah 237, *Kanshi Ram v Mt Chel Kaur*
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- (1909) 18 Mad L Jour 275 (276) 3 Mad L Tim 319 *Krishna Iyer v Lakshmiammal*
- (1913) 18 Ind Cas 710 (711) (Mad), *Ramanna v Annamma*
- (1917) A I R 1917 Mad 30 (34) 30 Ind Cas 270 *Venkata Rato v Tuljaram*
- (1914) 1914 Mad W N (Jour) 175
- (1924) A I R 1924 Oudh 381 (382) 27 Oudh Cas 173 83 Ind Cas 1055
Anand Din v Ram Sahai
[See (1904) 32 Cal 62 (71) 9 Cal W N 25 *Abinash Chandra v Harinath Shaha*]
- [But see (1919) A I R 1319 Mad 911 (922 379) 41 Mad 659 46 Ind Cas 202 (F B) *Varamma v Gopaladasayya*
- (1906) 29 Mad 390 (408 409) 1 Mad L Tim 183 16 Mad L Jour 307 (F B) *Chiruvolu Punnamma v Chiruvolu Perrazu*]
- ⁴ (1937) A I R 1937 Lah 760 (761) *Mt Widyawati v Nand Lal*

Note 9

- 1 (1906) 1906 Pun Re No 72 1907 Pun L R No 103 1906 Pun W R No 125
Lahori v Radho
[See also (1894) 1894 Pun Re No 90 *Mt Nur Khanam v Mt Bansi Begam*
(1899) 1899 Pun Re No 205 *Gami v Mt Kisho*]

decision¹ of the Madras High Court it was held that the language of this Article was wide enough to cover the case of an adopted son suing for a declaration in respect of an alienation by the widow made before the adoption. In *Vaidyanatha v Saithri*² a Full Bench of the High Court of Madras has, however, held that an adopted son could sue for possession of the alienated property *even when the widow is alive*. If he could sue for possession, he could not, by virtue of the proviso to Section 42 of the Specific Relief Act, sue for a mere declaration. There would thus be no room for the applicability of the Article. A suit for possession would, of course not be governed by this Article³.

See also Note 3 *supra*

11. Legal disability of a reversioner. — See Notes under Sections 6 and 7, *ante*

12. "Land." — The word 'land' is not defined either in the General Clauses Act, 1897, or in the Limitation Act 1908 it should therefore, be taken in its ordinary sense, and so taken it does not include incorporeal rights such as the equity of redemption in immovable property¹

The word 'land' includes a house and its site, but it is doubtful whether house alone, apart from its site, is included in the word 'land'.² It was held in the undermentioned case³ that the house alone was not land, but no reasons were given in support of this opinion. However, where there is a sale of a house, the presumption is that the house is sold *with its site*⁴.

13. Alienation, meaning of. — By alienation of land is meant a *transfer* of land whereby a distinct title is conferred on the

Note 10

- 1 (1910) 6 Ind Cas 443 (443) (Mad) *Venkata Subbarayadu v Bappanna Ratnamma* (26 Mad 143 Followed)
2 (1918) A I R 1918 Mad 469 (474) 41 Mad 75 42 Ind Cas 215 (F B) (26 Mad 143 Overruled)
3 (1909) 1 Ind Cas 647 (648 650) 33 Bom 88 *Ramakrishna v Thripura Bai*

Note 12

- 1 (1912) 17 Ind Cas 864 (865) 1912 Pun Re No 109 *Mt Ralli v Sundar Singh*
(But see (1921) A I R 1921 Lah 137 (137) 63 Ind Cas 787 7 Lah 273 *Phullo v Mt Dakhan* (Custom—Alienation by widow of mortgagee rights—Reversioner can impugn))
2 (1910) 5 Ind Cas 842 (842) (Lah) *Raiya Ram v Sher Singh*
(1904) 1904 Pun L R No 122 page 431 (433) 1904 Pun Re No 32 *Sant Ram v Ganga Ram*
3 (1914) A I R 1914 Lah 403 (410) 1914 Pun Re No 70 25 Ind Cas 463 *Dev Raj v Shiv Ram*
(But see (1920) A I R 1920 Lah 424 (425) 1 Lah 69 55 Ind Cas 924 *Soman Singh v Uttam Chand* (A I R 1914 Lah 403 Doubtful))
4 (1922) A I R 1922 Lah 93 (100) 2 Lah 5 58 Ind Cas 333 *Mt Amir Begum v Mt Hussain Bibi*

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alienor¹ In *Khunni Lal v Gobind Krishna*,² their Lordships of the Privy Council observed "The true test to apply to a transaction which is challenged by the reversioners as an alienation not binding on them is, whether the alienor derives title from the holder of the limited interest or life tenant." Hence, a *devolution* of property by succession, such as by an adoption made by a Hindu widow, does not amount to an alienation³ But a mortgage or hypothecation of immovable property,⁴ the creation of an occupancy right,⁵ a perpetual lease,⁶ or a gift,⁷ is an alienation. However, a gift by a sonless Hindu widow of her deceased husband's estate to her daughter who is the next reversioner merely accelerates the latter's succession, such a gift is not an alienation within the meaning of this Article, it, therefore, affords no cause of action to a reversioner to maintain a declaratory suit to impeach the gift.⁸ Similarly, where a widow alienates her *life interest* only in the property, the reversioner has no cause of action as it in no way affects his rights.⁹

The alienation may be made in any manner. It need not necessarily be one made by a formal document. It is sufficient that the

Note 13

- 1 (1911) 33 Ind App 87 (102) 10 Ind Cas 477 (480) 33 All 856 (P C), *Khunni Lal v Gobind Krishna*
- 2 (1911) 33 Ind App 87 (102, 103) 10 Ind Cas 477 (480) 33 All 856 (P C)
- 3 (1886) 1886 All W N 244 (244), *Mankuar v Lachman Singh*
(1927) A I R 1927 Nag 369 (370) 103 Ind Cas 112, *Pandurang v Mt Raki*
[See also (1892) 1892 Pan Re No 45, *Mt Begum v Mt Nur Bibi*]
- 4 (1924) A I R 1924 P O 247 (249) 46 All 831 51 Ind App 881 32 Ind Cas 962 (P C) *Kesho Prasad v Sheo Pargash*
(1890) 1890 All W N 184 (184), *Gulab Singh v Lachho Kuar*
(1894) 1894 All W N 184 (184), *Jaggi v Pirithi Pal*
"A I R 1927 Nag 369 (370) 103 Ind Cas 112, *Pandurang v Mt Raki* meaning the same is also
- (1907) 6 Cal L Jour 20 (8 N) (20) *Kamini Kumar v Bissesswar Chakravarti* (A deed of conditional sale effects an alienation)
- 5 (1915) A I R 1915 Lah 159 (160) 29 Ind Cas 789 *Hira v Mt Ghatke*
(Suit for declaration that creation of occupancy rights by widow is invalid—Article 125 applies)
[See (1920) A I R 1920 Lah 500 (501) *Nand Singh v Mt Dhan Kaur* (Creation of occupancy rights by widow—Transfer can be challenged by heir on ground of custom)]
- 6 (1934) A I R 1934 Nag 103 (103) 149 Ind Cas 687, *Mt Imrat Bai v Mt Phula*
- 7 (1888) 11 All 253 (256) 1888 All W N 22 *Bhupal Ram v Lachma Kuar*
- 8 (1888) 11 All 253 (256) 1888 All W N 22 *Bhupal Ram v Lachma Kuar*
(1907) 4 All L Jour 977 (680) 1907 All W N 269 *Tulsha v Baru*
- 9 (1910) 8 Ind Cas 278 (299) (Mad), *Venkamma v Pattaya* (Question of fact in each case)
[See (1880) 6 Cal L R 12 (15) 6 Ind App 110 4 Sar 15 (P C) *Raj Bahadur Singh v Achumbit Lal*]
[But see (1925) A I R 1925 Mad 941 (942) 86 Ind Cas 1016 *Venkatasubbayya v Subramaniam* (Where a widow does not purport to convey only her life interest, the transaction amounts to an alienation)]

female does an act which results in the transfer of the estate¹⁰ Thus, the action of a Hindu widow in causing a collusive suit to be brought against her and confessing judgment therein, whereby the plaintiff in that suit gets a decree for possession of property of which the widow is in possession, amounts to an alienation within the meaning of this Article¹¹ Similarly, where a female limited owner enters into a collusive arbitration which results in an award by which the estate of the last male owner is divided, it has been held that such an act amounted to an alienation¹²

A compromise in the nature of a family arrangement entered into by a widow or other limited heir binds the reversioners, though they may not be parties thereto, provided it is a *bono fide* settlement of disputes in respect of the estate. Such a compromise is not an alienation¹³

The withdrawal by a widow of the defence to an action on a mortgage executed by her husband is not an alienation¹⁴

15. "Made by the female."—The alienation should be one made by the female. A confirmation of a past alienation not made by her is not an alienation¹ Where a Hindu widow or other limited

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- 10 (1897) 19 All 524 (526) 1897 All W N 141, *Sheo Singh v Jeon*;
(1906) 29 All 239 (242, 243) 3 Mad L Tim 59 4 All L Jour 160 1907 All W N 33, *Ramsarup v Ram Dei*;
(1919) A I R 1919 Mad 706 (707) 47 Ind Cas 578, *Ranga Row v Ranga-nayaki Ammal*;
[See (1925) A I R 1925 Mad 507 (568) 83 Ind Cas 578, *Kamalakshi Ammal v Poochammal*]
[See however (1936) A I R 1936 Pat 535 (536) 165 Ind Cas 21 *Damar Mahton v Jagdip Mahton*]
- 11 (1897) 19 All 524 (526) 1897 All W N 141, *Sheo Singh v Jeon*;
(1928) A I R 1928 Lah 932 (932) 111 Ind Cas 203 10 Lah 237, *Kanshi Ram v Mt Chet Kuar* (A, who had inherited the mortgagee rights in a house, subsequently inherited the same house as a reversioner of his mother's father. Thus A became the full owner of the house. On A's death C, his wife, inherited the house as a limited owner. However, C allowed certain other reversioners of S to redeem the house. Held, that the redemption of the house amounted to an alienation within the meaning of Article 125.)
12. (1906) 29 All 239 (242, 243) 3 Mad L Tim 59 1907 All W N 33 4 All L Jour 160, *Ram Sarup v Ram Dei*;
18 (1911) 10 Ind Cas 477 (480) 83 Ind App 87 33 All 356 (P C), *Khunni Lal v Gobind Krishna* (29 All 487, Overruled.)
(1914) A I R 1914 P O 44 (45) 24 Ind Cas 309, *Hiran Bibi v Sohan Bibi* (Overruling 1 Ind Cas 180.)
(1919) A I R 1919 Mad 863 (865) 53 Ind Cas 171, *Gadwaju Somaraju v Dandu Venkiah*;
[See also (1910) 5 Ind Cas 640 (642, 643) 33 Mad 473 *Thimmaji Amma Garu v Subbaraju*]
[But see (1922) 67 Ind Cas 522 (523) (Lah), *Jhandha v Mt Jitan* (A case governed by the Punjab Customary Law)]
14. (1919) A I R 1919 Mad 706 (708) 47 Ind Cas 578, *Ranga Row v Ranga-nayaki Ammal*

Note 15

- 1 (1925) A I R 1925 Mad 919 (921) 85 Ind Cas 964, *Elagan v Nanjappan*

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owner gives some immovable property to a member of her family whom she wants to support and provide for, and such member transfers the property, the presumptive reversioner no doubt gets a right to bring a declaratory suit on such transfer taking place, but the transfer being not an alienation *made by* the widow or the limited owner, such a suit will be one not governed by this Article² Such a transaction amounts to a family settlement and not an alienation

A sale of property in *execution of a decree* is not an alienation *made by* the widow³

15. Alienation made by a female by way of mortgage.—As already seen in Note 13 *ante*, a mortgage or hypothecation of land is an alienation of land within the meaning of this Article Hence, a suit by a reversioner to obtain a declaration that the alienation by way of mortgage is not binding on the reversionary body after the death of the female must be brought within twelve years from the *date of the mortgage* And as a sale of the mortgaged property in *execution of the mortgage decree* is not an alienation made by the female,¹ such sale does not give a *fresh* cause of action²

Where, however, the female *herself, without the intervention of the Court*, sells the mortgaged property subsequent to the mortgage, such sale being an alienation of land, is liable to be impeached by the reversioners The sale itself gives a separate cause of action But, if the declaratory suit to impeach such sale is brought more than twelve years *after* the date of execution of the mortgage the plaintiff reversioner will be precluded from questioning the mortgage under the general principle that what cannot be done directly will not be allowed to be done indirectly³

(1919) A I R 1919 Mad 363 (365) 53 Ind Cas 171, *Gadiraju Somaraju v Dandu Venkiah* (25 Mad 731, Dissented from)
[But see (1902) 25 Mad 731 (733), *Mullapudi Ratnam v Mullapudi Ramayya*]

2 (1919) A I R 1919 All 175 (180) 41 All 492 50 Ind Cas 939, *Balbhader Prasad v Prag Datt*

[See also (1923) A I R 1923 Lah 406 (407) 76 Ind Cas 916 4 Lah 116 *Das Mal v Ram Chand*]

3 (1919) A I R 1919 Mad 706 (709) 47 Ind Cas 578, *Ranga Row v Ranga naykiammal*

(1890) 14 Bom 512 (515), *Chhaganram v Bai Motigavri*

Note 15

1 See Note 14 Foot-Note (3) above

2 (1894) 1894 All W N 134 (134), *Jaggi v Parthi Pal*

(1925) A I R 1925 Mad 567 (569) 88 Ind Cas 578 *Kamakshi Ammal v Poochammal* (A I R 1924 Mad 617, set aside)

(1907) 6 Cal L Jour (S N) 20 (20) *Kamins Kumar v Bissessuar Chakravarti*

(1922) A I R 1922 Nag 197 (198) 63 Ind Cas 417 18 Nag L R 42 *Tulabai v Lala Rao*

3 (1911) 11 Ind Cas 392 (395) 1911 Pun Re No 33 (F B) *Khaili Ram v Gulab Khan*

(1898) 1898 Pun Re No 71 *Devi Ditta v Parman*

(1917) A I R 1917 Lah 15 (15) 40 Ind Cas 63 1917 Pun Re No 25 *Rajinder Singh v Abdul Ghani* (Held that sale was not for necessity — Sale set aside — But mortgage being alive reversioner could redeem the same)

16. Alienation by the guardian of a minor.—An alienation of property by the mother of a *de facto* guardian of her minor daughter unsupported by legal necessity is voidable at the instance of a reversioner, who must seek his declaration as though it had been made by the daughter herself. Hence, the time for a suit to obtain declaration begins to run from the date of such alienation and not from the date when the alienation is either renewed or ratified by the minor after attaining majority.¹

Where a Hindu mother alienates property as the *guardian of her minor son*, the alienation is not made by a female. The minor son being the last male owner, what is conveyed is an absolute estate by the guardian of the last male owner. If, therefore, the son dies and the mother succeeds him as his heir, and a reversioner thereafter sues to impeach the alienation, the suit is not governed by this Article.²

17. Alienation made by a female in the Punjab.—The Punjab Limitation (Custom) Act (1 of 1920) provides a limitation of six years for a suit for a declaration that an alienation is not binding on the plaintiff reversioner after the death of the female or forfeiture of her interest in the property. However, that Act applies to suits relating to alienations of *ancestral* immovable property by persons who follow the Punjab custom. If the property is not ancestral *qua* the plaintiff, then the suit would be governed by Article 125 of the Limitation Act¹ for, an estate of a widow in the Punjab is subject to the same restrictions as that of a widow under Hindu law and where there is no custom applicable to the case, the reversioner can fall back on his personal law.²

18. Limitation runs from the date of the alienation.—A suit by a reversioner during the lifetime of a limited female owner to declare an alienation made by her, void after the death of such female was required to be brought within six years under the

(1922) A I R 1922 Lah 275 (277) 3 Lah 99 63 Ind Cas 760 *Ber Singh v Hazara Singh*

(1926) A I R 1926 Lah 657 (658) 97 Ind Cas 280 *Bhagat Singh v Karam Singh*

(1932) A I R 1932 Mad 97 (98) 136 Ind Cas 43 *Thiruvengadam Pillai v Gnanasambandam Pillai*

[See (1927) A I R 1927 Oudh 217 (218) 101 Ind Cas 52 *Badri Prasad v Bachcha*]

Note 16

1 (1931) A I R 1931 Mad 274 (275) 131 Ind Cas 603, *Adeyya v Govindu*

2 (1894) 18 Mad 193 (200) 4 Mad L Jour 275 *Sundrammal v Rangasami Mudaliar*

Note 17

1 (1933) A I R 1933 Lah 945 (945) 146 Ind Cas 350 *Sant Singh v Hardit Singh*

2 (1922) A I R 1922 Lah 217 (219) 5 Lah 450 74 Ind Cas 644, *Govinda v Nandu*

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Limitation Act of 1859 from the date of the alienation¹ Under the present Act, the limitation for such a suit is *twelve* years from the date of the alienation² and *not*, like the provisions in Articles 91, 92 or 164, from the date when the plaintiff acquires *knowledge* of the material facts³ Hence, a declaratory suit to impeach an alienation made by the female brought more than twelve years after the date of the alienation will be barred⁴ However, if the person entitled to institute a declaratory suit has, by means of fraud, been kept from the knowledge of such right by the widow or the alienee, then, as against the widow or the alienee claiming through her, such person is entitled to the benefit of Section 18, *ante*⁵

19. Relief in declaratory suit dependent upon another relief which is time-barred. — An act alleged to have been done by *A* which if proved to be valid in law would affect the interests of *B* in certain property, need not be impeached by *B* when such an act is void or illegal from its very inception *B* can totally ignore such an act Thus, where *A*, a Hindu widow governed by the Benares School of Hindu law, adopted a son without the express permission of her husband and then jointly with him executed a mortgage of the property inherited by her as a limited owner, upon which *B*, the next reversioner, brought a declaratory suit impeaching the alienation by the widow, it was held that as the adoption by *A* was invalid it was not necessary for *B* to set aside the same before bringing the present suit and that therefore the suit was not barred by Article 118¹

Plaintiff, as the next reversioner to a Hindu widow, sued for a declaration that an alienation made by her was not valid beyond her lifetime This suit was filed within the period of limitation prescribed by this Article In a previous suit by the widow against the plaintiff for partition, she had produced a will under which she claimed as heiress of her husband The plaintiff challenged it as a forgery but a partition was ordered *without any adjudication on the genuineness of the will* The plaintiff in his present suit also claimed a formal declaration of the forgery of the will This portion of the claim was admittedly barred under Article 93 It was held that

Note 18

- 1 (1873) 10 Bom H C R 351 (353) *Bhikaji Apaji v Jagannath Vishal*
- 2 (1923) A I R 1923 Lah 53 (54) 70 Ind Cas 636 *Chhajju Mai v Kundan Lal* (And not from the execution of a will according to the directions in which the alienation was made)
- 3 (1912) 16 Ind Cas 547 (548) (Cal) *Lokenath Ruth v Chintamani Tripathi*
- 4 (1936) 165 Ind Cas 448 (449) 44 Mad L W 208 (210) *Rajagopala Komar v Ramanuja*
(1896) 1896 Pnn Re No 26 *Mt Thakur Devi v Partab Singh*
- 5 (1915) A I R 1915 All 130 (130 131) 37 All 195 26 Ind Cas 737 *Kunwar Bahadur v Bindrabai*
(1912) 16 Ind Cas 547 (548) (Cal) *Lokenath Ruth v Chintamani Tripathi*
(1922) A I R 1922 Nag 197 (198) 63 Ind Cas 417 18 Nag L R 42 *Tukabai v Lala Sao*

Note 19

- 1 (1898) 1 Oudh Cas 30 (33 36) *Bhagwana v Barjor Singh Das*

there was no obligation on the plaintiff to set aside the will and that the relief claimed in respect of the will was unnecessary and did not affect the plaintiff's rights to the relief claimed²

Article 125
Note 19

126.* By a Hindu governed by the law of the Mitakshara to set aside his father's alienation of ancestral property.	Twelve years.	When the alienee takes possession of the property.
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Article 126

Synopsis

1. Legislative changes.
2. Essentials for the applicability of the Article.
3. "By a Hindu governed by the law of the Mitakshara."
4. "To set aside."
5. "His father's alienation."
6. Alienation.
7. Ancestral property.
8. "Takes possession."
9. Starting point.
10. Effect of failure to sue within twelve years.

Other Topics

Court sale is not alienation	See Note 6 Pt 4
Person governed by customary law—Article not applicable	See Note 3 Pts 1, 2
Possession need not necessarily be physical	See Note 8, Pt 2
<i>Son en ventre sa mère</i>	See Note 5 Pts 7, 8
Suit by after born son	See Note 5, Pts 5, 6
Suit by daughter to set aside alienation by father	See Note 5, Pt 4
Suit for redemption	See Note 4 Pts 4, 5

1. Legislative changes.

- 1 There was no specific provision corresponding to this Article in the Act of 1859. It was held that a limitation period of twelve years would apply to cases such as those contemplated by this

* Act of 1877, Article 126

Same as above

Act of 1871, Articles 125 and 126

125 —By a Hindu governed by the law of the Mitakshara to set aside his father's alienation of ancestral property	Twelve years	The date of the alienation
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126 —Like suit by a Hindu governed by the law of the Dayabhaga	Ditto	When the father dies
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Act of 1859

No corresponding provision

2. (1918) A 1 R 1918 Mad 1193 (1199) 37 Ind Cas 642, Venkamma v Narasimham

Article 126
Notes
1—3

Article and that time would commence to run when the alienee took possession of the property¹ Notwithstanding this, however, the corresponding Article of the Act of 1871 fixed the starting point as "the date of the alienation"

2 The Act of 1877 set the matter right by substituting the words "when the alienee takes possession of the property" for the words "the date of the alienation" in the third column of the Article

3 There was another Article (namely Article 126) in the Act of 1871 providing for a like suit by a Hindu governed by the law of the *Dayabhaga*. That provision was omitted in the Act of 1877 apparently on the ground that under the *Dayabhaga* law a son does not acquire any right by birth in the ancestral property and cannot question the alienation of such property by the father, who is entitled under that law to dispose of it as if it were his self acquired property

2. Essentials for the applicability of the Article — In order that this Article may apply —

1 the suit must be by a Hindu governed by the law of the *Mitakshara* (see Note 3),

2 it must be to set aside an alienation (see Note 4),

3 the alienation must have been made by his father (see Notes 5 and 6),

4 the alienation must have been in respect of ancestral property (see Note 7), and

5 the alienee must have taken possession of the property alienated (see Note 8)

3. "By a Hindu governed by the law of the *Mitakshara*." — It is only where the suit is by a "Hindu" governed by the law of the *Mitakshara* that this Article will apply. A suit by a person governed by the customary law in the Punjab is not within this Article² Nor does the Article apply to a suit by a Jain governed by tribal custom³

Article 126 — Note 1

- 1 (1867) 8 C 111 112 113 114 115 116 117 118 119 120 121 122 123 124 125 126 127 128 129 130 131 132 133 134 135 136 137 138 139 140 141 142 143 144 145 146 147 148 149 150 151 152 153 154 155 156 157 158 159 160 161 162 163 164 165 166 167 168 169 170 171 172 173 174 175 176 177 178 179 180 181 182 183 184 185 186 187 188 189 190 191 192 193 194 195 196 197 198 199 200 201 202 203 204 205 206 207 208 209 210 211 212 213 214 215 216 217 218 219 220 221 222 223 224 225 226 227 228 229 230 231 232 233 234 235 236 237 238 239 240 241 242 243 244 245 246 247 248 249 250 251 252 253 254 255 256 257 258 259 260 261 262 263 264 265 266 267 268 269 270 271 272 273 274 275 276 277 278 279 280 281 282 283 284 285 286 287 288 289 290 291 292 293 294 295 296 297 298 299 300 301 302 303 304 305 306 307 308 309 310 311 312 313 314 315 316 317 318 319 320 321 322 323 324 325 326 327 328 329 330 331 332 333 334 335 336 337 338 339 340 341 342 343 344 345 346 347 348 349 350 351 352 353 354 355 356 357 358 359 360 361 362 363 364 365 366 367 368 369 370 371 372 373 374 375 376 377 378 379 380 381 382 383 384 385 386 387 388 389 390 391 392 393 394 395 396 397 398 399 400 401 402 403 404 405 406 407 408 409 410 411 412 413 414 415 416 417 418 419 420 421 422 423 424 425 426 427 428 429 430 431 432 433 434 435 436 437 438 439 440 441 442 443 444 445 446 447 448 449 450 451 452 453 454 455 456 457 458 459 460 461 462 463 464 465 466 467 468 469 470 471 472 473 474 475 476 477 478 479 480 481 482 483 484 485 486 487 488 489 490 491 492 493 494 495 496 497 498 499 500 501 502 503 504 505 506 507 508 509 510 511 512 513 514 515 516 517 518 519 520 521 522 523 524 525 526 527 528 529 530 531 532 533 534 535 536 537 538 539 540 541 542 543 544 545 546 547 548 549 550 551 552 553 554 555 556 557 558 559 560 561 562 563 564 565 566 567 568 569 570 571 572 573 574 575 576 577 578 579 580 581 582 583 584 585 586 587 588 589 590 591 592 593 594 595 596 597 598 599 600 601 602 603 604 605 606 607 608 609 610 611 612 613 614 615 616 617 618 619 620 621 622 623 624 625 626 627 628 629 630 631 632 633 634 635 636 637 638 639 640 641 642 643 644 645 646 647 648 649 650 651 652 653 654 655 656 657 658 659 660 661 662 663 664 665 666 667 668 669 670 671 672 673 674 675 676 677 678 679 680 681 682 683 684 685 686 687 688 689 690 691 692 693 694 695 696 697 698 699 700 701 702 703 704 705 706 707 708 709 710 711 712 713 714 715 716 717 718 719 720 721 722 723 724 725 726 727 728 729 730 731 732 733 734 735 736 737 738 739 740 741 742 743 744 745 746 747 748 749 750 751 752 753 754 755 756 757 758 759 760 761 762 763 764 765 766 767 768 769 770 771 772 773 774 775 776 777 778 779 780 781 782 783 784 785 786 787 788 789 790 791 792 793 794 795 796 797 798 799 800 801 802 803 804 805 806 807 808 809 810 811 812 813 814 815 816 817 818 819 820 821 822 823 824 825 826 827 828 829 830 831 832 833 834 835 836 837 838 839 840 841 842 843 844 845 846 847 848 849 850 851 852 853 854 855 856 857 858 859 860 861 862 863 864 865 866 867 868 869 870 871 872 873 874 875 876 877 878 879 880 881 882 883 884 885 886 887 888 889 890 891 892 893 894 895 896 897 898 899 900 901 902 903 904 905 906 907 908 909 910 911 912 913 914 915 916 917 918 919 920 921 922 923 924 925 926 927 928 929 930 931 932 933 934 935 936 937 938 939 940 941 942 943 944 945 946 947 948 949 950 951 952 953 954 955 956 957 958 959 960 961 962 963 964 965 966 967 968 969 970 971 972 973 974 975 976 977 978 979 980 981 982 983 984 985 986 987 988 989 990 991 992 993 994 995 996 997 998 999 1000

Note 3

- 1 Such suits will be governed by the Punjab Limitation Act 1 of 1920
(See also (1917) A I R 1917 Lah 205 (206) 40 Ind Cas 446, *Jagat Ram v Dharam Singh*
(1922) A I R 1922 Lah 57 (58) 77 Ind Cas 274, *Kundan v Mam Rij*
(1923) A I R 1923 Lah 41 (42) 79 Ind Cas 211 *Prem Das v Sarba land*)
- 2 (1928) A I R 1928 Oudh 318 (351) 110 Ind Cas 180 *Milap Chand v Mt Mohini Bibi*

4. "To set aside." — The words "set aside" imply a prayer for immediate relief and not a mere declaration¹ In *Murajalli Hunia Gounden v Ramasamy Chetty*,² it was held that the Article "denotes also a suit in which possession is claimed and does not only contemplate a mere declaratory suit." A suit by a son against the alienee from his father for possession of the property alienated is really a suit to set aside such alienation. A contrary view seems to have been taken in the undermentioned case³ though no definite decision was given on that point. It is submitted that the opinion so expressed is not correct.

A suit for redemption of a usufructuary mortgage made by the father is not a suit to set aside any alienation, the object of the suit being to claim relief in conformity with and not in spite of the alienation⁴. The fact that the plaintiff in such suit challenges some of the terms of the mortgage such as the length of the period fixed for redemption or the rate of interest charged, cannot render the suit one to set aside the alienation⁵.

5. "His father's alienation." — In order that this Article may apply, the plaintiff must be the son of the person who alienated the property and which alienation is the subject matter of the suit. A suit by a son's son or other member of the family for possession from the alienee is not governed by this Article but may be governed by Article 127 or Article 144¹. A suit by an adopted son to set aside his adoptive father's alienation will stand in the same position as a suit by a son and will be governed by this Article². It has been held in the undermentioned case³ that a suit by a transferee from the son for possession of the property alienated, is also governed by this Article. In the case cited below⁴ it has also been held that a suit by a daughter to set aside an alienation by her

Note 4

- 1 (1914) A I R 1914 Lah 408 (410) 1914 Pun Re No 70 25 Ind Cas 463 *Dev Raj v Shiv Ram*
- (1923) A I R 1923 Lah 268 (270) 3 Lah 426 77 Ind Cas 174 *Gokha Ram v Sham Lal*
- 2 (1918) A I R 1918 Mad 19 (21) 45 Ind Cas 867 41 Mad 650
- 3 (1914) A I R 1914 Lah 870 (371) 1915 Pun Re No 14 25 Ind Cas 35 *Bahadur Chand v Naina Mal*
- 4 (1925) A I R 1925 Oudh 678 (580) 90 Ind Cas 184 *Mt Kaniz Fizza Bibi v Datadin*
- 5 (1925) A I R 1925 Oudh 678 (650) 90 Ind Cas 184 *Mt Kaniz Fizza Bibi v Datadin*
- (1932) A I R 1932 Oudh 66 (69) 135 Ind Cas 379 7 Luck 505 *Suraj Baksh Singh v Kedar Nath* (Rate of interest)

Note 5

- 1 (1904) 6 Bom L R 925 (914) *Wasant Rao v Anandrao*
- 2 (1928) A I R 1928 Oudh 848 (851) 110 Ind Cas 180 *Milap Chand v Mt Mohini Bibi*
- 3 (1918) A I R 1918 Mad 19 (20) 45 Ind Cas 867 41 Mad 650 *Murajalli Hunia Goundan v Ramasamy Chetty*
- 4 (1891) 1891 All W N 102 (103) *Chandra Pal Kuari v Bhairon Singh*

Article 126
Note 8

father is governed by this Article. It is submitted that this view is not correct. A daughter, unlike a son, does not get any interest by birth in the ancestral property, and cannot challenge alienations made by the father in respect of such property.

An after-born son can, under certain circumstances, sue to set aside his father's alienation of ancestral property.⁵ But he does not get any fresh cause of action on his birth. His cause of action is the same as that of the son in existence at the date of the alienation. Time, therefore, will run from the date of the alienor's taking possession and not from the birth of the after horn son.⁶ A son *en ventre sa mere* (in the mother's womb) at the time of the alienation is to be regarded as a son born at that time.⁷ He can also be regarded as a minor for the purposes of Section 6 of the Act and can claim its benefit.⁸

The mere fact that another person joined with the father in the alienation will not render the Article inapplicable.⁹ Nor will the fact that the father has purported to alienate ancestral property as *guardian* of the minor son take the case out of the Article.¹⁰ But

⁵ See Mulla's Hindu Law, Edition 8 Pages 317 to 319

⁶ (1925) A I R 1925 P C 33 (34) 52 Ind App 69 47 All 165 27 Oudh Cas 343 86 Ind Cas 249 (P O) *Ranodip Singh v Parameshtwar Pershad*

(1927) A I R 1927 All 54 (54) 97 Ind Cas 591, *Deonandan Singh v Musafir Singh*

(1921) A I R 1921 Oudh 196 (199) 24 Oudh Cas 330 64 Ind Cas 757 *Chokhey Singh v Hardeo Singh*

(1924) A I R 1924 Oudh 205 (207) 79 Ind Cas 666, *Oudh Behari Lal v Dal Singh*

(1924) A I R 1924 All 677 (678) 79 Ind Cas 1010 *Sankat Narayan v Ram Bharos*

(1921) A I R 1921 Oudh 127 (128) 61 Ind Cas 801 *Oudh Behari Singh v Suraj Bah*

(1921) A I R 1921 Oudh 229 (229) 65 Ind Cas 404 *Sheombar Khan v Rati pal Singh*

(1923) A I R 1923 Oudh 52 (54) 68 Ind Cas 933, *Ranodip Singh v Rameshar Prasad*

(1887) 2 O P L R 141 (143) *Sardar Singh v Ajai Singh*

(1924) A I R 1924 All 793 (793) 46 All 832 83 Ind Cas 1052 *Sita Ram Singh v Cheddi Singh*

(1924) A I R 1924 All 912 (914) 79 Ind Cas 1019 *Dhanraj Rai v Pam Naresh Rai*

(1925) A I R 1925 All 54 (55) 82 Ind Cas 307, *Sikandar Singh v Bachchu Pande*

(1925) A I R 1925 All 247 (247) 86 Ind Cas 704 *Ram Kishen v Baldeo Koeri*

(1925) A I R 1925 All 563 (564) 87 Ind Cas 667, *Thakur Prasad v Gulab Kunuar*

⁷ (1929) A I R 1929 Lah 254 (255) 116 Ind Cas 545 10 Lah 713 *Muhammied Khan v Ahmad Khan*

⁸ (1935) A I R 1935 Mad 839 (841, 842) 53 Mad 886 159 Ind Cas 1 (F B) *Renganatha Reddi v Ramasamy Mudali* (The contrary decision in A I R 1931 Mad 456 must be considered no longer law)

⁹ (1927) A I R 1927 All 54 (55) 97 Ind Cas 591 *Deonandan Singh v Musafir Singh*

¹⁰ (1918) A I R 1918 Mad 178 (179) 44 Ind Cas 605 *Ganesa Ayyar v Amirtha samy Odayar*

an alienation by the father acting as guardian of his son, of property belonging *exclusively* to the son, is not governed by this Article ¹¹

6. Alienation. — The third column of the Article assumes that the alienee has taken possession of the property. The word "alienation" in the first column must consequently refer only to such alienations as involve the transfer of possession of the property. It would thus include a sale or a usufructuary mortgage,¹ but not a simple mortgage² or a sale³ in which no possession is transferred to the alienee. Again, the alienation need not be for a *consideration*. It may be a *gift*.^{2b} Nor does the applicability of the Article depend upon the question whether the alienee has taken the property with or without notice of limited powers of the alienor.⁵

A court sale in execution of a decree against the father, of ancestral property, cannot be said to be an "alienation" within the meaning of this Article. Article 12 *ante* would apply to suits to set aside such sales.⁴

Property bequeathed by will may amount to an "alienation" within this Article.⁵ An allotment of a share on partition to a perfect stranger may be regarded as an alienation which can be impeached by the son.⁶

7. Ancestral property. — The expression "ancestral property" has been used in this Article in the ordinary sense in which it is used in the Hindu law, and cannot therefore be given any wider

[See also (1925) A I R 1925 Mad 793 (793) 66 Ind Cas 234, *Veerasamy Naidu v. Sengurunatha Pillai* (Case of alienation by managing member)]

11 (1921) A I R 1921 Mad 425 (426) 62 Ind Cas 630, *Arumugam Pillai v. Panayadan Ambalam*

(1929) A I R 1929 Mad 813 (816, 817) 118 Ind Cas 481, *Ramasamy v. Govindammal*

Note 6

1 (1921) A I R 1921 Oudh 196 (197) 24 Oudh Cas 330 64 Ind Cas 757, *Chokkey Singh v. Hardeo Singh*

2 (1927) A I R 1927 All 702 (703) 106 Ind Cas 377 50 All 163, *Bindeshri Upadhyaya v. Sital Upadhyaya*

2a (1922), A I R 1922 All 752 (753), 103 Ind Cas 96, *Amjad Singh v. Bahadur Singh* (Suit would be regarded as merely declaratory)

(1928) A I R 1928 Bom 383 (384) 113 Ind Cas 378, *Chintaman Balwant v. Bhagwan Ganpati*

2b (1918) A I R 1918 Mad 19 (22) 45 Ind Cas 867 41 Mad 650, *Murajalli Hunia Goundan v. Ramasamy Chetty*

3 (1918) A I R 1918 Mad 19 (22) 45 Ind Cas 867 41 Mad 650, *Murajalli Hunia Goundan v. Ramasamy Chetty*

4 (1926) A I R 1926 Mad 1190 (1192) 93 Ind Cas 31, *Narayana v. Venkata swami*

[But see (1881) 8 Cal L R 428 (430), *Munban Koer v. Nouruttun Koer*]

5 (1929) A I R 1929 Oudh 348 (351) 110 Ind Cas 180 *Mislap Chand v. Mt. Vohni Bibi*

6 (1913) 20 Ind Cas 958 (965) 40 Cal 966 40 Ind App 213 10 Nag L R 1, *Ramkishore Kedarnath v. Jas Narayan Ram Pachpal*

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Notes
7—9

sense¹ Thus, property gifted by a father to a son may, in a sense, be said to be ancestral in the son's hands inasmuch as he has received it from his ancestor Under the Hindu law as interpreted in certain Provinces, however, such property is not "ancestral property" but self-acquired² In such cases, such property cannot, even for the purposes of this Article, be regarded as ancestral property³

As to the meaning of the expression "ancestral property" generally in Hindu law, see Mulla's Hindu Law, 8th Edition, Sec 223

It has been held in the undermentioned case⁴ that the word "property" includes both moveable and immovable property, and that a suit to set aside an alienation of moveable property falls only within this Article and not Article 49 *ante*

The question whether property is "ancestral" does not depend upon the fact whether the alienee knew it to be so Hence, where the father represented to the alienee that it is not ancestral, a suit by the son to set aside the alienation will fall within this Article if in fact the property is ancestral⁵

8. "Takes possession." — The words "takes possession" do not mean "takes possession by the sole and unaided virtue and effect of the father's alienation" It will include also cases where the alienee takes possession by redeeming a mortgage with possession¹

It is not necessary for "taking possession" that the alienee should actually step on the land the physical possibility of the buyer dealing with the thing exclusively as his own is all that is necessary possession is thus not necessarily physical possession²

9. Starting point. — The starting point is the date when the alienee takes possession of the property alienated¹ The reason for fixing this date is stated in various ways It has been held that

Note 7

- 1 (1934) A I R 1934 Lah 397 (398) 150 I C 963 *Gobind Ram v Gopi Chand*
- 2 (1934) A I R 1934 Lah 397 (397) 150 I C 963 *Gobind Ram v Gopi Chand*
(1929) A I R 1929 Bom 313 (316, 317) 53 Bom 511 30 Cri L Jour 1090
119 Ind Cas 666 1929 Cr C 124, *Krishnaji Prabhakar v Emperor*
- 3 (1934) A I R 1934 Lah 397 (398) 150 I C 963, *Gobind Ram v Gopi Chand*
(1929) A I R 1929 Bom 313 (316 317) 53 Bom 511 30 Cri L Jour 1090
119 Ind Cas 666 1929 Cr C 124, *Krishnaji Prabhakar v Emperor*
Shib Narain
867 41 Mad 650, *Murajalli*

Note 8

- 1 (1918) A I R 1918 Mad 19 (22) 45 Ind Cas 867 41 Mad 650 *Murajalli Hunia Goundan v Ramasamy Chetty*
- 2 (1914) A I R 1914 Lah 870 (371) 1915 Pun Re No 14 25 Ind Cas 35, *Bahadur Chand v Nana Mal*

Note 9

- 1 (1915) A I R 1915 Mad 1107 (1110) 26 Ind Cas 873, *Ramasamy Iyer v Vanamamalas Iyer*

the Legislature has fixed this overt act of taking possession as the starting point so as to avoid as far as possible difficult questions of notice.² It has also been held that the Article is based on the principle that a son's knowledge of the alienation would ordinarily arise only when the alienee takes possession.³ The main reason would appear to be that the cause of action for a son to question his father's alienation really arises when possession is taken by the alienee,⁴ for, it is really then that there is really an invasion of the rights of the sons in the enjoyment of the family property.

The cause of action being as has been seen in Note 5 *ante*, the same even in the case of an after born son suing to set aside the alienation, the starting point in the case of such suits also is the date when the alienee takes possession.⁵

10. Effect of failure to sue within twelve years.—Where the only person or all the persons entitled to sue to set aside an alienation of the father's property fails or fail to do so within the period prescribed, his or their right is extinguished and the property ceases to be the family property.¹ Where a sale was executed for a pre-existing mortgage and twelve years after the vendee took possession a suit for redemption was filed it was held that the right to the property itself having been extinguished, the suit for redemption was not maintainable.²

127. By a person excluded from joint family property to enforce a right to share therein	Twelve years	When the exclusion becomes known to the plaintiff.
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Article 127

* Act of 1877, Article 127

127—By a person excluded from joint family property to enforce a right to share therein	Twelve years	When the exclusion becomes known to the plaintiff
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- (1924) A I R 1924 Oudh 205 (207) 79 Ind Cas 665 *Oudh Bihari Lal v Dal Singh*
 2 (1918) A I R 1918 Mad 19 (22) 41 Mad 650 45 Ind Cas 867 *Murajalli Hunia Goundan v Ramasam Chetty*
 3 (1927) A I R 1927 All 709 (703) 106 Ind Cas 377 50 All 163 *Bindeshri Upadhyay v Sital Upadhyaya*
 4 (1870) 5 Beng L R App 14 (15) *Aghori Ramaswaray Singh v Cochrane*
 (1917) A I R 1917 Mad 700 (702) 34 Ind Cas 791 *Soundararajan v Saratana Pillai*
 (1921) A I R 1921 Oudh 196 (193) 24 Oudh Cas 330 64 Ind Cas 757 *Chokke Singh v Hardeo Singh*
 5 See the cases cited in Foot Note 6 of Note 5 *ante*

Note 10

- 1 (1916) A I R 1916 All 356 (357) 83 Ind Cas 913 38 All 126 *Lachmi Narain Prasad v Ashen Ashore Chaud*
 (1924) A I R 1924 All 677 (677) 79 Ind Cas 1010 *Sankat Narayan v Ram Bharos*
 2 (1928) 112 Ind Cas 151 (152) (Oudh) *Aashish Singh v Balbhadar Singh*

Article 126
Notes
9—10

Article 127
Note 1*Synopsis*

1. Legislative changes.
2. Scope of the Article.
3. "Person" does not include a stranger.
4. "Joint family property."
 5. Presumption as to joint family property.
 6. Partition of joint family property.
 7. Muhammadans — Applicability of the Article to a suit by.
 8. Burmese Buddhists — Applicability of the Article to a suit by.
 9. Conversion of a coparcener to alien faith.
 10. Debts realised after separation of the joint family.
11. Exclusion.
 12. Exclusion — Onus of proof.
13. "To enforce a right to share."
 14. Suit to re-open partition.
15. Starting point of limitation.
 16. Suit by a minor.
17. Section 28 and this Article.

Other Topics

Conditions for applicability of Article	..	See Note 2
Exclusion must be total and not partial	..	See Note 11, Pts 8a to 11
Mere non participation in profits is not exclusion	..	See Note 11, Pts 7, 19
Partial partition	...	See Note 6 Pt 12
Suit for account of property left in management of one member after partition		See Note 6, Pt 13
Suit for mere declaration of right to joint family property		See Note 13, Pts 3 & 4

1. Legislative changes.

Act 14 of 1859

The corresponding provision in the Act of 1859 was clause 13 of Section 1 which provided for "suits to enforce the right to share in any property, moveable or immovable, on the ground

Act of 1871, Article 127

127 — By a Hindu excluded from joint family property to enforce a right to share therein	Twelve years	When the plaintiff claims and is refused his share
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Act of 1859, Section 1 clause 13

13. — By a Hindu excluded from joint family property to enforce a right to share therein	Twelve years	When the plaintiff claims and is refused his share
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the person in the possession or management of such property or estate on account of such alleged share

that it is joint family property. The period prescribed was twelve years and the starting point was —

- 1 the death of the person from whom the property alleged to be joint was said to have descended or
- 2 the date of the last payment to the plaintiff or any person through whom he claimed, by the person in the possession or management of such property on account of such alleged share¹

The expression 'payment' was interpreted liberally so as to include any enjoyment of or participation in the joint property. Even the occasional residence of the plaintiff or of his wife or family with the defendant in possession was held sufficient to satisfy this requirement². Thus it was held that possession of land by the plaintiff could be taken as equivalent to payment in respect of his share and that the proceeds of such land as substantial payment by the defendant³.

Article 127 Note 1

Article 127 — Note 1

- 1 (1872) 19 Suth W R 192 (193) 12 Beng L R 219 *Gossain Doss Koondoo v Siroo Koomaree Debia*

(1878) 10 Bom H C R 229 (229) *Shidhojirao v Nikojirao*

As to the difficulty felt in applying this clause to suits brought by a person governed by the Mitakshara School of Hindu Law see

(1866) 5 Mad H C R 99 (100-101), *Gorinda Pillai v Chidambara Pillai*

(1860) 5 Bom 48 (58) 7 Ind App 181 7 Cal L R 320 4 Sar 173 8 Suther 778 8 Shome L R 217 4 Ind Jur 472 (P C) *Lakshman Dada Naik v Ramchandra Dada Naik*

(1865) 2 Mad H C R 847 (848) *Subbaya v Sankara Subhanyar*

(1878) 12 Beng L R 349 (354) *Denonath Shaw v Hurry Narain Shaw*

[See (1883) 7 Bom 237 (300) 7 Ind Jur 540 *Hansji Chhibra v Valabh Chhibra*]

- 2 (1875) 1875 Bom P J 351 *Fidjashankar v Ganpatram* (Possess on or enjoyment by one coparcener of a portion of joint family property is equivalent to payment)

(1886) 11 Bom 455 (460) *Kane Dable v Antaji Gangadhar* (The fact that plaintiff's wife occasionally stayed with sharers in possession of the joint family property held to constitute a payment)

(1886) 11 Bom 461a (461) 1876 Bom P J 120 *Kazi Ahmed v Mero Keshav* (Although the plaintiff may have mainly resided away from the locality of the property yet he may either by occasional residence with his brother at the expense of the latter or by leaving his wife or family with him at the expense of the latter or by payments have received a benefit out of the undivided estate)

(1869) 4 Mad H C R 354 (359) *Subbaya v Rajeswara Sastrulu*

(1869) 11 Suth W R 938 (339) *Gobind Chunder Bagchee v Kripa Voyee* (Where a Hindu widow entitled to her husband's share continues to live in the family house and mingles with the family she will in the absence of evidence to the contrary be deemed to be receiving payment in money or money's worth on account of her share)

(1872) 17 Suth W R 530 (531) *Bhujohuree Paul v Huro Shoonduree Debee*

[See (1872) 17 Suth W R 451 (452) *Prossono Coomar Mookerjee v Shama Churn Mookerjee* (For proof of payment and residence)]

(1875) 24 Suth W R 1 (1) *Moonshiee Sirdar v Molungo Sirdar*

(1873) 19 Suth W R 169 (169) *Sreemuttee Binola v Dangoo Kansaree*]

[But see (1881) 1881 Bom P J 150 *Bai Janubai v Mithabhai*]

- 3 (1873) 1 Ind App 9 (29) 3 Sar 304 (P C) *Runjeet Singh v Koor Gujraj*

Article 127

Notes

1--2

Act of 1871

The corresponding Article of the Act of 1871 applied to a suit brought by a *Hindu*, excluded from the joint family property, to enforce a right to share therein, and the period of limitation was twelve years from the time when the plaintiff *claimed and was refused his share*¹ The effect of this provision was that, if the plaintiff, who had been excluded for fifty years, then claimed his share and was refused, he would still have twelve years from the time of such *refusal* to bring his suit, and that if he never claimed or was refused, the period within which he might bring his suit would be indefinite This apparent inadvertence was rectified in the Act of 1877²

Act of 1877

1. The word "person" was substituted in the corresponding Article of the Act of 1877 for the word "*Hindu*" in the first column The reason why the word "*Hindu*" was omitted is that there are in some districts Muhammadan families which might be described as joint in the sense in which the expression "joint family" is used in this Article³ (See Note 5 *infra*)

2 The words "when the exclusion becomes known to the plaintiff" were substituted in the third column for the words "when the plaintiff claims and is refused his share" It was held in the undermentioned case⁴ that the period of limitation prescribed by this Article was shorter than that prescribed by the former Act

2. Scope of the Article.—This Article provides limitation for a suit brought by a person excluded from joint family property, whether moveable or immovable,¹ to enforce a right to share therein The starting point of limitation is fixed as the date when the exclusion becomes known to the plaintiff In *Ramlakhi v Durga*

(1874) 22 Sath W R 185 (185) *Chunder Monee Debea v Mehar Jan Biset*

4 (1883) 7 Bom 297 (299) *Hansaji Chida v Lalabh Chida*

(1886) 11 Bom 455 (461), *Kane Babu v Antaji Gangadhar*

5 (1877) 3 Cal 228 (229, 230), *Kali Kishore Roy v Dhununjoy Roy*

6 (1890) 13 All 282 (284) 1891 All W N 88 (F B) *Amme Raham v Zia Ahmad*

(1914) A I R 1914 Bom 59 (87) 33 Bom 449 22 Ind Cas 195, *Jan Mahomed v Dattu Jafar*

(1891) 15 Mad 57 (60) 1 Mad L Jour 757n, *Patcha v Mohidin*

7 (1881) 7 Cal 461 (464 465) 9 Cal L R 243, *Narain Khoota v Lokenath Khoota*

Note 2

1 (1907) 8 Ind Cas 505 (506) (All), *Kishen Lal v Shub Narain*

and 313

(Profits
or from
as much
as which

such profits are derived)

(1937) A I R 1937 Bom 202 (207) 169 Ind Cas 81 *Dattatraya Dnyambar v Prabhakari Ramkrishna* (Claim for joint possession of family idol or enjoyment by turns or rotation of the income according to share)

Charan,² Garth, C J., observed with reference to this provision as follows

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2—3

"I conceive that in Article 127 the Legislature intended to make an exception from the general rule of limitation in favour of Hindus and others, to whom the law of joint family property, more specially applies in this country. Those persons often leave their houses for long period of time to seek employment in some distant place, and their relatives may take steps to exclude them from their family property without their knowing it. It has, therefore, been considered right to allow them to bring a suit under such circumstances to enforce their right within twelve years from the time when they first know of their exclusion."

The applicability of the Article to a suit depends upon the following four essential factors, namely

- 1 there must be a joint family (see Note 4),
- 2 there must be a joint family property (see Note 4),
- 3 plaintiff must be a member of the joint family (see Note 3), and
- 4 plaintiff must have been excluded from the joint family property³ (see Note 11)

3. "Person" does not include a stranger. — The Article deals with suits between some member or members of a joint family and some other member or members of the same family. The words "person" and "plaintiff" in the Article mean a person claiming a right to share in the joint family property on the ground that he is member of the family to which the property belongs. Consequently the Article is not applicable to a suit between one member of such family and an alienee who is in possession of the property by virtue of a transfer made by another member of the joint family.¹ Nor does it apply to a suit brought by a stranger to the family against any

² (1885) 11 Cal 680 (682)

³ (1890) 13 All 282 (285, 286) 1891 All W N 88 (F B) *Amme Raham v Zia Ahmad*

(1912) 15 Ind Cas 394 (396) 15 Oudh Cas 111 *Bisheshar Tewari v Bisheshar Dayal*

oyes Dossee

s 66 *Harkesh Singh*

v Hardes

(1924) A I R 1924 All 812 (813) 75 Ind Cas 953, *Bhagwan Das v Sukhdeo Koer*

(1903) 5 Bom L R 355 (355), *Abdul v Mahomed*

(1936) A I R 1936 Nag 80 (85) 162 Ind Cas 577 31 Nag L R (Supp) 191, *Ratan Singh v Jairamsingh*

[See (1866) 1866 Pun Re No 46, *Atter Singh v Kan Singh*

(1899) 7 Cal W N 155 (157), *Poyran Bibi v Lakhli Khan*]

Note 3

1 (1871) 15 Suth W R 24 (26) 6 Beng L R 530 14 Moo Ind App 1 2 Suther 397 2 Sar 636 (P C), *Radhanath Das v Osborne & Co*

(1885) 11 Cal 680 (682), *Ram Lakhi v Durga Charan*

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Notes
3-4

member of the joint family.²

4. "Joint family property." — In cases which arose under clause 13 of Section 1 of the Act of 1859, it was held by the Calcutta High Court that the words "joint family property" were not limited to property belonging to joint *Hindu* families, but included even property belonging to *Muhammadan* families¹ This view was adopted in the early decisions of the Bombay and Allahabad High Courts also² In the case of *Amme Raham v Zia*

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Reddi v Govindaswami Natchen

(1911) 9 Ind Cas 540 (541) (Lah) *Mt Sohandan v Aurangzhan*

(1902) 1902 Pun L R No 1 (3). *Chint Ram v Bakhtwar Rikh*

(1912) 15 Ind Cas 394 (893) 15 Oudh Cas 111, *Bisheshwar Tewari v Bisheshwar Dayal* (2 Oudh Cas 348 was not followed)

[See (1891) 16 Bom 186 (189) 1891 Bom P J 79, Abdul Rahim v Karpuram Dayal]

[But see (1881) 8 Cal 653 (655) 6 Ind Jur 687, *Issuridutt Singh v Ibrahim*.

(1899) 2 Oudh Cas 348 (350, 351), *Lal Gaur Kant v Shankar Bakhsh Singh* (Not followed in 15 Ind Cas 394 (Oudh))]

2 (1910)
(1896)

(1899) 7 Cal W N 155 (157). *Pouran Bibi v Lallhu Khan* (Do)

(1917) A I R 1917 Pat 393 (391) 41 Ind Cas 39, Jagu Mandal v Wadhao Mandal (Suit for partition by a married niece against her uncle)

[See also (1893 1900) 1893 1900 Low Bur Rul 415 (415) *Maung dung Ge v Ma Hla Win* (A member of the Burman Buddhist family who marries certainly ceases to be a member of a joint family)]

(1882) 11 Cal L R 312 (314), *Mothura Nath Dutt v Borhant Nath Dutt* (The suit was brought by the assignees of the interest of the daughter's son—*Held*, to such a suit Article 140 or Art 141 applied.)

Note 4

1 (1866) 5 Suth W R 238 (239) *Mt Khyroonissa v Salehoonissa Khatoon*

(1869) 11 Suth W R 45 (45) *Achina Bibee v Ajeeyoonissa Bibee*

(1874) 22 South W R 185 (185). *Chunder Monoy Debba v Mehargan Bibee*

(1875) 24 Suth W R 1 (1) *Moonshee Sirdar v Molungo Sirdar*

2 (1885) 1885 Bom P J 152 (155), *Sayad Gulam v Bibi Antarnisa* (Property left by a Mahomedan becomes divisible on his death among those members of his family who are entitled to shares according to the Mahomedan law or are residuaries. Till it is divided it is 'joint family property' within the meaning of Article 127.)

(1891) 16 Bom 186 (189) 1891 Bom P J 79 *Abdul Rahim v Kriparam Das*

(1896) 1896 Bom P J 365 *Mr Meher Ali v Mr Haidar*

(1898) 1898 Bom P J 393, *Sayadalli v Aminb*

(1909) 4 Ind Cas 242 (243) 33 Bom 719, *Fatma Doo v Ghisan Doo*

Ahmad,³ a Full Bench of the Allahabad High Court held that the words "joint family property" meant the property of a *joint family*, that the sense in which the term "joint family" was to be understood was the technical sense known to the Hindu law, and therefore the Article did not apply to a suit by members of a Muhammadan family for recovery of shares in immovable property of a deceased Muhammadan ancestor in the possession of the defendant.⁴ Sir John Edgc, C J, observed as follows

"Now those words may possibly be construed in two different ways. They might be construed as 'the joint property of the family' or as 'the property of the joint family.' I think in this country we would be misconstruing those words 'joint family property' to hold that they apply to a case where property was joint but the family was not. In my humble judgment, 'joint family property' means so Article 127 the property of a joint family and that would be strictly speaking 'joint family property'."

The view of the Allahabad High Court expressed in the above Full Bench decision has now been adopted by all the High Courts.⁵

- (1889) 14 Bom 70 (71) *Barasha v Masumsha* (Joint family property includes property left by a deceased Mahomedan and divisible among his heirs until it is divided and the said Article will apply to such property where there has been no division of it)
- (1887) 9 All 213 (216 217) 1887 All W N 22 11 Ind Jur 192 *Sahib un Nussa Dibi v Hafiza Dibi*
- (1887) 10 All 109 (114) 1886 All W N 8 *Ahmad Ali v Husain Ali* (Case between Mahomedan parties. It was assumed that Article 127 applied to the case)
- (1888) 10 All 343 (346) 1888 All W N 38, *Hashmat Begam v Mashar Husain*
- (1885) 1885 Bom P J 170 (171) *Sayad Gulam v Bibi Anarnisa*
- 3 (1890) 13 All 282 (283) 1891 All W N 88 (F B).
- 4 See (1908) 80 All 824 (327) 1908 All W N 126 5 All L Jour 852 4 Mad L Tim 88 (F B) *Sultan Begam v Debi Prasad* (It should be noted that the words used in the Article are 'joint family' and not 'undivided family', a term very well known to the Legislature. See S 44 of the T P Act and S 4 of the Partition Act)
- 5 (1917) A I R 1917 Bom 254 (257 258) 41 Bom 588 41 Ind Cas 761 (F B) *Isap Ahmad v Abhramji Ahmadji*
- (1914) A I R 1914 Bom 17 (19) 23 Ind Cas 565 *Mangaldas v Abdul Razak* (The notions of joint family property in the Hindu law sense are unknown to Muhammadan law. This is so in the case of Cutchi Memons too)
- (1914) A I R 1914 Bom 59 (101) 38 Bom 449 22 Ind Cas 195 *Jan Mahomed v Dattu Jafar*
- (1903) 5 Bom L R 355 (364) *Abdul v Mahomed*
- (1895) 22 Cal 954 (959 960) *Mahomed Akram Saha v Anardi Choudhrani*
- (1918) A I R 1918 Cal 471 (472) 38 Ind Cas 25 *Shamiruddi Mandal v Abdur Bari Mandal*
- (1899) 7 Cal W N 155 (157) *Peyran Bibi v Lakhu Khan*
- (1923) A I R 1923 Lab 519 (520) 73 Ind Cas 495 4 Lab 409, *Mt Zaynab v Ghulam Rasool*
- (1888) 1888 Pun Re No 89 *Nasruddin Shah v Mt Lal Bibi*
- (1902) 1902 Pun L R No 86 1902 Pun Re No 80, *Din Muhammad v Mehr Baksh*

Article 127
Note 4

including the High Courts of Calcutta and Bombay Where, however, a particular Muhammadan family has by custom, adopted the Hindu law of the joint family, this Article might be applied to a suit brought by a person excluded from the family property to enforce his right to share therein⁶

This Article therefore, is inapplicable to a suit the parties to which are Muhammadans for the only reason that the notion of joint family as understood by the Hindus is unknown to the personal law of the Muhammadans For the same reason the Article is also inapplicable to a suit the parties to which are Buddhists such as those living in Burma⁷ But the same cannot be predicated of

(1891) 15 Mad 57 (59) 1 Mad L Jour 751n *Patcha v Mohidin* (The words "joint family property" in Art 127 of the Constitution)

(1891) 15 Mad 60 (61-62) 1 Mad L Jour 754 *Kasim v Ayishamma* (There is no evidence to prove that the Hindu custom of holding family property undivided has been adopted by the Mapillas in Malabar)

muhammadan family succeed to property on the death of a relation each of them takes a share of each item of the property and a suit by such a member for a share is governed by Article 123 and not by Article 127)

(1912) 13 Ind Cas 791 (792) (Mad) *Cheria Imbichi Bibee v Syed Ali*

(1910) 6 Ind Cas 50 (51) 34 Mad 511 (F B) *Khaderia Hajee v Futeh Veetil* (A suit by a Mahomedan for a share of his wife's property in the possession of another sharer more than twelve years after the article 120 when is immovable)

nda

d L R 25 Mt
as used in the

Article qualify the word property and joint family is a peculiar concept of the Hindu law and could not apply to a Mahomedan family as such)

[See (1922) A I R 1922 Sind 41 (42) 79 Ind Cas 841 15 Sind L R 133 (F B) *Vazir v Dwarakamal*]

6 (1917) A I R 1917 Bom 254 (257) 41 Bom 588 41 Ind Cas 761 (F B) *Isp Ahmad v Abhramji Ahmady*

(1914) A I R 1914 Bom 59 (89-90) 38 Bom 449 22 Ind Cas 195 Jan

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L R 25 Mt
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property of a family governed by Mahomedan law and not proved to have adopted as a custom the Hindu law of the joint family)

7 (1909) A I R 1909 ... 7 Aug

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the parties who are governed by the Dayabhaga School of the Hindu Law. For, the joint Hindu family as a definite legal entity is as well known and recognized under the Dayabhaga as under the Mitakshara School of the Hindu Law.⁸

Property in the hands of widows and daughters inheriting property does not carry with it all the incidents of joint family property and therefore a suit by an excluded co widow or daughter praying for a partition as a mode of convenient enjoyment will not fall under this Article.⁹

5 Presumption as to joint family property — The normal state of every Hindu family is joint and the presumption is until the contrary is proved that every such family is and continues to be joint.¹ The strength of the presumption must however necessarily vary with every case. In *Kellappa Ramappa v Tippanna*² Lord Shaw observed as follows

It is no doubt true that there is a presumption that a Hindu family continues joint, but the sound proposition has for many years been accepted that the strength of the presumption necessarily varies in every case. The presumption of union is stronger in the case of brothers than in the case of cousins and the farther you go from the founder of the family the presumption becomes weaker and weaker.

See also the undermentioned cases³ to the same effect

(1897 1901) 2 Upp Bur Rul 458 (459) *Maung Tha Su v Maung Paw*
(1893 1900) 1893 1900 Low Bur Rul 415 (415) *Maung Aung Ge v Ma Hla*

Rin
[See also (1893 1900) 1893 1900 Low Bur Rul 522 (522) *Maung Pe v Ma Hla Win*]

[But see (1893 1900) 1893 1900 Low Bur Rul 132 (135) *Maung Tun v Ma Taw*]

8 (1917) A I R 1917 Bom 254 (256) 41 Ind Cas 61 41 Bom 583 (F B) *Isap Ahmad Mograria v Abhramji Ahmadji*

(1866) 8 Mad H C R 99 (101) *Gorindam Pillai v Chidambaram Pillai*

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9 (1921) A I R 1921 Mad 24 (27) 44 Mad 131 60 Ind Cas 593 *Aichamma v Bapiiah*

(1901) 24 Mad 441 (443) *Sellam v Chinammal* (Suit between co widows—Judgment suggests that the decision is under Article 144 though the head note treats the case as though it were decided under Article 197)

Note 5

1 (1869) 12 Moo Ind App 523 (540) 3 Beng L R 13 12 Suth W R 21 2 Suther 243 2 Sar 467 (P C) *Neethisto Deb v Deerchunder Thakoor*

2 (1929) A I R 1929 P C 8 (10) 56 Ind App 13 53 Bom 213 114 Ind Cas 13 (P C)

3 (1873) 10 Bom H C R 444 (468) *Moro Vishwanath v Ganesh Vishal*

(1873) 12 Beng L R 336 (342 345) 20 Suth W R 65 *Bholanath Mahta v Ajoodhia Pershad*

(1933) A I R 1933 Bom 386 (390) 145 Ind Cas 60 *Lingangouda v Sangangouda* (The severance of joint status is a matter of individual volition. It may be effected by agreement. But where the known

Article 127
Note 5

There is no presumption that a joint family possesses any joint property and the burden of proving in an action for partition of joint family property that any particular item of property is joint is primarily on the plaintiff ⁴ This burden is not discharged by merely showing that many years ago his and defendant's ancestors were joint, leaving the Court to presume from this that any property of which the defendant may be possessed at the time the suit is brought is joint family property ⁵ Where the property in suit is found to have been in the exclusive possession of the defendant for upwards of twelve years, the defendant has, under Article 144, a *prima facie* right to that property by force of twelve years' limitation rule against all the world If the plaintiff wants to bring his case within the operation of this Article, which places him in a more advantageous position than other claimants, he is bound to show that the property which he seeks to recover is the property of an existing joint family at the date when the cause of action accrued ⁶

But where it is proved or admitted that a Hindu family possesses joint property, the presumption is that all the property of which they are possessed is joint ⁷

prove by definite evidence how and when it happened In such a case the onus of proving that the property is joint lies on the person who alleges it)

4 (1920) A I R 1929 P C 1 (3) 113 Ind Cas 897 (P C) *Anugula Chait* -

(1863) 12 Beng J R 349 (3rd) *Denonath Shaw v Hurrymarain Shaw*
(1865) 3 Suth W R 173 (173), *Umbika Churn Shet v Bhuggobully Churn Shet*

(1865) 4 Suth W R 101 (101) *Gopal Chunder Chatterjee v Raj Coomares Debia* (The jointness to be proved by showing that the plaintiff was in possession either personal or constructive)

(1872) 17 Suth W R 505 (506 507) *Bhromar Coomar Debes v Banerjee Madhuk Banerjee*

(1910) 8 Ind Cas 930 (933) 4 Sind L R 161 *Metharam v Rewachand*
[See (1888) 13 Bom 61 (66 67) *Tootsydas Ludha v Premji Trivandas*]

5 (1882) 9 Cal 237 (241) 7 Ind Jur 361 5 Shome L R 51, *Ohoy Churn Ghose v Gobind Chunder Dey*

(1886) 11 Bom 216 (219) *Ramchandra Narayan v Narayan Mahadev* (Defendant in possession for thirtyfive years)

(1886) 11 Bom 221n 1883 Bom P J 262 *Yathoba v Narayan*

6 (1884) 6 All 442 (443 444) 1884 All W N 154 *Thakur Prasad v Partab*
(1892) 9 Cal 237 (241) 7 Ind Jur 361 5 Shome L R 51 *Ohoy Churn Ghose v Gobind Chunder Dey*

(1866) 3 Bom H C R A C 170 (173) *Gurati v Gurati* (Defendant in possession for thirty years)

(1933) A I R 1933 Bom 366 (393) 145 Ind Cas 780 *Lingangouda v Sangangouda*

[See (1913) 18 Ind Cas 868 (869) (Lab) *Narainjan Singh v Naitha Singh*]

7 (1919) 20 Cal 1

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slad Tewary v

6. Partition of joint family property. — According to the true notion of an undivided Mitakshara joint Hindu family, no individual member of that family, whilst it remains undivided, can predicate that he is entitled to any definite share in the joint family property¹ Partition therefore is the *ascertainment of the shares* of the existing coparceners in the joint property, in other words, it consists in a *division* by which the proportion of each coparcener with respect to *all or any* of the joint property is fixed² Once the shares are defined the partition is complete After the shares are so ascertained, the parties "might elect either to have a partition of their shares by metes and bounds, or to continue to live together and enjoy their property in common as before Whether they did one or the other would only affect the mode of enjoyment and not the tenure of the property or their interest in it"³

Partition, in this sense, namely that of a division of property into specific shares, is to be distinguished from partition, in its other sense, namely a division of title⁴ In its latter sense, it means a

(1907) 11 Cal W N 478 (466) 9 Bom L R 595 5 Cal L Jour 838 2 Mad L Tim 151 17 Mad L Jour 184 (P C), *Anandrao v Vasantrao*

(1911) 10 Ind Cas 543 (545) 33 All 677, *Ram Kishan Das v Tandanmal*

(1881) 8 Cal 517 (519) 10 Cal L R 489 6 Ind Jur 579, *Ramphul Singh v Deg Narain Singh*

(1878) 8 Cal 515 (517) 8 Sar 78 R & J 49 3 Suther 490 2 Ind Jur 151 (P C), *Danno v Asashee Ram*

(1921) A I R 1921 Cal 181 (137) 69 Ind Cas 476, *Nisaran Chandra v Nirupama Devi*

(1911) 12 Ind Cas 6 (8) (Cal), *Baramanand Mahanti v Krishna Charan Patnaik*

(1914) 22 Ind Cas 27 (23) (Cal), *Ganpat Varicari v Bal Mukund*

(1906) 4 Cal L Jour 56 (61), *Rama Nath Chatterjee v Kusum Kamini Devi*

(1873) 19 Suth W R 231 (231) (P C), *Chand Hurree Maitee v Rajah Norendro Narain*

(1865) 3 Suth W R 21 (23), *Bisumbhur Sircar v Soorodhunoy Dossee*

(1927) A I R 1927 All 454 (459) 49 All 763 102 Ind Cas 66, *Hurkesh Singh v Mt Hardoi*

(1866) 1 Agra 285 (235), *Dabee Suhas v Sheo Dass Rai*

(1904) 6 Bom L R 925 (938), *Wasantrao v Anandrao*

(1926) A I R 1926 Oudh 77 (78) 1 Luck 1 91 Ind Cas 976, *Abhaiddat Singh v Ragho Indar Partab*

(1917) A I R 1917 Oudh 179 (180) 39 Ind Cas 493 *Lala Jagan v Mathura Prasad*

(1914) A I R 1914 Oudh 229 (230) 24 Ind Cas 633, *Jagannath v Aadar*

Note 6

1 (1866) 8 Suth W R 1 (1) 11 Moo Ind App 75 2 Sar 218 1 Suther 657 (P C), *Appooier v Rama Subba Iyer*

2 (1866) 8 Suth W R 1 (1) 11 Moo Ind App 75 1 Suther 657 2 Sar 218 (P C), *Appooier v Rama Subba Aiyar*

(1903) 30 Cal 738 (751) 5 Bom L R 461 30 Ind App 139 7 Cal W N 578 8 Sar 489 (P C), *Balkishen Das v Ram Narain Sahu*

3 (1903) 30 Cal 738 (752 753) 5 Bom L R 461 30 Ind App 139 7 Cal W N 578 8 Sar 489 (P C), *Balkishen Das v Ram Narain Sahu*

4 (1866) 8 Suth W R 1 (1) 11 Moo Ind App 75 1 Suther 657 2 Sar 218 (P C), *Appooier v Rama Subba Aiyar*

(1916) A I R 1916 P C 104 (108) 43 Cal 1031 43 Ind App 151 37 Ind Cas 321 12 Nag L R 113 (P C), *Mt Gurja Bai v Sadashiv Dhundiraj*

Article 127
Note 6

severance of the joint status All that is necessary for a severance of the joint status is a *definite and unambiguous intimation by a member of the joint family of his intention to separate himself from the family and to enjoy his share in severalty*⁵ Thus, the severance of joint status is a matter of individual volition while the actual partition may be effected by different methods by private agreement, by arbitrators appointed by the parties, or, in the last resort, by the Court⁶

A partition may be partial either in respect of the property or in respect of the persons making it⁷ It is open to the members of a joint family to make a partition of a *part* of the joint estate, while retaining their status as a joint family and holding the rest as the properties of a joint undivided family⁸ However, where from the evidence of a case it can be held that the parties *intended to sever*, then the joint status of the family is determined, and with regard to any partition of the estate which remains undivided, the presumption is that the members of the family hold it as tenants in common unless and until a special agreement to hold it as joint tenants is proved⁹ When it is admitted or proved that a partition has already

⁵ (1916) A I R 1916 P C 104 (109) 43 Cal 1031 43 Ind App 151 37 Ind Cas 321 12 Nag L R 113 (P C) *Mt Gurja Bai v Sadashiv Dhundiraj*

(1972) A I R 1972 P C 901 (209) 45 Mad 489 49 Ind App 163 68 Ind Cas 451 (P C) *Ramalinga v Narayan*

(1913) 18 Ind Cas 30 (32) 35 All 60 40 Ind App 40 16 Oudh Cas 129 (P C) *Suraj Narain v Iqbal Narain* (What may amount to a separation or what conduct on the part of some of the members may lead to disruption of the joint undivided family and convert a joint tenancy into a tenancy in common must depend on the facts of each case)

(1920) A I R 1929 Bom 424 (426) 121 Ind Cas 439 *Mulji Narotari v Hirabai Ramchandra* (Dissenting from 18 Bom 611)

(1876) 1676 Pun Re No 100, *Mutsadi Mal v Mt Dhan Kour*

(1927) A I R 1927 Oudh 265 (273) 104 Ind Cas 567, *Bishunath Kuar v Sheo Bahadur Singh*

⁸ (1916) A I R 1916 P C 104 (106) 43 Cal 1031 43 Ind App 151 12 Nag L R 113

⁷ (1866) 8 Suth W
Appovier

(1894) 18 Mad 418 (419) *Muthusami Mudaliar v Nallakulanatha Mudaliar* (Partial partition as to property)

(1925) A I R 1925 P C 49 (51) 52 Ind App 83 48 Mad 254 87 Ind Cas 333 (P C) *Palani Ammal v Muthukrishnakatachala* (Partial as to person)

(1931) A I R 1931 Bom 97 (98) 54 Bom 616 127 Ind Cas 510 *Martland*

Cas 147, *Babanna*

mbai Juangowoda

v Gurunathgouda

[See (1886) 1886 Pun Re No 86 *Budha Mal v Bhagwan Das*]

⁹ (1902) A I R 1922 P C 201 (205) 46 Mad 489 49 Ind App 163 68 Ind Cas 451 (P C) *Famlinga v Narayana* (Whether there was a disruption of the family status is to be found from the facts of the case)

(1909) 3 Ind Cas 9 (10) (Cal), *Ajodhya Pershad v Mahdeo Pershad*

⁹ (1974) A I R 1974 Bom 31 (32) 47 Bom 773 73 Ind Cas 969 *Dagad v Gori da v Sakubai Nana* (Decision in 18 Bom 611, held doubtful in view of A I R 1916 P C 104)

taken place, the presumption is that all the joint family property was divided and the person alleging that family property in the exclusive possession of one of the members after such partition is liable to be partitioned, has to make good his allegation by proof ¹⁰

This Article presupposes the existence of a joint family, that is, the status of jointness of the family. Where, therefore, the *status of jointness is put an end to*, the family does not remain a joint family within the meaning of this Article, and even if the property in possession of such family is not actually divided by metes and bounds, a suit to recover possession of the plaintiff's share in such property is governed, *not* by this Article, but either by Article 144 or by Article 120 as the case may be.¹¹

- (1931) A I R 1931 Bom 37 (98) 51 Bom 616 127 Ind Cas 510, *Martand v Radhabai*
(1923) A I R 1923 Lah 497 (497) 73 Ind Cas 694 4 Lah 252, *Bens Pershad v Mt Gurdett* (18 Bom 611, Dissented from)
10 (1877) 8 Cal 315 (317) 3 Sar 78 R & J 49 3 Suther 490 2 Ind Jur 151 (P C), *Banno v Kashee Ram*
(1932) A I R 1932 Mad 207 (211) 55 Mad 483 137 Ind Cas 616, *Kumarappa Chetty v Muthuswaya Raghunatha*
(1870) 7 Bom H C R A C 153 (177, 178), *Narayan Babaji v Nana Manohar*
(1886) 11 Bom 216 (219) 1886 Bom P J 325, *Ramchandra Narayan v "*
" " " " " " admitted that there was a partition
of the property
in 1886
years
all bar
(1900) 25 Bom 367 (369) 2 Bom L R 1134, *Vinayak Narsingh v. Datto Gound*
(1921) A I R 1921 Bom 276 (277) 45 Bom 914 61 Ind Cas 761, *Ramchandra v Tukaram*
(1926) A I R 1926 All 453 (454) 94 Ind Cas 944, *Partab Narain v Ram Kumar* (Where a family is admitted to be separate on the date of the suit it is on the party that alleges that the acquisitions were made at a time when the family was joint, to prove that they were so made)
(1923) A I R 1923 Cal 18 (19) 72 Ind Cas 680, *Kailash Chandra v Bejoy Chandra*
(1893) 1893 Pun Re No 66, *Sadhu Ram v Mt Bansi Bai*
(1927) A I R 1927 Oudh 499 (501) 105 Ind Cas 410, *Sargoo Prasad v Deo Dat Lal*
[See (1936) A I R 1936 Pat 68 (69) 159 Ind Cas 453, *Mukhrum Rai v Chandradeep Rai*]
11 (1931) A I R 1931 P C 48 (51) 58 Ind App 106 27 Nag L R 131 130 Ind Cas 673 (P C) *Gowindrao v Rajabai*
(1896) 24 Cal 809 (814) *Banco Tewary v Doona Tewary*
(1922) A I R 1922 Mad 150 (152, 154) 71 Ind Cas 177 45 Mad 648 (F B), *Yerukola v Yerukola*
(1909) 1 Ind Cas 408 (409) 32 Mad 191, *Vaidyanatha Iyer v Ayyaswamy Iyer* (If there was a division in status even with reference to the properties which were not divided by metes and bounds then the Article applicable to a claim to enforce the right in a joint family property, that is Article 127, would not apply)
(1920) A I R 1920 Mad 763 (769 770) 43 Mad 299 59 Ind Cas 978, *Keesara Venkatappaya v Nayani Venkata Ranga Rao* (A suit for partition by the heir of one tenant in common against the heir of the other tenant in common is governed by Article 144 and not by Article 127)

Article 127
Notes
6—9

Where, however, there is only a *partial partition* with the result that a certain portion of the joint family property is left in the hands of the defendant, the property so left does not lose the character of joint family property. Hence, a suit to enforce a right to share in such property will fall within the scope of this Article¹²

Where there has been a disruption of the *status* of the jointness of a Hindu family, and on the division of the joint family properties a portion of the *moveable* property is, by consent of all the *quondam* coparceners left in management of a member of the family, a suit by one of such coparceners for an *account* of the property left in such management is governed by Article 89 and not by this Article¹³ (See also Notes under Article 62 *ante*)

7. Muhammadans — Applicability of the Article to a suit by. — See Note 4, *ante*

8. Burmese Buddhists — Applicability of the Article to a suit by. — See Note 4, *ante*

9. Conversion of a coparcener to alien faith. — A coparcener, by conversion to an alien faith, such as Muhammadanism ceases to be a coparcener and upon his conversion a separation is caused immediately¹ The possession of the family property by such converted member becomes that of a tenant in common from

(1930) A I R 1930 Bom 61 (62) 54 Bom 4 124 Ind Cas 778 *Krishnaji Annajee v Annajee Dhondajee* (Article 190 applied)

(1877) 1877 Bom P J 194 *Derapa v Ganpaya*

(1936) A I R 1936 Pat 68 (69 70) 159 Ind Cas 458 *Mukhran Bai v Chandradeep Bai*

[See (1919) A I R 1919 Mad 531 (531, 534) 42 Mad 431 52 Ind Cas 470 *Kumarappa Chettiar v Saminatha Chettiar*

(1893) 4 Mad L Jour 43 (45) *Ammu v Kunhunn Menon*]

[But see (1935) A I R 1935 Nag 137 (139) 81 Nag L R 304 156 Ind Cas 672 *Mansaram v Champalal* (The correctness of the decision is doubtful)]

12 (1924) A I R 1924 Mad 113 (114) 74 Ind Cas 1018 *Rajagopala Aiyangar v Soundararaja Aiyangar*

(1929) A I R 1929 Mad 27 (28) 114 Ind Cas 337, *Vairayapuri Chettiar v Subramania Chettiar* (The burden of proving the adverse nature of his possession lies on the defendant)

(1894) 18 Mad 418 (419) *Muthusami Mudaliar v Nallakulanatha Mudaliar*

(1887) 11 Bom 216 (219) 1686 Bom P J 325 *Ramchandra Narayan v Narayan Maladev* (What would bar the operation of the Article in question would be a reservation of a part of the joint estate from partition and a possession of that portion conceded to and taken by one of the sharers as the common property of himself and the other sharers)

(1927) A I R 1927 Oudh 499 (501) 105 Ind Cas 410 *Sarjoo Prasad v Deodat Lal*

13 (1930) A I R 1930 P C 18 (21) 121 Ind Cas 205 (P C) *Vairayya v Adenna*
See also Notes under Article 89 *ante*

Note 9

1 (1916) A I R 1916 Lah 43 (44) 1916 Pun Re No 5 35 Ind Cas 549
Ganga Singh v Mt Begam

the moment of his conversion and is not adverse to the other coparceners²

Article 127
Notes
9-11

10 Debts realized after separation of the joint family.—
See Notes under Articles 62 and 89, *supra*

11. Exclusion — Clause 13 of Section 1 of the Act of 1859 did not contain the words 'excluded' and 'exclusion'. But it was held on an interpretation of the clause that time did not run against any member of the family in respect of his right to share in the family property unless he was *excluded* from such property.¹ This interpretation was based upon the general principle of law that in the case of co owners and joint tenants, the possession of one is in law the possession of all² unless ouster or exclusion was proved.³ The Act of

2 (1924) A I R 1924 Lah 479 (479) 80 Ind Cas 519 *Jamna Bai v Gonda Ram*

Note 11

1 (1866) 3 Mad H O R 99 (102 103) *Govindan Pillai v Chidambara Pillai*

2 (1918) A I R 1918 P C 1 (2) 1918 Pun Re No 64 47 Ind Cas 626 (P C) *Hardit Singh v Gurmukh Singh* (If possession may be either lawful or unlawful in the absence of evidence it must be assumed to be the former)

(1878) 19 Suth W R 231 (231) (P C) *Chand Hurree Maitee v Rajah Nor endro Narain*

(1926) A I R 1926 P C 100 (102) 53 Ind App 220 48 All 529 29 Oudh Cas 316 93 Ind Cas 1013 1 Luck 399 (P C) *Nirman Singh v Rudra Partab Narain Singh*

(1870) 1870 Pun Re No 49 *Lalla v Jejjopal*

(1906) 4 Cal L Jour 56 (61) *Ramanath Chatterjee v Kusum Kamini Devi*

(1917) A I R 1917 Lah 872 (872) 39 Ind Cas 762 *Umrao Singh v Lachmi Narayan* (Coparcener in possession alienating family property but continuing to stay in the same property even after such alienation—His possession does not become adverse from the date of alienation)

(1897) 1897 Pun Re No 118 *Das v Maja Das*

(1906) 80 Mad 201 (202) 2 Mad L Tim 184 *Dhoorjetti Subbayyar v Dhoorjetti Venkayya* (The fact that the plaintiff did not ask for a share does not amount to exclusion)

(1916) A I R 1916 Mad 511 (511) 29 Ind Cas 183 *Devarasu Venkatachala Dwarakanadha Rao v Venkata Rao Pantulu*

(1886) 10 Bom 24 (27) *Nilo Ramchandra v Govind Ballol*

(1866) 3 Agra 271 (271) *Tootsee Ram v Nahur Singh*

facie as adverse to other coparceners—Even 50 years absence will not amount to adverse possession)

(1897) 3 Cal W N 774 (776) *Baroda Sundari Deby v Annoda Sundari Deby*

(1887) 1887 Bom P J 9 *Moro Sakharani v Keso Dinhar*

(1900) A I R 1920 Mad 793 (796) 50 Ind Cas 725 *Narayanma Deo Garu v Krishnachandra Deo Garu*

(1907) 6 Cal L Jour 735 (741 742) 35 Cal 961 12 Cal W N 127, *Jogendra Nath Rai v Baldeo Das Marwari* (A silent possession accompanied by no act which can amount to an ouster or give notice to his co-tenant that his possession is adverse ought not to be construed into an adverse possession mere possession however long continued if silent cannot give one co-tenant in possession title as against the other co-tenant))

3 (1866) 10 Moo Ind App 511 (535) 2 Sar 189 (P C) *Jowala Buksh v Dharum Singh*

Article 127
Note 11

1871 adopted this interpretation and Article 127 provided for suits by a person *excluded* from joint family property to enforce a right to share therein

There is no definition of the word "exclusion" in the Act, but as observed by their Lordships of the Privy Council in *Radhoba v Aburao*,⁴ an *intention to exclude* is an essential element in exclusion and it is necessary for the Court in each case to be satisfied, before finding exclusion of any member, that there was an intention on the part of those in control and possession of the joint family property to exclude such member⁵

The long absence of a member from the family⁶ or his non participation in the profits of the property⁷ would not, by itself,

(1926) A I R 1926 P C 100 (102) 53 Ind App 220 48 All 529 29 Oudh Cas 316 98 Ind Cas 1013 1 Luck 389 (P O) *Nirman Singh v Rudra Pratap Naram Singh*

(1912) 17 Ind Cas 657 (658) 37 Bom 81, *Malkappa v Mudhappa*

4 (1929) A I R 1929 P C 231 (237) 53 Bom 699 56 Ind App 816 119 Ind Cas 1 (P O)

[See also (1920) A I R 1920 Mad 793 (796 797) 52 Ind Cas 725 *Narasimha v Krishnachandra*

(1917) A I R 1917 P C 77 (77) 42 Ind Cas 258 (P C) *Shyamananda Das v Bankanta Das* {What constitutes exclusion from a joint estate may well in many cases be a question of law}]

5 In the following cases such an intention was not present and it was held that there was no exclusion

(1906) 80 Mad 201 (202) 2 Mad L Tim 184, *Dhoorjetti Subbayyar v Dhoorjetti Venkayya*

(1890) 1890 Bom P J 207, *Gurupadaya v Baslingayya* (Mere proof of quarrels having taken place between the plaintiff and defendant in a particular year is not conclusive proof that there was exclusion of the plaintiff from joint family property where even after such quarrel the parties continue to live in union)

(1910) 8 Ind Cas 930 (933) 4 Sind L R 161, *Meetharam v Rewachand* (To hold exclusion it is not enough to prove defendant's assertion that the property was separate self acquired property)

(1886) 1886 Pun Re No 18 *Mehr Chand v Duni Chand*

[See (1885) 1885 Bom P J 170 *Sayed Gulam Hussain v Bibi Anwarissa* (The mere fact of the person's claiming to have excluded being in possession for more than twelve years or the person alleged to have been excluded having made no claim for more than twelve years is not sufficient to constitute exclusion)]

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(1927) A I R 1927 Mad 111 (112) 99 Ind Cas 158 *Gowindasa v Chettiar v Kothandapana Chettiar* (Plaintiff absent for eighteen years)

(1875) 1875 Pun Re No 37, *Gyan Singh v Hazara Singh*]

7 (1927)

property in any effective way)

(1910) 5 Ind Cas 924 (925) (Mad) *Samsanthi Gramany v Detasikama Gramany* (Mere non participation is not exclusion within the meaning of Article 127)

be sufficient to establish the exclusion of such member from the family property though such fact would be of great evidentiary value in determining the question of exclusion⁸

Article 127
Note 11

The exclusion contemplated by the Article is *total* exclusion and not *partial* exclusion⁹. In *Nirman Singh v Lal Rudra Pratap Narain Singh*,¹⁰ the Subordinate Judge who first decided the case had observed as follows

"The cause of action would not arise unless the coparcenor is *absolutely* excluded, and is not absolutely excluded if he is in receipt of maintenance from the family property. Exclusion, to bar a suit under Article 127, must be a *total* exclusion."

Their Lordships of the Privy Council upheld this view as the correct one. It would follow that where a member is in receipt of some payment from the family property, there cannot be said to be any exclusion¹⁰. The undermentioned cases¹¹ expressing a contrary view, namely that the exclusion need not be *total*, can no longer be accepted as laying down the correct law

(1937) 11 Bom 365 (368), *Dinkar Sadashiv v Bhikaji Sadashiv*

(1911) 9 Ind Cas 425 (426) (Oudh), *Bharat Prasad v Ganga Bahsh*

[See (1916) A I R 1916 Nag 19 (19) 57 Ind Cas 339 *Suka v Rakh* (But on evidence it was held that plaintiff was separated from his two brothers)]

[See also (1901) 24 Mad 441 (443) *Sellam v Chinammal* (The judgment suggests that the decision is under Art 144 though the head note treats the case as though it were decided under Art 127)]

8 (1866) 8 Mad H C R 99 (102) *Govindan Pillai v Chidambara Pillai*

8a (1919) A I R 1919 Mad 531 (531 533) 42 Mad 431 52 Ind Cas 470 *Kumarappa Chettiar v Saminatha Chettiar*

(1880) 5 Bom 48 (60) 7 Ind App 181 8 Suther 778 8 Shome L R 217 4 Ind Jur 472 7 Cal L R 320 4 Sar 173 (P C) *Lakshman Dada Naik v Ramchandra Dada Naik*

(1897) 20 Mad 256 (268) 24 Ind App 118 7 Sar 185 (P C), *Lakshmi Devi Garu v Surya Narayana Dhatrasu*

9 (1926) A I R 1926 P C 100 (103 104) 53 Ind App 220 48 All 529 29 Oudh Cas 316 98 Ind Cas 1018 1 Luck 389 (P C)

10 (1906) A I R 1906 P C 100 (103) 53 Ind App 220 48 All 529 29 Oudh Cas 316 98 Ind Cas 1018 1 Luck 389 (P C) *Nirman Singh v Lal Rudra Pratap Narain Singh* (In this case it was asserted by the contesting defendants themselves that the plaintiffs were in receipt of cash maintenance and that they were in possession of some lands in lieu of the same. It was held that plaintiffs had not been excluded from the property)

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not possible to say with reference to Article 127 that in respect of this share there has been any exclusion of the plaintiff)

11 (1897) 21 Bom 325 (327 328) *Tishnu Ramchandra v Ganesh Appaji* (The fact that the plaintiffs were not excluded from their share in part of the joint property does not prevent Article 127 Schedule II of the Limitation Act 15 of 1877 from operating in respect of another part from which they had been excluded to their knowledge)

(1893) 1893 Bom P J 272, *Harichandra v Raghunath* (Do)

(1886) 1886 Pun Re No 86 *Budha Mal v Bhagwan Das*

Article 127
Note 11

Subject to the principles stated above the question whether a person has been excluded from joint family property must depend largely upon the facts of the particular case under consideration¹³. See the following illustrative cases —

- 1 A was the son of X by his lawful wife After X's death B also a son of X by another woman was permitted to live in the family house and was paid maintenance not as being a coparcener but as a mere dependant and as being son of a concubine of X B's claim as a coparcener was also distinctly denied by A more than twelve years before date of suit It was held that under the circumstances B must be considered to have been excluded from the enjoyment of joint family property ¹³
- 2 A member was refused partition more than twelve years before date of suit and he did not receive any proceeds from the joint family property at any time thereafter It was held that he was excluded from the joint family property ¹⁴
- 3 N a member of the joint family voluntarily went after the death of his parents to live with his maternal uncle He was not turned out He went with the consent of the eldest male member of the family The members of the joint family did not however subscribe anything for his maintenance or marriage expenses It was held by the Privy Council that N was not excluded from the joint family ¹⁵
- 4 In a suit for partition of joint family property the defence was that the plaintiff's father was expelled from the family and that he had received his share of the property The evidence established that he re appeared in the village where the family resided that he took up his abode in the village and that he was recognised as a member of the family It was held that no case of exclusion from the joint property could be made ¹⁶

(1933) A I R 1933 Bom 386 (392) 145 Ind Cas 780 *Lingangouda v Sangangouda* (In this case A I R 1926 P C 100 has been referred to for the purpose of another point but was not adverted to in connexion with the discussion on the question whether the exclusion should be part of or total.)

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18 (1920) A I R 1920 Mad 793 (791) 52 Ind Cas 725 *Narsimha Deo Garu v
Krishnachandra Deo Garu*

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10 of family property)

15 (1999) A I R 1929 P C 231 (236) 53 Bom 699 56 Ind App 816 118 Ind
 Cas 1 (P C) *Radioba Batoba Vagl v Abirao Bhagwantrao*

16 (1912) 15 Ind Cas 184 (185) (P C) *Jasulal Mahton v Lohs Narayan Mahton*

- 5 The receipt of profits by one member of the family may be quite consistent with the title of the whole. One member of the family may be in receipt of one part of an estate and another may be in receipt of another part of the estate and they may have afterwards in account the one to the other in respect of the excess of receipts over their respective rights. In such a case there is no exclusion.¹⁷
- 6 Refusal to accept an offer of a monthly allowance on the ground of its inadequacy does not amount to exclusion.¹⁸
- 7 A, who was in Government service, had to leave his native village entrusting the entire family property to the management of his undivided brother, B. In 1863 B wrote to A to take up the management of his share but A did not do so. In 1882 he instituted the suit for partition. B pleaded the bar of limitation time running against A since 1863. It was held that the suit was within time as the letter conclusively showed that the possession of B had not been as his own property to the exclusion of A, and that the mere circumstance that A had not continued to participate in profits of the property did not justify the inference that A had subsequent to the date of the letter, been excluded.¹⁹
- 8 If from motives of convenience the members of a joint family reside on different portions of the family property one of the members taking charge of one shop to carry on trade there and another taking charge of another shop to carry on trade there, the member of the family who has the more valuable shop cannot be allowed to set up at the end of twelve years the law of limitation and exclude his brother from participating in the profits of that shop.²⁰
- See also the undermentioned cases.²¹

17 (1878) 19 Suth W R 231 (231) (P C) *Chand Hurree Maates v Rajah Norendro Narain*

18 (1913) 18 Ind Cas 30 (33) 35 All 80 40 Ind App 40 16 Oudh Cas 129 (P C) *Suraj Narain v Iqbal Narain*

19 (1887) 11 Bom 365 (365) *Dinkar Sadashiv v Bhikaji Sadashiv*

20 (1870) 14 Suth W R 228 (228) *Sookh Lal v Dhoojuaia v Goolzar Dhoojuaia*
(1928) 4 I R 1923 Lah 569 (571) 72 Ind Cas 742 *Bhagaran Das v Mt Farbat*

(1907) 11 Cal W N 127 (128) (Notes) *Bluban Mohan v Gourchandra*

(1927) 4 I R 1927 Oudh 265 (274) 104 Ind Cas 587 *Dishunath Kunwar v Sheo Bahadur Singh*

(1908) 4 Nag L R 120 (128) *Ramdayal v Gulabai Bas*

(1869) 6 Bom H O R A C 238 (241) *Sakho Narayan v Narayan Bhikaji*

21 (1907) 11 Cal W N 127 (128) (Notes) *Bluban Mohan v Gourchandra*

The heaviness of the burden will, however, depend upon the facts and circumstances of each case. In *Yellappa v. Tipanna*,² their Lordships of the Privy Council observed as follows:

Under the Act of 1859, apart from the question of exclusion, it was for the plaintiff to show that his suit was commenced within the period of twelve years from the death of the person from whom the property alleged to be joint was said to have descended, or that he had had possession of the share, or that he received payments on account of it. Under the Act of 1871, also, apart from the question of exclusion, the onus was on the defendant to prove that the plaintiff *claimed and was refused* his share within the prescribed period.

- (1894) 18 Bom 197 (202, 203) *Krishnadas v Khargouda* (The plaintiff must be made aware of an intention to exclude him from his rights)
(1910) 8 Ind Cas 930 (933) 4 Sind L R 161, *Meitharam v Renuchand* (Mere assertion that property is self acquired is not enough to show exclusion)

1 (1929) A I R 1929 P O 231 (238) 53 Bom 699 118 Ind Cas 1 56 Ind App 316 (P O), *Radhoba Baloba Vagh v Aburao Bhaguantrao*
(1926) A I R 1926 P O 100 (102) 53 Ind App 220 48 All 529 29 Oudh Cas 316 98 Ind Cas 1013 1 Luck 389 (P C), *Nirmon Singh v Rudra Partab Narain Singh*

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- [See (1901) 24 Mad 441 (443), *Sellam v Chimmammal*]
2 (1929) A I R 1929 P O S (10) 56 Ind App 13 53 Bom 213 114 Ind Cas 13
(P C).

Under the Act of 1877 as well as under the present Act, the question of onus, which arose under the Acts of 1859 and 1871 as aforesaid, does not arise, as time has been made to run from the date when the "exclusion becomes known to the plaintiff." But the onus, which lies on the defendant, is to show that the plaintiff was excluded to his knowledge more than twelve years before suit.³

13. "To enforce a right to share."—The expression "to enforce a right to share" would include not only a right to enforce a right to common enjoyment of the family property, but also a right to claim actual possession of a share by partition.¹ The contrary view expressed in the undermentioned cases,² namely that the Article is restricted to suits to enforce a right to share in the common enjoyment of the property, is, it is submitted, not correct.

A suit for a mere declaration of a right to joint family property, or for such a declaration and injunction, is not a suit to "enforce

- 3 (1869) 11 Suth W R 72 (75) 2 Beng L R A C 284, *Uma Sundari Das v Dwarkanath Roy*
 (1871) 15 Suth W R 400 (401), *Rajoo Singh v Gunesh Monee Burmonee*
 (1872) 17 Suth W R 451 (452), *Prosunno Coomar Mookerjee v Shama Churn Mookerjee*
 (1872) 19 Suth W R 192 (193) 12 Beng L R 219, *Gossain Dass Koondoo v Siroo Koomaree Debia*
 (1875) 23 Suth W R 881 (882), *Kristo Chunder Burmo Surmah v Mohesh Chunder Burmo Surmah*
 (1875) 25 Suth W R 87 (87), *Krishna Dhun Chowdhry v Hur Coomary Chowdhrai*
 (1866) 8 Mad H C R 99 (103), *Govindam Pillai v Chidambara Pillai*
 (1890) 1890 Pun Re No 142, *Pala Mal v Nehal Singh*
 (1875) 1875 Bom P J 851, *Vidyashankar v Ganpatram*
 See also cases cited under Foot Note (1) above

Note 13

- 1 (1929) A I R 1929 P C 231 (233, 238) 56 Ind App 318 53 Bom 699 118 Ind Cas 1 (P C) *Radhoba Baloba v Aburao Bhagwantrao*
 (1929) A I R 1929 P C 1 (3) 113 Ind Cas 897 (P C), *Annamalai Chetty v Subramanian Chetty*
 (1926) A I R 1926 P C 100 (101, 102) 53 Ind App 220 43 All 529 29 Oudh Cas 316 98 Ind Cas 1013 1 Luck 359 (P C) *Nirman Singh v Rudra Pratib Narain Singh*
 (1890) 5 Bom 48 (59 60) 7 Ind App 181 3 Suther 778 3 Shoms L R 217 4 Ind Jur 472 7 Cal L R 320 4 Sar 173 (P C), *Lakshman Dada Naik v Ramchandra Dada Naik*
 (1885) 11 Cal 777 (783, 784) 12 Ind App 112 R & J 90 4 Sar 642 (P C), *Raghunath Bai v Maharaj Bai*
 (1900) 8 Ind Cas 512 (514, 516) (F B) (Mad), *Rangiah Chetty v Subramania Chetty*
 (1891) 15 Bom 135 (143) *Raoji v Bala*
 (1930) A I R 1930 Bom 61 (63) 54 Bom 4 124 Ind Cas 773, *Krishnaji v Annajee*
 2 (1890) 18 All 252 (255) 1891 All W N 83 (F B), *Amme Raham v Zia Ahmad*
 (1912) 15 Ind Cas 394 (396) 15 Oudh Cas 111 *Bisheshar Tewari v Bisheshar Dayal*
 (1892) 15 Mad 186 (191) *Muttakke v Thimmappa*
 (1895) 22 Cal 954 (960) *Mahomed Akram Shaha v Anardi Chowdhrai*
 (1869) 11 Suth W R 192 (193), *Lukhee Monee Dossee v Brojo Bullub Seal*

The right of a member of a Malabar *tarwad* to maintenance is a proprietary right based on co ownership in the property of the *tarwad*. Consequently, the claim to recover the maintenance or the arrears of maintenance falls within this Article, as it is eventually a claim to participate in the joint enjoyment of the *tarwad* property and, therefore, "to enforce the right to share therein" 5

14. Suit to re-open partition.—A suit to re open a partition and to re adjust the shares of the parties thereto on the ground of mistake, is governed by Article 96 and not by this Article¹

15. Starting point of limitation. — Under the Act of 1859, time for such a suit as is contemplated by this Article ran from the death of the person from whom the property alleged to be joint is said to have descended, or from the date of the last payment to the plaintiff on account of the alleged share.¹

Under the Act of 1871, the starting point was the date when the plaintiff claimed and was refused his share.² Under the present

- 3 (1935) A I R 1935 Pesh 95 (97) 157 Ind Cas 845 *Moti Ram v Devi Das*
4 (1933) A I R 1933 Lah 712 (714) 14 Lah 806 141 Ind Cas 409, *Atma Ram*
v Godhu Ram
(1935) A I R 1935 Pesh 95 (96) 157 Ind Cas 845, *Moti Ram v Devi Das*
5 (1936) A I R 1936 Mad 573 (574) 163 Ind Cas 190, *Narayana Tirumampuri*
v Valsa Gorinda
(1912) 14 Ind Cas 883 (885) 36 Mad 203 *Maratadi v Pamakkar*
(1892) 15 Mad 186 (192), *Muttakke v Thimmappa*

1 (1931) A I R 1931 Mad 707 (710) 54 Mad 893 135 Ind Cas 9, *Rama Kotayya v Sundararamayya*
[See (1927) A I R 1927 Nag 350 (350) 104 Ind Cas 493 *Jain v Tulharam*]

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(Held that the plain
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from the property a share of which they claimed, for a period beyond
that prescribed by clause 13)

(1868) 3 Agra 159 (159) *Maksood Ali Khan v Ghaseooddeen Khan* (Do)

2 (1882) 6 Bom 741 (742) *Hars v Maruti*

(1883) 7 Bom 297 (299) 7 Ind Jur 540, *Hansji Chhibra v Valabh Chhibra*

(1877) 3 Cal 229 (231), *Kali Kishore Roy v Dhunnujoy Roy*

Article, the limitation is to be computed from the time when the exclusion from the joint family property *first becomes known to the plaintiff*³ Like Article 118, the date from which the time begins to run is thus a subjective or personal date⁴

16. Suit by a minor. — Time, under this Article, runs when the exclusion becomes *known* to the plaintiff. This is so even in the case of a minor. It cannot be laid down as a proposition of law that no knowledge can be imputed to a minor during his minority. Their Lordships of the Privy Council observe "the view that you cannot impute knowledge to a minor is certainly not in accordance with the facts of the human nature"¹ Time, therefore, will begin to run even against a minor from the date of his knowledge, though by virtue of Section 6 *ante* he would be entitled to file a suit within three years after attaining majority, even if the date of knowledge was beyond twelve years of the suit. Of course, if the date of knowledge is not shown by the defendant to be beyond twelve years of the suit, the suit will not be barred by the mere fact that it was filed more than three years after the plaintiff's attaining majority² In the under-mentioned decision,³ where a suit was brought by the *quondam* minor plaintiff eight years after his attaining majority, it was observed "even if it be held that he became aware of his exclusion from the date of his attaining majority the suit is clearly within time. This decision has to be explained on the assumption that the defendant failed to offer proof of knowledge beyond twelve years of the suit

(1876) 1876 Pan Re No 100 *Mutsadi Mal v Mt Dhan Kour*

3 (1883) 10 All 343 (346) 1883 All W N 38 *Hashmat Begam v Masher Husain*

(1832) 6 Bom 741 (742) *Haris v Varuti*

(1912) 17 Ind Cas 642 (643 644) 37 Bom 64 *Babaji Akoba v Dattu Laxman*

(1881) 8 Cal 653 (655) 6 Ind Jar 637, *Issuridutt Singh v Ibrahim*

(1917) A I R 1917 Oudh 179 (180) 39 Ind Cas 493 *Lala Jagan v Mathura Prasad*

(1897 1901) 2 Upp Bar Rul 458 (459) *Maung Tha Su v Maung Paw*

(1912) 17 Ind Cas 657 (658) 37 Bom 84 *Valkappa v Mudkappa*

[See (1895) 21 Bom 325 (327) *Vishnu Ramchandra v Ganesh Appaji*,
(As to the framing of issue touching the point of limitation.)]

(1895) 11 Cal 777 (783 784) 12 Ind App 112 4 Sar 64^o (P C)
Raghunath Bali v Maharaj Bali]

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Note 16

1 (1924) A I R 1924 P O 137 (141) 51 Ind App 290 45 Bom 411 "9 Ind Cas 971 (P C) *Kalyandappa v Chanbasappa*

(1920) A I R 1920 Mad 793 (797) 52 Ind Cas 725 *Narasimla Deo Caru v Krishnachandra Deo Caru*

2 (1899) 2 Oudh Cas 348 (350) *Lal Gauri Kant v Shankar Balhish Singh* (Of doubtful authority on another question. See Note 3)

3 (1929) A I R 1929 All 302 (305) 116 Ind Cas 849 *Aranjan Prasad v Behari Lal*

Article 127
Notes
13—15

a right to share" in the joint family property.³ Such a suit would not also be maintainable under the Proviso to Section 42 of the Specific Relief Act, 1877, when the plaintiff has been excluded from possession.⁴

The right of a member of a *Malabar tarwad* to maintenance is a proprietary right based on co ownership in the property of the *tarwad*. Consequently, the claim to recover the maintenance or the arrears of maintenance falls within this Article, as it is eventually a claim to participate in the joint enjoyment of the *tarwad* property and, therefore, "to enforce the right to share therein".⁵

14 Suit to re-open partition.—A suit to re open a partition and to re adjust the shares of the parties thereto on the ground of mistake, is governed by Article 96 and not by this Article.¹

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Under the Act of 1871, the starting point was the date when the plaintiff claimed and was refused his share.² Under the present

- 3 (1935) A I R 1935 Pesh 95 (97) 157 Ind Cas 845 *Moti Ram v Devi Das*
4 (1933) A I R 1933 Lah 712 (714) 14 Lah 306 141 Ind Cas 409 *Atma Ram v Godhu Ram*
(1935) A I R 1935 Pesh 95 (96) 157 Ind Cas 845 *Moti Ram v Devi Das*
5 (1936) A I R 1936 Mad 578 (574) 163 Ind Cas 190 *Narayana Tirumampu v Iala Govinda*
(1912) 14 Ind Cas 883 (885) 36 Mad 203 *Maravadi v Pamakkar*
(1892) 15 Mad 186 (192), *Uttiakke v Thimmappa*

Note 14

- 1 (1931) A I R 1931 Mad 707 (710) 54 Mad 863 135 Ind Cas 9 *Rama Kotayya v Sundaramayya*
[See (1927) A I R 1927 Nag 350 (350) 104 Ind Cas 493 *Jain v Tukaram*]

Note 15

- 1 (1864) 1864 Suth W R 349 (350) *Madhub Dyal v Panchanun Dyal*
(1866) 6 Suth W R 170 (170) *Bjdonath Ojha v Gopal Mal*
(1874) 21 Suth W R 130 (131) *Anund Chunder Pooshalee v Mokta Kishes Dabla*

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from the property a share of which they claimed for a period beyond that prescribed by clause 13)

- (1868) 3 Agra 158 (159) *Maksood Ali Khan v Ghaseooddeen Khan* (Do)
2 (1882) 6 Bom 741 (742) *Hari v Maruti*
(1883) 7 Bom 297 (299) 7 Ind Jur 540 *Hansji Chhida v Valabh Chhida*
(1877) 3 Cal 228 (231) *Kali Kishore Roy v Dhunmunjoy Roy*

Held that the plain-
tiff received nothing

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Article 127
Notes
15—16

16. Suit by a minor. — Time, under this Article, runs when the exclusion becomes *known* to the plaintiff This is so even in the case of a minor It cannot be laid down as a proposition of law that no knowledge can be imputed to a minor during his minority Their Lordships of the Privy Council observe "the view that you cannot impute knowledge to a minor is certainly not in accordance with the facts of the human nature"¹ Time, therefore, will begin to run even against a minor from the date of his knowledge, though by virtue of Section 6 *ante* he would be entitled to file a suit within three years after attaining majority, even if the date of knowledge was beyond twelve years of the suit Of course, if the date of knowledge is not shown by the defendant to be beyond twelve years of the suit, the suit will not be barred by the mere fact that it was filed more than three years after the plaintiff's attaining majority² In the under mentioned decision,³ where a suit was brought by the *quondam* minor plaintiff eight years after his attaining majority, it was observed "even if it be held that he became aware of his exclusion from the date of his attaining majority the suit is clearly within time This decision has to be explained on the assumption that the defendant failed to offer proof of knowledge beyond twelve years of the suit

(1870) 1870 Fm Re No 100 *Utsadi Mal v Mt Dhan Kour*

3 (1888) 10 All 343 (346) 1888 All W N 33 *Hashmat Begam v Mazher Husain*

(1882) 6 Bom 741 (742) *Hari v Varul*

(1912) 17 Ind Cas 642 (643 644) 37 Bom 64 *Babaji Akoba v Dattu Lazman*

(1881) 8 Cal 653 (655) 6 Ind Jur 637, *Issuridutt Singh v Ibrahim*

(1917) A I R 1917 Oudh 179 (180) 89 Ind Cas 498 *Lala Jagan v Mathura Prasad*

(1897 1901) 2 Upp Bur Rul 458 (459) *Maung Tha Su v Maung Paw*

(1912) 17 Ind Cas 657 (658) 37 Bom 84 *Mallappa v Mudhappa*

(See (1895) 21 Bom 325 (327) *Vishnu Ramchandra v Ganesh Appaji* (As to the framing of issue touching the point of limitation)

(1885) 11 Cal 777 (783 784) 12 Ind App 112 4 Sar 642 (P C) *Raghunath Bali v Mal araj Bali*

4 (1924) A I R 1924 P C 137 (141) 51 Ind App 220 48 Bom 411 79 Ind Cas 971 (P C) *Kalyandappa v Chanbasappa* (This was a decision on the interpretation of Article 118 under which the time runs from the knowledge of the plaintiff)

Note 16

1 (1921) A I R 1924 P C 137 (141) 51 Ind App 220 43 Bom 411 79 Ind Cas 971 (P C) *Kalyandappa v Chanbasappa*

(1920) A I R 1920 Mad 793 (797) 52 Ind Cas 725 *Narasimha Deo Garu v Krishnachandra Deo Garu*

2 (1899) 2 Oudh Cas 348 (350) *Lal Gauri Kant v Shankar Balhsh Singh* (Of doubtful authority on another question See Note 3)

3 (1929) A I R 1929 All 302 (303) 116 Ind Cas 849 *Nivanyan Prasad v Behari Lal*

Article 127
Notes
16—17

and it cannot be said that the High Court wanted to lay down as a proposition of law that no knowledge can be imputed to a minor during his minority.

It has been held in the undermentioned decision⁴ by the Madras High Court that where there is a guardian, knowledge of the guardian should be imputed to the minor.

17. Section 28 and this Article. — Where a suit is barred under this Article, the right to the property itself gets extinguished under Section 28, *ante*¹

Article 128

128. By a Hindu for arrears of maintenance.	Twelve years.	When the arrears are payable.
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Article 129

129. By a Hindu for a declaration of his right to maintenance.	Twelve years.	When the right is denied.
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Articles 128 and 129.

Synopsis

1. Legislative changes
2. Scope of the Articles.
3. Article 128 distinguished from Article 129.
4. "By a Hindu."
5. Arrears of maintenance.
6. Right to maintenance.
7. "When the right is denied."

* Act of 1877, Articles 128, 129

Same as above

Act of 1871, Article 128

128 By a Hindu for maintenance	Twelve years	When the maintenance sued for is claimed and refused
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4 (1920) A I R 1920 Mad 793 (798) 52 Ind Cas 725, *Narasimha Deo Garu v Krishnachandra Deo*

Note 17

1 (1882) 8 Cal 919 (921) 7 Ind Jur 85 (P C) *Ram Soonder Roy v Ramsahye Bhugut*

(1903) 27 Mad 192 (196) 18 Mad L Jour 341, *Ramanathan Chetti v Murugappa Chetti*

(1914) 1 I R 1914 Mad 440 (443) 38 Mad 684 22 Ind Cas 555 *Nanjaya Mudali v Shanmuga Mudali*

(1921) A I R 1921 Mad 24 (27) 44 Mad 131 60 Ind Cas 583 *Atchamma v Dapiah* (Right to property extinguished under S 28 — Right of survivorship of the excluded member is also lost)

[But see (1866) 8 Mad H C R 99 (103) *Govindan Pillai v Chidambaram Pillai* (Decision under Act of 1859 wherein there was no corresponding Section to the present Section 28)]

Articles 128 and 129.

Articles
128 & 129
Notes
1—2

1. Legislative changes.

1. Clause 13 of Section 1 of the Act of 1859 which corresponded to these Articles applied only to cases where maintenance claimed was a specific charge on the inheritance of any estate¹ in other cases, clause 16 of Section 1, which gave six years from the accrual of the cause of action, was applied²
- 2 Article 128 of the Act of 1871 did not provide for a suit for arrears of maintenance, but ran as follows —“By a Hindu for maintenance—twelve years, when the maintenance sued for is claimed and refused ” It was held in the undermentioned case³ that this Article was not intended to define or create cause of action, but simply to lay down the period within which an existing right may be enforced

2. Scope of the Articles —The corresponding provision of the Limitation Act of 1859, namely Section 1 clause 13, applied to suits for the recovery of maintenance, whether the right to receive maintenance arose out of the general Hindu law, or out of a specific deed granting such maintenance¹ Articles 128 and 129 apply only where the maintenance is claimed not on the basis of contract but *on the basis of status of the plaintiff under the Hindu law*^{1a} A claim for maintenance based solely on contract will be

Act of 1859, Section 1 clause 13

To suits for the recovery of maintenance where the right to receive

management of such property or estate on account of such maintenance

Articles 128 and 129.

Note 1

- 1 (1865) 4 Suth W R 84 (84) *Bynode Chatterjee v Luckhee Monee Debta*
(When the right to have such maintenance is a charge not on the estate of a deceased person but on the estate of a living person clause 13 Section 1 of Act 14 of 1859 can have no application)
- (1868) 5 Bom H C R A C 130 (132) *Timmappa Bhat v Parmeshriamma*
- (1868) 4 Mad H C R 137 (138) *Abbakku v Ammu Shettati*
- (1879) 6 Ind App 114 (118) 3 Bom 415 3 Ind Jur 332 2 Shome L R 274
3 Shome L R 190 3 Suther 617 4 Sar 24 6 Cal L R 162 (P C)
Narayanrao Ramchandra v Ramabai
- (1899) 12 Mad 347 (349) *Ramanamma v Sambayya*
- 2 (1878) 2 Bom 637 (638) *Kala Nilakanth v Lakshmi Bai*
- 3 (1879) 3 Bom 207 (209) 3 Ind Jur 566 1879 Bom P J 261 *Jit v Ramji Bai*; *Chowdhuri*

Note 2

- 1 (1864) 1864 Suth W R (Gap) 13 (13) *Bamasoondery Debea v Shama Soondery Debea*
- 1a (1896) 23 Cal 645 (663) *Girijanund Datta Jha v Sailajanund Datta Jha*
(1936) A I R 1936 Pat 158 (159) 161 Ind Cas 478, *Debu Ramji Das v Mahamaya Prasad*
(1915) A I R 1915 Cal 550 (557) 26 Ind Cas 939 *Narendra Chandra Lahari v Nalini Sundari Debi*

Articles
128 & 129
Notes
2-4

governed by Article 115 or Article 116² And, if the maintenance is made a *charge* upon an immovable property, a suit to enforce such a charge would be governed by Article 132³

Whenever the *right* to maintenance is founded on the Hindu law, these Articles will apply, even if the *rate* of maintenance is fixed by an agreement In this view, it is submitted, the following decision⁴ is open to doubt Whether the suit is based upon Hindu law or upon a contract is to be determined from the nature of the plaint⁵

3. Article 128 distinguished from Article 129.—A *right to maintenance* is a right which accrues on the happening of a certain event, and is not a *recurring* right but is a *constant* one till the happening of some other event which determines it On the other hand, a *right to recover arrears of maintenance* is a *recurring right* unless maintenance is fixed by the parties at one consolidated sum¹

The cause of action for a suit to recover arrears of maintenance accrues from time to time according to the want and exigencies of the person entitled²

4. "By a Hindu."—Articles 128 and 129 govern those cases in which the maintenance or the arrears thereof is claimed by virtue of a right based upon the general Hindu law and not upon a contract The words "by a Hindu" should be taken to mean "by a person claiming under the Hindu law"¹ The term Hindu does not admit of any exact definition, all that can be said is that if a person is born a Hindu, mere deviation from orthodoxy is not sufficient to deprive him of Hindu status He might continue to possess it even if he

2 See the cases cited in Foot Note (1a) above

3 (1883) 9 Cal 845 (951) 13 Cal L R 830 10 Ind App 45 4 Sar 442 7 Ind Jur 443 R & J 72 (P O), *Ahmed Hossein Khan v Nihal ud din Khan* (Suit between Muhammadan brothers)

4 (1924) A I R 1924 Nag 176 (177) 75 Ind Cas 833, *Bhonajee v Saraswati*.

5 (1934) A I R 1934 Pat 99 (101, 102) 12 Pat 869 149 Ind Cas 733, *Saraswati Kuer v Sheoratan Kuer*.

(1936) A I R 1936 Mad 573 (574) 163 Ind Cas 190, *Narayana v Yaha Govinda*

Note 3

1 (1921) A I R 1921 Lah 121 (123) 2 Lah 243 64 Ind Cas 892, *Charanjit Singh v Amar Ali Khan*

2 (1879) 3 Bom 415 (420) 6 Ind App 114 6 Cal L R 162 9 Ind Jour 332 2 Shome L R 274 3 Shome L R 190 3 Suther 617 4 Sar 24 (P C), *Narayana Rao Ramchandra v Ramabai*

(1863) 2 Mad H C R 36 (37), *Venkopadhaya v Kaveri Hengusu*

Note 4

1 (1896) 23 Cal 645 (663), *Gurijanund Datta Jha v Silajanund Datta Jha*
(1878) 2 Bom 624 (629), *Sidlingappa v Sidata* (The liability to maintain under the Hindu law arises out of the jural relation of the Hindu family and has no connexion with contract)

(1936) A I R 1936 Pat 158 (159) 161 Ind Cas 478, *Dabu Ramji Das v Rai Mahamaya Prasad*

[See (1929) A I R 1929 Lah 872 (873) 121 Ind Cas 428 11 Lah 99, *Parshotam v Balwant*]

becomes a member of Brahmo Samaj or accepts the religious persuasion of the Sikhs or the Jains or at times worships with Buddhists²

The effect of the words 'by a Hindu' in these Articles excludes from their application not only a suit for maintenance brought by one who is *not* a Hindu,³ but also a suit brought by one who though a Hindu is not entitled to maintenance *under the Hindu law*⁴. As to persons who are entitled to maintenance under the Hindu law see the undermentioned cases⁵

5 Arrears of maintenance — In order to recover arrears of maintenance, it is necessary to prove that there was a *wrongful withholding* of maintenance for the period for which the arrears are claimed¹. *Mere non payment* of maintenance is not a *conclusive* proof of wrongful withholding. But it constitutes *prima facie* proof of wrongful withholding and if it is coupled with a denial of the plaintiff's right to maintenance, it may become a sufficient proof of wrongful withholding to entitle the plaintiff to claim arrears of maintenance².

- 2 (1903) 31 Cal 11 (32-33) 30 Ind App 249 7 Cal W N 895 5 Bom L R 345 13 Mad L Jour 331 1903 Pun Re No 84 1903 Pun L R 135 8 Sar 543 (P C) *Bhagwan Koer v J C Bose*
- (1922) A I R 1922 P C 197 (200) 49 Cal 310 66 Ind Cas 609 48 Ind App 553 11 Low Bur Bul 155 (P C) *Ma Yau v Maung Chit Maung*
- (1928) A I R 1926 Lah 100 (106) 94 Ind Cas 695 7 Lah 275 *Basant Das v Hem Singh* (Udasis constitute a sect of Sikhism—They are Hindus) [See (1927) A I R 1927 Pat 145 (159) 6 Pat 506 106 Ind Cas 620 *Ishwari Prasad v Hari Prasad Lal*]
- 3 (1919) A I R 1919 Bom 37 (37) 51 Ind Cas 968 *Ali Mohamed v Fatima Mohamed* (Claim for maintenance by a Muhammadan — Article 61 applied)
- 4 (1915) A I R 1915 Cal 550 (551) 26 Ind Cas 939 *Narendra Chandra v Nalini Sundari* (Article 128 does not apply when claim is by stranger to family—Widow of invalidly adopted son is not member of family)
- 5 (1896) 20 Bom 181 (183-189) *Maharaja Shri Fatesangji v Kutar Hari sangji* (Right of maintenance in impartible estate)
- (1918) A I R 1918 P C 81 (83) 41 Mad 778 45 Ind App 148 47 Ind Cas 354 (P C) *Rama Rao v Rajah of Piltapur* (Impartible zamindari — Suit for maintenance by an adopted son of the late Rajah against the present Rajah)
- (1903) 27 Mad 13 (15) *Lingappa Goundan v Yesudasan* (Claim by illegitimate son of a Hindu by a woman not a Hindu to maintenance)
- (1902) 29 Cal 557 (570-576) 6 Cal W N 530 *Siddensury v Janardhan* (Widowed daughter in law — Moral obligation of the father in law — Legal obligation of his heir)

Note 5

- 1 (1893) 18 Mad 403 (405) *Seshamma v Subbarayadu*
- 2 (1900) 24 Mad 147 (154, 155) 27 Ind App 151 5 Cal W N 74 10 Mad L Jour 294 2 Bom L R 945 7 Sar 761 (P C) *Mallikarjuna Prasada Nayadu v Durga Prasada Nayadu* (Revering 17 Mad 86°)
- [See (1885) 10 Bom 327 (338) 11 Ind Jnr 21 *Ramrao Trimbaik v Ishwantsrao Madhavrao*]
- [See also (1879) 12 Beng L R 238 (248) Ind App Sup Vol 203 20 Suth W R 21 3 Sar 259 (P C) *Paja Prithvi Singh v Pani Rajkooer*]

Articles
128 & 129
Notes
4-5

Articles
128 & 129
Note 5

It is not necessary to prove a demand for each year's maintenance as it became payable.⁵ While a demand is allowed to be *prima facie* evidence of need on the plaintiff's part, it is not in a demand that the right to obtain the arrears of maintenance is rooted.⁴

Wrongful withholding of maintenance constitutes a cause of action. The withholding of maintenance may be proved otherwise than by a demand and refusal,⁵ that is by any circumstances which would amount to a refusal of maintenance.⁶

Arrears of maintenance can be claimed for any number of years within the period of limitation, unless abandonment or waiver is expressed or can be implied from the circumstances of the case.⁷ However, it must first be proved that the plaintiff is entitled to maintenance under the general Hindu law.⁸ And even on such proof, the grant of arrears is a matter within the discretion of the Court and the Court may for sufficient reasons refuse to award any arrears, or may award arrears at a rate lower than that fixed for payment in the future.⁹ As to circumstances when arrears of maintenance may be totally refused by the Court, see the undermentioned cases.¹⁰

- 3 (1900) 21 Mad 147 (154 155) 27 Ind App 151 5 Cal W N 74 10 Mad L Jour 294 2 Bom L R 945 7 Sar 761 (P O) *Mallikarjuna v Raja Venkata Ramalingamma*
(1911) 10 Ind Cas 110 (111) (Mad) *Rangathayi v Nelli Munuswamy*
(1911) 12 Ind Cas 708 (708) 36 Bom 181 *Parvathi Bai Bhagirath v Chattru Limbaji*
4 (1918) A I R 1918 Bom 122 (122) 43 Bom 66 47 Ind Cas 623 *Karbasappa v Kallava*
(1900) 24 Mad 147 (155) 27 Ind App 151 5 Cal W N 74 10 Mad L Jour 294 2 Bom L R 945 7 Sar 761 (P O) *Mallikarjuna Prasada Nayadu v Durga Prasada Nayadu*
5 (1879) 6 Ind App 114 (119) 3 Bom 415 3 Ind Jur 832 2 Shome L R 274 3 Shome L R 190 3 Suther 617 4 Sar 24 6 Cal L R 162 (P O) *Narayan Rao Ramachandra v Ramabai*
6 (1892) 17 Bom 45 (48) *Motilal Prannath v Bai Kashi*
7 (1928) A I R 1928 Mad 561 (562) 107 Ind Cas 641 *Krishnamacharsar v Chellammal*

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[See also (1894) 20 Bom 181 (188 189) *Fatesangji Javatsangji v Harisangji Fatesangji* (Right of maintenance in impartible estate)]

- 8 (1934) A I R 1934 Pat 99 (103) 12 Pat 869 149 Ind Cas 735 *Saraswati Kuer v Sheoratan Kuer*
9 (1899) 21 All 183 (185 186) 1899 All W N 22 *Raghubans Kunwar v Bhagwant Kunwar* (Eleven years delay in bringing the suit for arrears of maintenance—Arrears at Rs 16 and future maintenance at Rs 80 a month allowed)
(1918) A I R 1918 Bom 122 (122) 43 Bom 66 47 Ind Cas 623 *Karbasappa v Kallava*
(1893) 18 Mad 403 (404) *Seshamma v Subbarayadu*
10 (1928) A I R 1928 P C 187 (190) 110 Ind Cas 80 (P O) *Naganna Nayudu v Rajyalakshmi Devi* (A I R 1925 Mad 757 Reversed)

6. Right to maintenance — A claim by a junior member of a *tarwad* against the *karnavan* to enforce his right to participate in the joint enjoyment of the *tarwad* property is not a suit relating to maintenance but is one for the enforcement of a right to or in immovable property. The right to maintenance in a Malabar *tarwad* is the mode in which the right of ownership is enforced. Hence a suit for maintenance by a junior member of a *tarwad* is one that by its nature falls under Article 127 as a suit to enforce the right to share in joint family property and not one under Article 129¹.

As to whether a decree can be passed for future maintenance, see the case² cited below.

7. "When the right is denied." — Time runs from the date when the right is denied, that is when there is a formal and final refusal on the part of the defendant of the right of the plaintiff for maintenance¹.

Even where the suit to establish a right to maintenance is barred, the right is not extinguished and a *defence* of a right to maintenance will not be barred².

It is for the defendant who sets up the bar of limitation to prove the denial at a time beyond the period prescribed³.

130.* For the resumption or assessment of rent-free land	Twelve years	When the right to resume or assess the land first accrues	Article 130
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* Act of 1877, Article 130

Same as above

Act of 1871, Article 130

Same as above with an additional proviso which ran — Provided that no such suit shall be maintained where the land forms part of a permanently settled estate and has been held rent free from the time of the Permanent Settlement

(1889) 12 Mad 183 (185 186) *Yenkanna v Aslamma*

(1900) A I R 1920 Lah 306 (308) 1919 Pun Re No 147 55 Ind Cas 2 *Mt Bholi Bai v Mt Chimni Bai*

Note 6

- (1912) 14 Ind Cas 383 (385) 36 Mad 203 *Maravadi v Pamakkar*
- (1903) 13 Mad L Jour 499 (499) *Achulan Nair v Kunjunnai Nair*
- (1891) 19 Cal 139 (145 146) (F B) *Ashutosh Bannerjee v Lulhomon Debbya*

Note 7

- (1896) 90 Bom 181 (189) *Fatesang, Jaswatsangji v Harisangji, Fatesangji*
(1899) 12 Mad 347 (349) *Ramanamma v Sambayya*
- (1924) A I R 1924 Cal 864 (366) 73 Ind Cas 235 *Gopal Chandra v Kadam bini Das*
- (1914) A I R 1914 Mad 457 (457) 23 Ind Cas 831 *Rangappa Kalaka v Kulandai Ayal*

Article 130
Note 1

Synopsis

1. Scope of the Article.
2. Right first accrues.
3. Right of resumption of land.
4. Denial of liability to assessment.
5. Effect of bar under this Article.
6. Revenue sale.
7. Suits by Government.

1. Scope of the Article.—The Article applies to suits for the resumption or assessment of *rent-free* land. Unless and until the tenure in question is found to be a *rent free* tenure, this Article has no application¹. In other words, a suit for the assessment of land presumably *liable* to be assessed is not covered by this Article². Where the land is *not rent free* and the relationship of landlord and tenant exists, the right to have fair rent assessed continues so long as the relationship continues³ and mere non-payment of rent for a period does not bar the landlord's right to have the rent assessed and to recover the rent from the tenant⁴.

Act of 1859, Section 1 clause 14

Limitation of twelve years Suits by proprietor of land to resume or assess lakheraj or rent free land. Provided if the land has been held rent free from the time of the Permanent Settlement

To suits by the proprietor of any land or by any person claiming under him, for the resumption or assessment of any lakheraj or rent free land — the period of twelve years for claiming the ri — the period of some person provided that in

Article 130 — Note 1

- 1 (1919) A I R 1919 Cal 885 (886) 47 Ind Cas 420 *Kamini Sundari v Abdul Halim* (Record of Rights in this case stated that though no rent was paid at the moment the land was *liable* to pay rent)
- (1923) A I R 1923 Cal 392 (393) 72 Ind Cas 829, *Akbar Sarcar v Ramesh Chandra Moitra*
[See (1914) A I R 1914 Cal 270 (272) 21 Ind Cas 415 *Keshwar Bhagat v Sheo Prasad Lal*]
- 2 (1919)
- (1919) A I R 1919 Cal 885 (886) 47 Ind Cas 420 *Kamini Sundari v Abdul Halim*
- 3 (1932) A I R 1932 Cal 41 (42) 133 Ind Cas 693 *Gour Sundar Majumdar v Krishna Kamini Chaudhuran*
- 4 (1923) A I R 1923 Cal 392 (393) 72 Ind Cas 329 *Akbar Sarcar v Ramesh Chandra Moitra*
(1912) 16 Ind Cas 365 (366) 40 Cal 173 *Prosonna Kumar Mukherjee v Srisanthia*
(1878) 2 Cal L R 569 (570), *Protap Chunder Chowdhry v Shukhee Soonduree Dassee*

2. Right first accrues.—Where a cause of action for resumption or assessment has arisen in favour of a particular person, time begins to run from that date and the fact that the plaintiff succeeds to such person will not give him a fresh starting point of limitation¹ So also, the mere recognition of the plaintiff's right to resumption contained in a *wajib-ul-urz* does not amount to a grant so as to give plaintiff a new starting point for the right of resumption²

A suit for assessment must be brought within twelve years of the date on which the land became liable to assessment³ A decree declaring certain lands to be liable to resumption and assessment in a prior suit between the parties gives new starting point of limitation for a subsequent suit for actual assessment⁴

3. Right of resumption of land.—In suits for resumption of land granted to the defendant for life, the right to resume arises on

(See (1916) A I R 1916 Bom 273 (274) 40 Bom 606 30 Ind Cas 505, *Madhavrao v Ansuabai*)

(1913) 19 Ind Cas 64 (65) (Cal), *Chintamani Dutt v Jogeshur Bhattacharya*

(1868) 10 Suth W R 461 (461), *Dhunput Singh v Russomoyee Chowdhraim* (Presumption of 'rent free' from continued non payment of rent discussed)

(1921) A I R 1921 Bom 175 (176) 60 Ind Cas 392 45 Bom 636, *Bhim Bai v Siamu Rao* (There must be some overt act, such as refusal to pay rent))

Note 2

1 (1874) 23 Suth W R 24 (24), *Mt Bunnoo v Moulvie Ameerooddeen* (Plaintiff a purchaser from Government)

(1864) 1 Suth W R 197 (198), *Nirunjun Acharjee v Kurali Charn Banerjee* (Putneedar deriving title from zamindar whose right to resume lapsed)

(1865) 8 Suth W R 83 (36) *Krishto Mohundoss Bukshee v Joy Kishen Mookerjee* (Do)

(1871) 15 Suth W R 436 (436) *Gunga Ram Chowdhry v Huree Nath Chowdhry* (Do)

(1864) 1864 Suth W R 170 (170), *Sheikh Busseeroodeen v Shubpersad Chowdry* (Suit by dar putneedar who purchased at a sale—Limitation does not begin from date of sale but from the time when the right accrued to predecessor)

(1866) 3 Mad H O R 67 (68), *Sri Raja Seta Rama Krishna Nayudappa Ranga Rao Bahadur Garu v Sri Jagunthi Salayamma Garu*

2 (1867) 2 Agra 189 (189), *Dayum Khan v Thunsookh Rai*

3 (1896) 1896 Bom P J 602 *Nasartangi Jehangirji Wadia v Sir Jamselji Jyishoy* (The land became assessable in 1879 80, ever since then the defendant refused to pay assessment)

4 (1889) 16 Cal 449 (455), *Bir Chunder Manikya v Rajmohun Goswami*

(1889) 16 Cal 450n (452), *Nil Komul Chuckerbuly v Bir Chunder Manikya* (See (1871) 15 Suth W R 474 (475, 476) *Rajah Suttyanund Ghossal v Hur Kishore Dutt*)

(1872) 17 Suth W R 363 (364) 3 Beng L R App 82, *Sowdaminee Debee v Suroopchunder Roy*)

(But see (1870) 1870 A C L R 500 1870 A C L R 500 1870 A C L R 500)

Article 130

Notes

3—4

the death of the grantee ¹

An unequivocal demand for possession as to operate as a final election of the landlord to re-enter, constitutes the starting point of limitation for an action for resumption ²

In the case of lands granted for aervice, the *refusal* to perform the service gives the cause of action for resumption ³ The *mere non-performance* of the aervice does not, by itself, make the possession of the holder adverse to the plaintiff ⁴ A grant created by a zamindar for *personal* aervices to be rendered would be *prima facie* resumable when the services are dispensed with, ⁵ but in such a case the plaintiff is not entitled to resume the grant before he gives the grantee *notice dispensing with his services* ⁶ It would also seem to be necessary in such cases to establish that, on the terms of the grant, it was resumable by remission of service ⁷

A grant rent-free for a particular purpose cannot be resumed so long as the purpose continues and no right of resumption or assessment arises ⁸

Where a grant of land making the grantee exempt from the payment of the Government revenue is void under law, the land is resumable ⁹

4. Denial of liability to assessment.—In suits for assessment of rent, the cause of action may arise upon a distinct notice of the tenant's claim to hold the land rent-free, ¹ that is, a hostile claim to

Note 3

- 1 (1924) A I R 1924 Pat 293 (299) 71 Ind Cas 929, *Mahdeo Asram v Jagatray Kuer*.
- 2 (1924) A I R 1924 Pat 449 (450) 3 Pat 320 78 Ind Cas 474, *Kamakshya Narain Singh v Suraj Nath Misra*
- 3 (1929) A I R 1929 Pat 433 (436) 9 Pat 425 123 Ind Cas 630 *Nirmal Kumar v Surjan Dushadh*
- 4 (1922) A I R 1922 Pat 541 (542) 1 Pat 292 69 Ind Cas 703 *Nand Lal Sahu v Shrinivas Hukum Singh*
(1899) 22 Bom 602 (604, 606 607) 1 Bom L R 61, *Komargowda v Bhimaji*
(There must be a refusal to perform service or a claim to hold the land free of service)
- 5 (1895) 22 Cal 938 (942), *Radha Pershad v Budhu Dashad*
- 6 (1895) 22 Cal 938 (942), *Radha Pershad v Budhu Dashad*
- 7 (1877) 1 Bom 586 (589) 1 Ind Jur 619, *Ketal Kuler v Talukhdari Settlement Officer*
- 8 (1912) 13 Ind Cas 513 (515) 39 Cal 439 *Birendra Kishore v Akramah*
(Grant to certain tenants to construct embankments to a silted up tank and to re excavate the tank—Tank excavated and kept up)
- 9 (1880) 2 All 545 (550, 551, 554) (F B) *Jaganath Pandey v Prag Singh*
(S 10, N W P Regulation 19 of 1793 S 30, Act 18 of 1873 and S 79, Act 19 of 1873—Length of possession by grantee is immaterial see page 550)
[See (1868) 9 Sath W R 1 (2) Beng L R Sup Vol 774 (F B) *Mahomed Akil v Asadunnissa Debee*]

Note 4

- 1 (1926) A I R 1926 Cal 683 (685, 686) 25 Ind Cas 622, *Devendra Narain v Jhumur Pramank*

the knowledge of the plaintiff.² The same principle would apply in suits for resumption.³

At the preparation of the Record of Rights the defendants claimed to be entitled to hold the lands without payment of rent. Their contention was, however, overruled and an entry in the Record was made that the land was not exempt from payment of rent. It was held that a suit for assessment of rent, instituted more than twelve years after the above infructuous assertion of the right of the defendants, was not barred.⁴ In a similar case, where in the Record of Rights no actual decision of the question was made by the Settlement Officer but the tenant was entered as a settled raiyat and no rent had been assessed, it was held that limitation ran from the date of the Record of Rights.⁵

5. Effect of bar under this Article.—The effect of not suing within the period prescribed is to create rights by adverse possession in a party who has proved possession of the lands without any stipulation for rent for over the said period.¹ The reason is that a

2 (1916) A I R 1916 Cal 880 (880) 32 Ind Cas 856, *Birendra Kishore v Ram Kumar Chakkravarthy*

(1915) A I R 1915 Cal 386 (387) 30 Ind Cas 696, *Birendra Kishore v Lakshmi*

(1915) A I R 1915 Cal 527 (528) 31 Ind Cas 391, *Kali Mohan Tripura v Birendra Kishore* (Claim in settlement proceedings)

(1912) 13 Ind Cas 517 (518) (Cal) *Birendra Kishore v Dulwar Ali*

(1912) 13 Ind Cas 518 (519) 39 Cal 453, *Birendra Kishore v Roshan Khan*.

(1933) A I R 1933 Pat 596 (597) 145 Ind Cas 949, *Kisho Prasad Singh v Tribeni Sahas*

(1938) A I R 1936 Cal 289 (291) 9 R Cal 589 (590 591) 166 Ind Cas 821, *Chandra Kumar De v K C Mukherjee, Official Receiver* (Limitation begins only from the time of the landlord's knowledge that tenant is holding land without payment of rent)

[See (1915) A I R 1915 Cal 416 (416) 30 Ind Cas 917, *Birendra Kishore v Nasir Mahomed*]

3 (1878) 3 Cal 793 (796), *Pelamber Baboo v Nilmony Singh Deo*

4 (1918) A I R 1918 Cal 784 (785) 38 Ind Cas 469 *Birendra Kishore v Fuljan Bidi* (This was not a suit in respect of rent free land)

5 (1912) 15 Ind Cas 64 (64) (Cal), *Aman Gazi v Birendra Kishore*

Note 5

1 (1924) A I R 1924 Cal 693 (694 697) 51 Cal 135 81 Ind Cas 493, *Sailaja Nath Ray v Reshes Case Law*

(1915) A I R 1915 Cal 835 (836) 30 Ind Cas 948 (F B) *Birendra Kishore v Ramachandra Dey* (Suit for assessment of rent—No relationship of landlord and tenant alleged—Defendant claiming rent free title for over twelve years)

(1914) A I R 1914 Cal 820 (821) 24 Ind Cas 319, *Jafar Ahmed v Birendra Kishore* (Do)

v Anusuvabas

(1933) A I R 1933 Pat 596 (597) 145 Ind Cas 949, *Kesho Prasad v Tribeni Sahas*

(1866) 1 Agra Rev 33 (40), *Bhagoutee Charan v Baboo Shiva Pershad* (Rent-free holder encroaching on adjoining land and enjoying it for over twelve years—Suit for assessment or resumption barred)

Article 130
Notes
5—7

suit to resume or to levy assessment on rent free lands is a suit really for possession within the meaning of Section 28 of the Limitation Act ²

A distinction has to be drawn between a claim of adverse possession in respect of the absolute interest and that in respect only of a limited interest as a tenant. In the latter case, a claim for assessment of rent will not be barred except as provided by Article 130 ³

The different periods in respect of two different claims cannot be tacked on to raise a plea of adverse possession in a suit for assessment of rent ⁴

A tenant, however, is not precluded from asserting adverse possession in respect of land which was not part of his tenure originally but which was a later accretion held by him adversely to the plaintiff ⁵

6. Revenue sale.—Where, under any enactment for the time being in force, a sale held for arrears of revenue is subject to all incumbrances a claim by adverse possession acquired prior to such sale has been held to be an "incumbrance" ¹ and in such a case though a suit for assessment or resumption may not be barred as such, under this Article, the claim by adverse possession will prevail as an incumbrance as aforesaid ²

7. Suits by Government.—A suit by the Government or by an auction purchaser claiming under the Government for resumption or assessment is not governed by this Article but by Article 149 ¹

(See (1933) A I R 1933 All 624 (625) 150 Ind Cas 264 *Tika v Bibi Kalsumunnissa*)

(1915) A I R 1915 Cal 422 (423) 80 Ind Cas 946, *Birendra Kishore Manikya v Anandapriya Baishanabi*

(1915) A I R 1915 Cal 557 (558) 30 Ind Cas 942, *Birendra Kishore Manikya v Ramcharan Dass*

(1909) 4 Ind Cas 494 (494) (Cal) *Pran Krishna Shaha v Naba Kumar Chowdhary* (Lakheraj title obtained by claim of adverse possession as Lukherajdars)

(1875) 24 Suth

(1865) 4 Suth

(1866) 6 Suth

(1866) 7 Suth

v Kishroo Mundur]

2 (1921) A I R 1921 Bom 303 (306) 45 Bom 694 61 Ind Cas 40 *Sakharam Govind v Trimbakrao Ramchandra*

3 (1926) A I R 1926 Cal 893 (895) 95 Ind Cas 622 *Devendra Naryan v Jhumur Pramank*

4 (1922) A I R 1922 Cal 100 (100) 92 Ind Cas 100 *Phang v Ramdas* the

Note 6

Das (Section 53,

1 (1882) 8 Cal 230 (235, 236) 10 Cal L R 41, *Aoylashbhashny Dosses v Gocoolmonji*

Note 1

131.* To establish a periodically recurring right. | Twelve years. | When the plaintiff is first refused the enjoyment of the right.

Article 131

Synopsis

1. Legislative changes.
2. Scope of the Article.
3. Suit for recovery of arrears of payments periodically due.
4. Suit against co-sharer or rival claimant of right.
5. "Periodically recurring right."
6. Right to turn of worship.
7. Suit for enhancement of rent, etc.
8. Right to maintenance.
9. Starting point of limitation.

Other Topics

Burial fees	See Note 5 F N (6)
Exclusive or perpetual right	See Note 5 F N (5) Note 6, Pt 2
Extinguishment of right	See Note 2, Pt 4
Malikana	See Note 4 Pt 3 Note 5 F N (6)
Mere non payment of rent for 12 years—No adverse possession	See Note 9 F N (2)
Right to office lost—Right to recurring payments also lost	See Note 2, Pts 5 to 7
Suit for mere declaration—Consequential relief not necessary	See Note 2, Pts 2, 3
* To establish *	See Note 2 F N (3), Note 3

1. **Legislative changes.** — There was no specific provision corresponding to this Article in the Act of 1859¹ The Article was first introduced in the Act of 1871 and repeated in the Acts of 1877 and 1908

2. **Scope of the Article.** — Where a plaintiff is entitled to a periodically recurring right but is refused the enjoyment of such right, he can sue for a declaration that he is entitled to such right. Such a suit will be one for the *establishment* of a periodically recurring right and will come within the purview of this Article. Thus, where a plaintiff claims to be entitled to receive a certain *percentage*

✱	Acts of 1877 and 1871
	Same as above
	Act of 1859
	No corresponding provision

Article 131 — Note 1

Article 131
Notes
2—3

on the revenue collections of certain villages every year but the Government refuses to pay him such percentage and contends that he is only entitled to a *fixed* annual payment, a suit for a declaration by the plaintiff that he is entitled to a percentage of the revenue collections every year will lie within this Article¹

The Article will apply to a suit for a *bare declaration* that the plaintiff is entitled to a periodically recurring right. It is not necessary that the suit must include a prayer for *consequential relief*². The contrary view³ is, it is submitted, not correct.

It has been held that where the plaintiff has been refused the enjoyment of his periodically recurring right and he does not sue for the establishment of such right within the period of limitation prescribed by this Article his right will be extinguished under Section 28, *ante*⁴.

Where the plaintiff's recurring right depends on some *other* right which is extinguished under Section 28, the *recurring* right also will be extinguished and no suit will, thereafter, lie for the establishment of such right⁵. Thus, where the plaintiff claims a right to inspect the accounts of a temple annually but this right depends on the plaintiff's right of supervision over the management of the temple the plaintiff will lose his right of annual inspection of accounts also if he loses, by efflux of time, his right of supervision over the management of the temple⁶. Similarly, where a right to certain annual payments is attached to an office, the loss of the right to the office will also involve the loss of the right to the annual payments⁷.

3 Suit for recovery of arrears of payments periodically due — Where the plaintiff is entitled to certain annual or other periodical payments and the suit is for the *recovery* of arrears of such payments there is a conflict of decisions as to whether this Article

Note 2

- 1 (1934) A I R 1934 P C 108 (112) 148 Ind Cas 796 58 Bom 306 61 Ind App 190 (P C) *Secy of State v Parashram Madhavrao* (Confirming A I R 1932 Bom 319)
- 2 (1937) A I R 1937 Mad 303 (307) 173 Ind Cas 307 *Chakrapani Rao v Venkatadri Appa Rao* (7 Mad 311 Followed)
- 3 (1893) 16 Mad 291 (295) 3 Mad L Jour 98 *Balakrishna v Secy of State* (1903) 26 Mad 291 (313 314) 13 Mad L Jour 27 *Ratnamasari v Akhla dammal* (The expression to establish is used as the correlative of to set aside)
- 4 (1883) 1883 Pun Re No 106 page 331 *Durga v Bhoratu* (Grazing rights)
- 5 (1917) A I R 1917 Mad 407 (408) 95 I C 646 *Siddalinga v Ramachandra* (1938) A I R 1938 Mad 47 (50) *Krishnaiah v Lodd Govind Doss*
 [See (1935) A I R 1935 Mad 377 (378) 157 Ind Cas 569 *Aribalaram v V R M Peria Karuppan* (Landlord not suing for possession within 12 years after termination of lease—Right to recover arrears of rent also is barred)]
- 6 (1917) A I R 1917 Mad 407 (408) 95 I C 646 *Siddalinga v Ramachandra*
- 7 (1938) A I R 1938 Mad 47 (50) *Krishnaiah v Lodd Govind Doss* (26 Mad 113 Followed A I R 1920 Mad 447 Explained)

applies to such a suit. The view generally adopted is that such a suit is not a suit to *establish* a periodically recurring right but one to *enforce* such right and that therefore this Article will not apply to such a suit.¹ But it has been held by the Madras High Court² and the Judicial Commissioner's Court of Nagpur³ that such a suit also will come within the scope of this Article. It is submitted that this view is not correct. But even according to the Madras High Court,⁴ if the suit is not against the person liable to make the payment in the first instance but against a person who has received the payment, this Article will not apply, the reason being that in the latter case the suit will be one for money had and received and will come under Article 62 *supra*. Similarly, a suit for recovery of rent⁵ or wages⁶ will not be governed by this Article as there are *special* Articles applicable to such cases.

Article 131 Note 3

Note 3

- 1 (1937) A I R 1937 All 57 (60) 166 Ind Cas 823 I L R (1937) All 140 *Hidayat Ullah v Gokul Chand* (A I R 1914 Mad 377 (F B) Dissented from)
- (1912) 14 Ind Cas 505 (505) 34 All 246 *Lachminarain v Turab Unnissa*
- (1931) A I R 1931 Bom 189 (190) 55 Bom 193 131 Ind Cas 465, *Janardhan Trimbak v Dinkar Hari*
- (1917) A I R 1917 Bom 10 (11) 42 Bom 277 44 Ind Cas 851, *Huchrao Timmaj v Bhimarao Gururao*
- (1897) 22 Bom 869 (671) *Chamanlal v Bapubhai*
- (1929) A I R 1929 Lah 872 (873) 11 Lah 99 121 Ind Cas 423, *Parshotam Singh v Balwant Singh*.
- (1921) A I R 1921 Lah 121 (123) 64 Ind Cas 892 2 Lah 243 *Charanjit Singh v Amir Ali*
- (1906) 1906 Pun Re No 83 p 306 1907 Pun L R No 89 *Dost Muham mad v Sohan Singh*
- (1919) A I R 1919 Oudh 84 (85) 22 Oudh Cas 345 51 Ind Cas 540 *Jagdeo v Mathura Prasad*
- (1936) A I R 1936 Pat 158 (159) 161 Ind Cas 478 *Babu Ramji Das v Mahamaya Prasad*
- (1934) A I R 1934 Pat 44 (44 45) 151 Ind Cas 1013 *Padhum Lal v Tribeni Singh*
- (1926) A I R 1926 Pat 205 (207) 5 Pat 249 91 Ind Cas 826 *Baidyanath Jiu v Harduit Bwari*
[But see (1910) 5 Ind Cas 869 (870) 34 Bom 319 *Sakharam Hari v Lakshminarao Thirtha Swami*]
- 2 (1914) A I R 1914 Mad 377 (379) 38 Mad 916 23 Ind Cas 806 (F B) *Mana Vikrama Zamorin v Achuta Venon*
- (1938) A I R 1938 Mad 47 (50) *Krishniah v Lodd Govind Doss*
- (1936) A I R 1936 Mad 704 (706) 164 Ind Cas 794 *Chinnathambiar v Rama Iyer*
- (1887) 10 Mad 115 (117) *Alubi v Kunhbi*
- (1920) A I R 1920 Mad 447 (447) 53 Ind Cas 783 *Ghulam Gouse v Jannia*
- (1936) 1936 Mad W N 156 (156) *Srinivasa Upadhyaya v Padmakke Hengsu*
- 3 (1928) 109 Ind Cas 85 (86) (Nag) *Nazar Ali v Akaji*
- 4 (1938) A I R 1938 Mad 47 (51) *Krishniah v Lodd Govind Doss*
[See also (1910) 5 Ind Cas 869 (870) 34 Bom 349 *Sakharam Hari v Larmi Pura Tirtha Swami*]
- 5 (1935) A I R 1935 Mad 682 (684) 158 Ind Cas 223 *Chathanni Rayaran v Narayan Ayyar*
- 6 (1936) A I R 1936 Mad 149 (150) 161 Ind Cas 475 *Sivaram Joti Sha v Nagappa*

Article 131
Notes
3-4

Where a suit is brought both for the declaration of a right to certain periodical payments as well as for recovery of arrears of such payments, this Article will only apply to the former relief and not to the latter relief¹

Where the defendant denies the plaintiff's right to the payments claimed, the plaintiff will not be entitled to a decree for arrears of payments unless he establishes his right to such payments. Hence in such cases, if the suit for the establishment of the plaintiff's right is time barred under this Article, his claim for the arrears also will be time barred. The plaintiff cannot evade the operation of this Article by framing his suit merely as one for the recovery of arrears in such cases². But this principle will not apply where the plaintiff has already obtained a decree against the defendant establishing his right and such decree is in force³.

4 Suit against co sharer or rival claimant of right. — It has generally been held that where the suit is for the establishment of a right to periodical payments, this Article applies whether the defendant is the person originally liable to pay or is a co sharer who has received payment from that person⁴.

7 (1906) 1906 Pun Re No 83 p 306 1907 Pun L R No 89 1906 Pun W R No 126, *Dost Muhammad Khan v Sohan Singh*
(1937) A I R 1937 All 57 (60) 166 Ind Cas 823 I L R (1937) All 140 *Hidayat Ullah v Chand*

(1891) 15

(1931) A I

Tripathi v Dinkar Hari

8 (1937) A I R 1937 All 57 (60 61) 166 Ind Cas 823, *Hidayat Ullah v Gokul Chand*
(1906) 15

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9 (1906) 1906 Pun Re No 83 p 306

(1885) 1

(1831) 1

(1917) 1

Behari Singh

[But see (1887) 11 Bom 222 (234) *Shivaram Dinkar v Secretary of State* (Decree for arrears for a particular year might establish the plaintiff's right to them in that year)]

Note 4

1 (1910) 5 Ind Cas 869 (870) 34 Bom 349 *Sakharam Hari v Laxmi Priya Tirtha Swami*

(1921) 15 Bom 135 (137, 143) *Raoji v Bala*

received by defendant in that year

Jagdeo

But in the undermentioned case² it was held by the Madras High Court that a suit against a person for declaration that the plaintiff is entitled to receive certain annual payments *direct* from the Government (from whom such payments were being received) and not through the defendant was governed by Article 120 and not by this Article. But no reasons are given for the decision.

In the undermentioned case³ it was held by the Privy Council that a suit for declaration of title in *malikana* allowance against a *rital claimant* was governed by Article 120.

5. "Periodically recurring right."—The Article applies only where the plaintiff claims a *right* against the defendant. Hence, where the plaintiff only seeks to establish that he is *not liable* in respect of a certain periodical right claimed by the defendant against him this Article does not apply.^{1a} Thus a suit for a declaration that the plaintiff is not liable to pay water cess to the Government is not within this Article.¹ On the same principle, a suit for a declaration that the plaintiff is only liable to pay a certain sum periodically to the defendant and not the higher sum claimed by the defendant is not governed by this Article.²

Further, the right must be a *recurring right*.³ If the right claimed accrues once and for all the Article does not apply. Hence a suit to establish the plaintiff a right under a certain lease to hold land as a permanent tenant at a fixed annual rent, does not come within this Article as in such a case the right of the plaintiff accrues once and for all when the lease comes into force and does not *recur*.⁴

[See also (1897) 9 All 213 (216 217) 1897 All W N 22 11 Ind Jur 192 *Sahibunnissa Bibi v Hafiza Bibi* (Doubted if the statute applied at all to the case, but if it did apply the twelve years period under this Article or Article 127 applied)]

² (1903) 13 Mad L Jour 267 (268) *Srinivasa Ramanujachariar v Subba chariar*

³ (1929) A I R 1929 P C 166 (169) 51 All 439 117 Ind Cas 493 56 Ind App 267 (P C) *Mt Jaggo Bai v Ulasava Lal*

Note 5

^{1a} (1939) 1 Bom L R 373 (378) *Khanderao v Ramji*

¹ (1914) A I R 1914 Mad 534 (535) 37 Mad 322 18 Ind Cas 770 *Secretary of State v Janakiramayya*
[See also (1916) A I R 1916 Mad 934 (981) 31 Ind Cas 207, *Subbanna v Secretary of State*]

² (1909) 3 Ind Cas 747 (748) 33 Mad 171 *Achamma v Narayanaswamy Naidu*

³ (1903) 13 Mad L Jour 267 (268) *Srinivasa Ramanujachariar v Subba chariar*

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v

(1878) 4 Cal 653 (655) *Eshan Chunder Roy v Monmohini Dassi*

(1923) A I R 1923 Cal 392 (394) 2 Ind Cas 329 *Afbar Sarcar v Ramesh Chandra*

⁴ (1899) 1 Bom L R 373 (378) *Khanderao v Ramji*

Article 131
Note 8

In the undermentioned case,⁵ the Madras High Court observed as follows

"The mere fact that sums of money are paid periodically does not make the right one that periodically recurs. The right is always there, but it is only exercised at such times as the sums fall due. To put an illustration, it seems to us it would be just as reasonable to say that an official entitled to a salary of so many rupees a month can call that a periodically recurring right. We do not agree with that contention at all. We think the distinction is plain. In the one case the right is always vested in one person to receive periodical payments; in the other the right which at one time is vested in one person, at another time passes away to somebody else, which, of course, is a periodically recurring right in the true sense of the term."

It is submitted that the test suggested by the Madras High Court in the above case is not correct and that a right can be a periodically recurring right, although it is not vested in two different persons at different periods of time.

For instances of periodically recurring rights within the meaning of this Article, see the undermentioned cases⁶

5 (1920) *Ind Cas 108* (112) 61 Ind App 190 58 Bom 806 148 Ind

6 (1934) A I R 1934 P O 108 (112) 61 Ind App 190 58 Bom 806 148 Ind
the

(1904)

142

(1933) A I R 1933 Pat 695 (696, 697) 150 Ind Cas 242 *Naga Manjari v Kms Mahatani* (Do)

(1915) A I R 1915 All 67 (67) 28 Ind Cas 600 *Mohammad Hussain v Mohammad, Bibi* (Do)

(1918) A I R 1918 Cal 740 (741) 89 Ind Cas 522, *Surja Datta Sarma v Ekadaha Koch* (Do)

(1926) A I R 1926 Cal 883 (885) 95 Ind Cas 622, *Devendra Narayan v Jhumur Pramanik* (Do)

(1914) A I R 1914 Cal 29 (32) 20 Ind Cas 910, *Barhamdutt Missir v Krishna Sahay* (Do)

(1916) A I R 1916 Bom 143 (144) 41 Bom 159 38 Ind Cas 54 *Ganesh Vinayak v Sitabai Narayan* (The payment of dhara or assessment or customary rent to mamdar is a recurring right within Art 131)

(1935) A I R 1935 Cal 744 (746) 160 Ind Cas 121 *Dinanath Kar v Sitendra Nandan Das* (Customary right to remission of rent is a periodically recurring right)

(1914) A I R 1914 Cal 32 (34) 21 Ind Cas 179, *Hem Chandra Chowdhury v Atul Chandra Chakravarti* (Right to recover dastur)

(1884) 10 Cal 697 (708) *Gopi Nath Chakravarti v Bhuwat Pershad* (Right to malikana is a periodically recurring right)

(1875) ⁷Suit to recover
as was brought
years from the

6. Right to turn of worship.—A *palla* or right to worship an idol in turn is a periodically recurring right within the meaning of this Article¹ But an exclusive and perpetual right of worship is not a recurring right²

7. Suit for enhancement of rent, etc — A suit for the establishment of the plaintiff's right to an *enhancement* of the payments which he is entitled to receive periodically from the defendant is a suit to establish a periodically recurring right within the meaning of this Article¹

- (1889) 1889 Pun Re No 154 p 513 *Gahna v Ikhlas Khan* (Right to levy talukdari dues from the defendant)
- (1883) 1883 Pun Re No 106 page 331 *Durga v Bhonatu* (The right to graze cattle in certain forests is periodically recurring right (assumed))
- (1938) A I R 1938 Mad 47 (50) *Krishnasah v Lodd Govinda Doss* (Here ditary right to receive a small fraction of the zamindari's *melaram* in each village is periodically recurring right)
- (1936) A I R 1936 Mad 701 (705) 164 Ind Cas 794 *Pandiachinna Thambiar v Rama Iyer* (Claim to get a *manibam* or an annual allowance from and out of the revenue collections of a village is a periodically recurring right)
- (1914) A I R 1914 Mad 377 (377) 38 Mad 916 23 Ind Cas 806 (F B), *Manatikrama Zamorin Raja Aiaragal of Calicut v Achutha Menon* (Right to adima allowance is periodically recurring right)
- (1900) 10 Mad L Jour 114 (115) *Veerabhadra Varaprasada Row v Vellanki Venkatadri* (Holder of hereditary office of *karnam*—Suit by to establish right to annual payment as *rusum* is within this Article)
- (1928) 109 Ind Cas 85 (86) (Nag) *Nazar Ali v Akaji* (Right to receive *lawajama* or *deshmulki* allowance is periodically recurring right)
- (1919) A I R 1919 Oudh 84 (84) 22 Oudh Cas 345 54 Ind Cas 540 *Jagdeo v Mathura Prasad* (Right to a share in offerings of a temple is periodically recurring right)
- (1900) 3 Oudh Cas 351 (357) *Sheikh Chedi v Deputy Commissioner Bahraish* (Declaration of plaintiff's right to a moiety of offerings made at shrine of Muhammadan saint is within this Article)
- [See (1914) A I R 1914 Low Bur 241 (243) 8 Low Bur Bul 64 24 Ind Cas 911 *Secy of State v Va Duce* (Covenant for renewal in lease on same terms i e to contain same covenant—Such covenants will not include the covenant for renewal itself)]

Note 6

- 1 (1882) 8 Cal 807 (809) 10 Cal L R 439 *Gopeekishen Gossamy v Thakoordoss Gossamy*
- (1884) 4 Cal 683 (685) *Eshan Chunder Roy v Monmohini Dassi*
[But see (1871) 15 Suth W R 29 (30) 6 Beng L R 352 *Gaur Mohan Choudhury v Madan Mohan Choudhury* (Right to turn of worship of idol is not recurring right)]
- 2 (1884) 4 Cal 683 (685) *Eshan Chunder Roy v Monmohini Dassi*

Note 7

- 1 (1916) A I R 1916 Pat 120 (121) 39 Ind Cas 65 2 Pat L Jour 194 *Brij Behari Singh v Sheo Sanhar Jha* (Claim to enhanced rent)
- (1897) 21 Bom 394 (396) *Gopal Rao v Mahadeta Rao* (Do)
- (1902) 6 Cal W N 360 (362) *Jotindra Mohan Tagore v Chandra Nath Sanyal* (Do)
- (1900) 10 Mad L Jour 114 (115) *Veerabhadra Varaprasada Row v Vellanki Venkatadri* (Claim to annual payment payable to holder of hereditary office as *rusum* at enhanced rate is within this Article)

Article 131
Notes
8-9

8. Right to maintenance. — A right of *maintenance* cannot be strictly called a *periodically recurring* right. Such a right is a *constant* right which accrues upon the happening of a certain event and continues till the happening of some other event which determines it.¹

9. Starting point of limitation. — Limitation begins to run under this Article from the time when the plaintiff is *first* refused the enjoyment of his right.¹ In order to constitute a refusal within the meaning of this Article, there must be a *definite demand and refusal*. The mere fact that the plaintiff has *not exercised* his right is not enough.²

(1924) A I R 1924 Pat 193 (196) 72 Ind Cas 781 *Sheopratap Dubey v Sheogulam Lal* (A suit for enhancement brought more than six years after the date of the final publication of the Record of Rights in which the defendants are entered as raiyats at fixed rates is not barred by limitation as such Record of Rights does not create or extinguish any rights. Article 120 does not apply but Article 131

v *Ramji*;

ad Cas 851 *Shri Bala Maharaj v*

[See (1918) A I R 1918 Cal 740 (741) 39 Ind Cas 522 *Surja Datta v Ekdahia Koch* (Where however before claiming enhancement of rent a permanent tenure under which the defendant claims to hold the land has to be set aside)]

[But see (1910) 5 Ind Cas 115 (116) (Cal) *Mohammad Mehdi Hassan Khan v Phil Kuar Mahton* (Suit for declaration that rent payable by defendant to plaintiff was at a higher rate than that entered in the Record of Rights is governed by Article 120 and cause of action arises at the time of the entry in the Record of Rights)]

Note 8

- 1 See (1921) A I R 1921 Lah 121 (123) 2 Lah 243 64 Ind Cas 892 *Claranjit Singh v Amur Ali Khan*
 (1864) 2 Mad H C R 36 (37) *Venkopadhyaya v Kavari Hengusu*

Note 9

- 1 (1899) 9 Mad L Jour 57 (59) *Ramaswami Aiyar v Kantayyan*
 2 (1926) A I R 1926 Cal 883 (885) 95 Ind Cas 622 *Derendra Narayan v Jhunnur Pramanik*
 (1891) 15 Bom 135 (138 143) *Raoji v Bala*
 (1892) 1892 Pun Re No 146 page 448 *Ramman v Budh Singh*
 (1920) A I R 1926 Bom 345 (346) 95 Ind Cas 851 *Shri Bala Maharaj v Sakharam Venkatesh*
 (1921) A I R 1921 Bom 175 (176) 45 Bom 638 60 Ind Cas 802 *Bhimabai Padappa v Swamirao Shrinivas*
 (1916) A I R 1916 Bom 143 (144) 38 Ind Cas 54 41 Bom 159 *Ganesh Vinayak v Sitabai Narayan*
 (1930) v *Prasad*

recurring right)

(1924) A I R 1924 Pat 193 (196) 72 Ind Cas 781 *Sheopratap Dubey v Sheogulam Lal*

v *Jaleendra*
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 in general)

Illustration

Article 131
Note 9

A was entitled to receive from the Government 1 rupee 5½ annas per cent of the yearly revenue collections in certain villages. The Government, however, without authority substituted in 1889 a fixed allowance to be paid to A, and was paying it to A. In 1900, A applied to the Government that he should be given 1 rupee 5½ annas per cent of the yearly assessment and not the fixed allowance. The Government refused the application in 1913 and A sued the Government in 1923 for a declaration of his right to receive the allowance on the percentage basis.

- (1926) A I R 1926 Cal 552 (554) 91 Ind Cas 411 *Manohar Das Mahanta v Brojendra Lal Das*
 (1915) A I R 1915 Cal 350 (552) 26 Ind Cas 939 *Narendra Chandra v Nalini Sundari*
 (1914) A I R 1914 Cal 32 (34) 21 Ind Cas 179 *Hem Chandra v Atul Chandra*
 (1902) 6 Cal W N 360 (362) *Jotindra Mohan Tagore v Chandra Nath Sahu*
 (1874) 21 Suth W R 88 (89) *Syed Shah Aleh Ahmud v Nehal Singh*
 (1914) A I R 1914 Lah 242 (244) 23 Ind Cas 445, *Karparam v Jaschand*
 (1901) 1901 Pnn Re No 108 page 381, *Mt Zinat v Murtaza Khan*
 (1889) 1889 Pnn Re No 154 page 514 *Gahana v Ikhlas Khan*
 (1889) 1889 Pnn Re No 106 page 331 *Durga v Bhonatu*
 (1928) A I R 1928 Lah 123 (123) 69 Ind Cas 6 *Lekhu Ram v Mohammad Ramean*
 (1918) A I R 1918 Mad 1 (2) 41 Mad 374 44 Ind Cas 699 (F B) *Kumar appa Reddi v Manatala Goundan* (Refusal by Government to recognize custom under which the mirasdar claimed such dues from the defendant (not Government) does not necessarily show that the defendant must have refused)
 (1910) 5 Ind Cas 615 (617) (Mad) *Bangarayya Garu v Jagannatha Raju Garu*
 (1884) 7 Mad 341 (343) 8 Ind Jur 188 *Ramnad Zemindar v Dorasami* (The denial by the defendant must have been made in answer to a demand by or on behalf of the plaintiff)
 (1906) 29 Mad 42 (43) 16 Mad L Jour 35 *Lakshminarayan v Venkata Narasimha Naidu* (Non collection does not necessarily imply that it is in consequence of denial of plaintiff's right)
 (1904) 14 Mad L Jour 477 (479) *Jagannatha Pandayar v Muthia Pillai*
 (1928) 103 Ind Cas 85 (86) (Nag) *Nazar Ali v Ahaji*
 (1900) 3 Oudh Cas 351 (357) *Sheikh Chedi v Deputy Commissioner, Bahraich*
 (1926) A I R 1926 Pat 340 (344) 96 Ind Cas 189 6 Pat 51 *Midnapore Zamindari Co Ltd v Mukhtakeshi Patrani*
 [See also (1923) A I R 1923 Cal 392 (394) 72 Ind Cas 329 *Albar Sarcar v Ramesh Chandra* (Mere non payment of rent for 12 years does not make the possession of the tenant adverse)]
 (1879) 4 Cal 661 (663) 3 Ind Jur 565, *Poresh Narain Roy v Kassi Chunder Talukdar* (Do)
 (1937) A I R 1937 Pat 96 (99) 167 Ind Cas 235 *Kameshwar Singh v Sakhawati Ali* (Do)
 (1913) 18 Ind Cas 243 (243) (Mad), *Sreenivasa Pantulu Garu v Jogi Raju* (Do)]
 [But see (1889) 11 Bom 222 (234) *Shivram Dinkar v Secretary of State* (Total discontinuance of payment for more than twelve years — Right barred)
 (1897) 15 Mad 161 (163) *Pamchandra v Jaganmohana* (Do)
 (1872) 9 Bom 11 C R 260 (264, 265), *Madrala v Bhagrantha* (Case und r 1859 Act)]

Article 131
Note 9

Their Lordships of the Privy Council held that the starting point under this Article for the suit was the *refusal* by the Government in 1913 and that the suit was not barred.⁵

Where the plaintiff is once refused the enjoyment of his right but the dispute is compromised and the plaintiff's right is again recognized, limitation under this Article will only run from the time when *subsequently* there is a refusal of enjoyment of the right.⁴

The word "plaintiff" in this Article includes the person from or through whom he derives his title (see Section 2 clause 8, *ante*) and hence, where the first refusal of the enjoyment of the right has been made when the plaintiff's predecessor-in-title was entitled to the right, limitation under this Article will begin to run from such refusal and there will be no fresh starting point of limitation after the plaintiff succeeds to the right.⁶

The burden of proving that more than twelve years before the suit there was a demand and refusal of the enjoyment of the plaintiff's right, is on the *defendant*.⁶

Article 132

132.* To enforce payment of money charged upon immoveable property. Twelve years. When the money sued for becomes due.

Explanation.—For the purposes of this Article—

(a) the allowance and fees respectively called *malikana* and *haggs*,

(b) the value of any agricultural or other produce the right to receive which is secured by a charge upon immoveable property, and

(c) advances secured by mortgage by deposit of title deeds,

shall be deemed to be money charged upon immoveable property.

* Act of 1877, Article 132

132.—To enforce payment of money charged upon immoveable property

Twelve years

When the money sued for becomes due

Explanation.—The allowance and fees respectively called *malikana* and *haggs* shall, for the purpose of this clause be deemed to be money charged upon immoveable property

3 (1934) A I R 1934 P C 108 (112) 148 Ind Cas 796 58 Bom 306 61 Ind 100 (P C) S. 100 of State v. Purnashram Madhavrao (Con

da Row v. Vellanki
Kandra Chowdhury

Synopsis

Article 132

1. Legislative changes.
2. Scope of the Article.
3. "To enforce payment."
4. "Charged."
 5. Suit to enforce a charge created by decree.
 6. Suit on charge created by award.
 7. Suit to enforce vendor's lien.
 8. Suit to enforce charge in other cases.
 9. Mortgage by a Hindu father — Suit against sons to enforce pious obligation.
 10. One mortgagor paying off mortgage — Suit for contribution against co-mortgagor.
 11. Suit against substituted security.
 12. Claim for interest due under mortgage.
 13. Suit against surety for mortgagor.
 14. Suit to enforce right obtained by subrogation.
 15. Renewal of mortgage — Suit on renewed mortgage.
 16. Person interested not made party to mortgage suit — Subsequent suit against him.
 17. Suit against trespasser.
 18. Suit for personal decree.
19. Immovable property.
20. Explanation, clause (a).
21. Explanation, clause (b).
22. Explanation, clause (c).
23. "When the money sued for becomes due."
 24. Mortgage for a term certain with default clause — Starting point.
 25. Suspension or revival of cause of action.
26. Failure to sue on mortgage in time — Effect of.
27. Claim by mortgagee disallowed — Suit to enforce mortgage.

Other Topics

Allowance not charged on immovable property—Suit for it is not governed by this Article See Note 20, Pt 5
 Date fixed in mortgage for payment—Mortgagor adjudicated insolvent—No fresh cause of action See Note 23, Pt 9

Act of 1871, Article 132

132—For money charged upon immoveable property Twelve years When the money sued for becomes due

Explanation—The allowance and fees called *malikana* and *hazqs* shall, for the purpose of this clause, be deemed to be money charged upon immoveable property

Act of 1859 — See Legislative changes, Note No 1

Article 132
Note 1

Interest as damages—Article not applicable	See Note 12 Pt 6
Mortgage by conditional sale	See Note 2 F N (7)
Mortgaged property becoming submerged— No suspension of cause of action	See Note 25 Pt 1
Redemption of sub-mortgage by mortgagee — No fresh cause of action	See Note 23 Pt 10
Section 28 not applicable to mortgage suits	See Note 26 Pt 1
Special or local law	See Note 2 Pt 9
Suit by Hindu widow for recovery of money spent in discharge of husband's debts	See Note 6 Pt 5
Suit by Hindu widow to recover arrears of maintenance	See Note 3 F N (1)
Suit by principal against agent	See Note 3 Pt 4
Suit by subsequent mortgagee to enforce payment out of surplus proceeds:	See Note 11 Pts 1 2
Suit by vendee for money paid under sale on sale being set aside	See Note 8 Pt 6
Suit for share of mortgage money received by co owner of property	See Note 8 Pt 4
Suit to enforce maintenance allowance	See Note 8 Pt 1
Suit to enforce mortgage money from out of substituted security—Starting point	See Note 11 Pt 7
Suit to recover unpaid purchase money personally from vendee—Article not applicable	See Note 7 Pt 3

1. Legislative changes — There was no specific provision corresponding to this in the Act of 1859 and it was held that a suit to enforce a mortgage was one falling under clause 12 of Section 1 of that Act¹. *Mahikanas* and *haqq*s were, under that Act regarded as interests in immovable property, a non enjoyment of which for a period of twelve years was held to extinguish a right thereto².

Column 1 of the corresponding Article of the Act of 1871 provided for suits 'for money charged upon immoveable property'. The words 'to enforce payment of money charged upon immoveable property' were substituted in the Act of 1877 for the first column of Article 132 of the Act of 1871.

Article 132 — Note 1

- 1 (1875) 1 Cal 163 (167) 25 Suth W R 84 3 Ind App 1 3 Sar 531 3 Suther 222 (P O) *Juneswar Dass v Mahabeer Singh*
 (1868) 10 Suth W — — — — — *Ady Surran*
 (1868) 9 Suth W 1 *Hussain*
 (1868) 10 Suth W R 379 (379) 6 Beng L R 387n *Ragunandan v Majbuth Singh*
 (1867) 2 Agr 244 (244) *Koombeharee Lall v Ram Narain*
 (1869) 1 N W P H O R 260 (261) *Nouab Oomrao Begum v Khooshee Ram*
 (1874) 1874 Bom P J 81 (81) *Bappoo v Kalu*
 (1867) 8 Suth W R 51 (54) *Mt James Khanum v Mt Amatool Fatima Khanum* (Lien for dower due to a Muhammadan widow)
 — — — — — *Thathutharan illan gapa*

onda Freddy

- 2 (1915) A I R 1915 Cal 552 (553) 21 Ind Cas 775 *Yohesri Prosad Singh v Basynath Hazari* (Not enjoyed for more than twelve years before Act of 1871—Claim for *mahikana* was barred)

The Explanation as it stood originally was substituted by the present Explanation without the clause (c) by Act 1 of 1927. Clause (c) of the Explanation was added by Act 21 of 1929

Article 132
Notes
1—2

2. Scope of the Article.—This Article applies to suits to enforce payment of money charged upon immovable property¹ The suit must be one to recover money out of the immovable property

- (1906) 10 Cal W N 151 (153), *Jagarnath Pershad Singh v Kharach Lal*
 (1868) 9 Suth W R 102 (102), *Hiranund Sahu v Mt Ozeerun*
 (1867) 7 Suth W R 336 (337), *Mt Ozeerun v Baboo Heeranund Sahoo*
 (1869) 12 Suth W R 498 (498) 4 Beng L R A C 29, *Bhuli Singh v Mt Nimu Dehu*
 (1881 1882) 6 Bom 546 (552, 560) 6 Ind Jur 648 (F B), *Collector of Thana v Hari Sita Ram*
 (1872) 9 Bom H C R 99 (112), *Balwantrao v Purushotam Siddeshwar*
 (1873) 10 Bom H C R 281 (290, 291) 13 Beng L R 254 21 Suth W R 178 3 Sar 306 1 Ind App 34 (P C), *Maharana Futtleshangji Jaswant sangji v Desai Kulhanraji, Hukamatraji* (Toda giras haq is immovable property)
 (1873) 10 Suth W R 94 (95), *Gobind Chunder v Ram Chunder*
 (1870) 13 Suth W R 465 (466), *Beebee Chummunt v Mt Om Kulsoom*
 (1869) 12 Suth W R 493 (495) 4 Beng L R A O 29, *Bhuli Singh v Mt Nimu Dehu*
 (1869) 12 Suth W R 46 (46) 8 Beng L R App 102, *Bhuli Singh v Mt Nehma Dha*
 (1869) 10 Suth W R 302 (303), *Dudhrul Hug v The Court of Wards*
 (1906) 10 Cal W N 151 (153), *Jagarnath Pershad Singh v Kharach Lal* [See (1874) 21 Suth W R 83 (89), *Syed Shah Aleh Ahmud v Nehal Singh*]
 [See also (1862 1863) 1 Bom H C R 166 (189), *Bharat Singji Mansangji v Natanidharaya Mansukhram*]
 [See however (1865) 2 Suth W R 162 (163) *Government v Roop Narain Singh*
 (1866) 6 Suth W R 151 (152), *Heeranund Sahoo v Mt Ozeerun* (Six years)]

Note 2

- 1 (1931) A I R 1931 Pat 285 (291) 134 Ind Cas 609 11 Pat 112 *Mukhdeo Singh v Harakh Narayan Singh*
 (1921) A I R 1921 Pat 403 (405) 63 Ind Cas 297, *Jasnandan Prashad v Baijnath Saran*
 (1908) 1908 Pun Re No 95 1908 Pun W R 165, *Daulat Ram v Woollen Mills Co Ltd*
 (1897) 1897 Pun Re No 83, *Mt Fazlan Nohan v Muhammadji*
 (1880) 1880 Pun Re No 69, *Kala Shah v Fazl*
 and
 (1921) A I R 1921 Mad 514 (515) 66 Ind Cas 554 *Pamasami Iyengar v Kuppasami Iyer* (Registered contract to indemnify charging immovables)
 (1885) 9 Bom 233 (235), *Hari Mahadaji v Balambhat Raghunath*
 (1912) 15 Ind Cas 851 (852) (All), *Bhagwati Singh v Sarup Singh* (Suits governed by Article 132 are not entitled to the benefit of Section 81 ante, now repealed)
 (1887) 9 All 158 (164) 1887 All W N 15, *Laxmidh Pande v Balgobind*

On the introduction of Article 147 in the Act of 1877, there arose a conflict of decisions as to the applicability of this Article to suits on *mortgages* as distinguished from *charges*. According to some decisions this Article applied only to suits relating to *charges* and suits for sale or foreclosure in respect of *mortgages* were governed by Article 147.³ According to other decisions Article 147 only applied to cases where the mortgagee sued for sale or foreclosure in the

- (1875) 7 N W P H O R 226 (226), *Rodho Panaday v. Rup Kuar*
 (1911) 10 Ind Cas 910 (910) (Bom), *Dayaram v Lazaman* (The limitation prescribed for a suit or application of the kind referred to in Section 48 of the Deccan Agriculturists' Relief Act, is twelve years)
 (1930) A I R 1930 All 530 (531) 123 Ind Cas 379, *Mahomed Ishaq v Municipal Board, Cawnpore*
 [See (1867) 14 Cal 637 (691) *Madho Misser v Sidh Binawk Upadhya* (Where a document creates neither mortgage nor a charge this Article is inapplicable)]
 [See also (1927) A I R 1927 All 417 (418) 100 Ind Cas 670 49 All 430 *Anpurna Kunuar v Ram Padarath*
 (1971) 8 Bom H C R A C 61 (63) *Gokal Bhas Mulchand v Jhaier Chaturbhuy*]
 2 (1885) 7 All 502 (506) 12 Ind App 12 9 Ind Jur 100 4 Sar 619 (P C) *Ram Din v Kalka Prasad*
 (1906) 10 Mad 100 (100) F - - - - - *Mohammed v Sitayamarasu Annamma*
 ubar Dayal v Lachmin
 Shankar
 (1914) 22 Ind Cas 959 (960) (1918) 1 Upp Bar Rul 178 *Nga Ya Ba v Nga Bys*
 (1935) A I R 1935 All 239 (240) 56 All 711 155 Ind Cas 390, *Srinathji v Panna Kunwar*
 (1883) 12 Cal L R 165 (167) *In the matter of T Agabeg*
 (1881) 1881 Pun Re No 90 page 194 (199), *Gahi Mal v Shera* (Per Brandreth J)
 (1884) 1884 Pun Re No 55 (F B) *Devi Das v Ishar Das*
 (1906) 33 Cal 299 (1000) *Kallar Roy v Ganga Pershad Singh*
 (1893) 20 Cal 79 (84) 19 Ind App 234 6 Sar 241 (P C), *Kameswar Pershad v Raj Kumar, Rattan Koer*
 I Singh
 ubra Begam v Fazal
 Husam
 [See also (1886) 1886 Bom P J 112 (112) *Dulanbai v Sakharani*
 (1886) 1886 Bom P J 169 (169) *Gungabai v Venkaji*]
 3 (1902) 25 Mad 220 (243) (F B) *Narayana Ayyar v Venkataramana Ayyar* (Dissenting from 21 Mad 326 (F B))
 (1887) 10 Mad 509 (517) 11 Ind Jur 452 *Rangasami v Muthukumarappa*
 (1886) 9 Mad 218 (220) 10 Ind Jur 182, *Aliba v Nanu*
 (1900) 1900 Pun L R No 12 *Jawahar Singh v Chand Kour* (Following 1890 Pun Re No 112 (F B))
 (1884) 6 All 551 (554 555 556, 559) 1884 All W N 189, *Shib Lal v Canga Prasad*
 (1883) 1883 All W N 200 (200) *Padho v Umar Daraz Khan*
 (1894) 1894 All W N 57 (58) 16 All 207, *Todar v Ayub Khan*
 (1896) 20 Bom 408 (413 416 422) (F B) *Datto Duddishur v Vistlu*
 (1891) 15 Bom 183 (186) *Venkaleshtetti v Narain Shetti*

alternative and this Article would apply in other cases notwithstanding that the suit was based on a mortgage and not merely on a charge.⁴ A third view was that whatever might be the position with regard to mortgages created after the coming into force of the Transfer of Property Act of 1882, with regard to hypothecations of immovable property made before the coming into force of that Act, it was this Article that applied and not Article 147. This view was based on the ground that in such cases there was only a charge and not a mortgage as defined by the Transfer of Property Act.⁵ The decision of the Privy Council in *Vasudeva Mudaliar v Sreenivasa Pillai*⁶ has set the above conflict at rest and it is now settled law that this Article applies to all suits for sale or foreclosure in respect of mortgages as well as to suits to enforce charges and that Article 147 is confined to cases where the mortgagee is entitled to sue and sues for foreclosure or sale in the alternative.⁷

(1890) 14 Bom 577 (579), *Onkar Ramshet Marwadi v Firm Govardhan Parshotam Das*

(1899) 13 Bom 90 (96, 99) 13 Ind Jur 181 (F B), *Motiram v Vetal*

(1899) 14 Bom 877 (880), *Dulakhi Ganushet v. Tukarambhat*

(1896) 10 Bom 519 (526), *Rhemji Bhagandas Gujar v. Rama*

ng v Thakur Narain Singh (Over

N 959 6 Cal L Jour 237 (F B),

(1898) 21 Mad 326 (332, 333, 337, 339) (F B) *Ramachandra Rayuguru v Modhu Padhi*

(1898) 8 Mad L Jour 217 (219), *Nilakanta Ratho v Gangapani Pandu*

(1890) 1890 Pun Re No 112 p 327 (331, 333), *Ram Saran Das v Mehtab*

(1893) 6 C P L R 64 (65), *Akharkhan v. M. Fazilabi*

(1872 1892) 1872 1892 Low Bur Rul 555 (563, 565), *Pethaperumal Chetty v James L Phillips*

5 (1899) 21 Mad 139 (140) 7 Mad L Jour 315, *Perianna Gounden v Muthu tira Gounden*

(1899) 21 Mad 326 (332) (F B) *Ramachandra Rayuguru v Modhu Padhi*

(1887) 10 Mad 509 (513, 515) 11 Ind Jur 452, *Rangasami v Muthukumar appa*

(1896) 9 Mad 218 (222) 10 Ind Jur 182 *Aliba v Nanu* (Per Muthusami Iyer, J.)

6 (1907) 30 Mad 426 (433 434) 34 Ind App 186 4 All L Jour 625 9 Bom L R 1104 11 Cal W N 1005 6 Cal L Jour 379 17 Mad L Jour 444 2 Mad L Tim 393 (F C)

omar Baru (The

(F B) *Balaram*

11 All 302, *Sheorani*

Sakhi v Mahur

(1924) A I R 1924 Mad 736 (737) 82 Ind Cas 393, *Agnes Isabella Campbell v Audikessaidu Navadu* (This Article does not apply to English mortgages.)

Article 132
Notes
2—3

This Article will apply not only to a suit against the mortgagor but also to one against the mortgagor's representative⁸

Where a period of limitation is prescribed by a special or local law for a suit which would otherwise fall within this Article the suit must be brought within the period so fixed by the special or local law⁹

In the undermentioned case,¹⁰ a mortgaged property was sold for arrears of land revenue and purchased by a third party. The mortgagee then sued to enforce the mortgage against the purchaser. It was held that the suit, not having been brought within the six months' period laid down by Section 59 of the Madras Revenue Recovery Act, was barred by limitation.

Where a single suit comprises both a claim to enforce a charge upon immovable property and a claim to enforce the personal covenant contained in the mortgage document, one of the claims may be barred but not the other¹¹

3. "To enforce payment." — These words will include suits for foreclosure¹ and suits for sale. They will not include suits for possession or for confirmation of possession² or for redemption³

Rayu garu v Modhu Padhu
 as the mortgagee is entitled to

8

as 901, *Munappa v Subbiah*

(Transferee of the property)

(1924) A I R 1924 Rang 204 (206) 1 Rang 714 79 Ind Cas 766 *Ma Lon v Ma Nyo* (Suit against the pre-emptor of the mortgaged property)

9 (1906) 4 Cal L Jour 553 (555) *Kali Charan Bhowmik v Harendra Lal Roy* (Suit for rent which is a charge under Bengal Tenancy Act)

(1935) A I R 1935 Mad 378 (379) 160 Ind Cas 254 *Municipal Council Trichinopoly v Ratnam Pillai* (Suit for recovery of property tax)

ind v
 s Ten

10 (1887) 10 Mad 62 (63) *Kellaya v Viraya*

11 (1885) 7 All 502 (505) 12 Ind App 12 9 Ind Jur 160 4 Bar 619 (P C) *Ram Din v Kalka Prasad*

(1876) 1876 Pan Re No 73 *Shankar Das v Ghanta*

[See also (1925) A I R 1925 Oudh 92 (92-93) 79 Ind Cas 912 27 Oudh Cas 268 *Kuar Behari Lal v Lala Devi Madho*]

Note 3

1 (1917) A I R 1917 Mad 232 (233) 34 Ind Cas 475 *Ramayya v Seshayya*
 (1932) A I R 1932 Oudh 178 (179) 139 Ind Cas 61, *Ram Sarup v. Gaya Prasad*

(1933) A I R 1933 Oudh 81 (83) 142 Ind Cas 821, *Ganga Prasad v Bislu-nath Singh*

5 Luck 53

2

confirmation

of possession)

3

161 *Ramjhar*
 redemption
 (no money)
 v Sanwal

Time, for a suit for foreclosure, will run from the date fixed for payment of money in default of which foreclosure is to be made³

A suit by a principal against his agent for accounts and to enforce a charge on immovable property created to secure the monies which might be found due from the agent on taking accounts will be governed by this Article⁴

4. "Charged." — The word "charged" in this Article is not limited to a charge such as is referred to in Section 100 of the Transfer of Property Act,¹ though such a charge would also be governed by this Article² It is definitely settled after the decision of their Lordships of the Privy Council in *Vasudeta Mudaliar v. Srinivasa Pillai*³ that it would include a mortgage, which is

- (1935) A I R 1935 Oudh 139 (140) 153 Ind Cas 808 10 Luck 531, *Ram Adhar v. Shankar Bakhsh Singh*
(1933) A I R 1933 Lah 503 (504) 14 Lah 596 142 Ind Cas 805, *Sundar Das v. Beli Ram* (Suit for redemption by puisne mortgagee)
(1937) A I R 1937 Nag 205 (207) 1 L R 1937 Nag 367 172 Ind Cas 289, *Ramkumar Das v. Mt. Chittia Bai*
(1929) A I R 1929 Cal 609 (610) 119 Ind Cas 135 57 Cal 704 (F B), *Sayamali Molla v. Anisuddin Molla*
(1890) 14 Bom 118 (114) *Daudbhai Rambhai v. Daudbhai Alibhai*
[But see (1910) 5 Ind Cas 877 (878) (Cal), *Nidhiram Bandopadhyay v. Sarbessur*
(1926) A I R 1926 Cal 500 (500) 91 Ind Cas 719, *Nil Madhab Mahapatra v. Joy Gopal Mahanti*
(1925) A I R 1925 Mad 150 (150) 82 Ind Cas 864, *Appayya v. Venkataramayya*
(1925) A I R 1925 Mad 76 (78) 84 Ind Cas 301, *Lakshmanan Chettiar v. Sella Muthu Naicker*]
8 (1933) A I R 1933 Oudh 81 (83) 142 Ind Cas 621, *Ganga Prasad v. Dishunath Singh*
4 (1920) A I R 1920 Cal 848 (849) 59 Ind Cas 126, *Dasarathi Chatterjee v. Anil Mohan Ghose*
(1916) A I R 1916 Cal 680 (682) 43 Cal 248 80 Ind Cas 697, *Madhusudan Sen v. Rakhal Chandra Das*
(1915) A I R 1915 Cal 118 (119) 24 Ind Cas 18, *Troilokhyanath Mandal v. Abinash Chandra Roy*
(1905) 85 Cal 298 (301) 7 Cal L Jour 279 12 Cal W N 620, *Hafesuddin Mandal v. Jadu Nath Saha*
[But see (1910) 5 Ind Cas 59 (60) (Cal), *Jogesh Chandra v. Benodelal Roy*]

Note 4

- 1 (1922) 67 Ind Cas 939 (940) (Lah) *Abdul Samad v. Municipal Committee, Delhi* (Charge which will operate not immediately but on the happening of a condition also comes within Article 132, though not under Transfer of Property Act, Section 100)

- 2 (1886) 9 Mad 218 (221) 10 Mad L Jour 182, *Aliba v. Nanu*
3 (1907) 80 Mad 426 (434) 34 Ind App 186 4 All L Jour 625 9 Bom L R 1104 11 Cal W N 1005 6 Cal L Jour 379 17 Mad L Jour 444 2 Mad L Tim 383 (P C)

5. Suit to enforce a charge created by decree. — Where a decree makes a certain sum of money a charge on immovable property, a suit to enforce such charge is within the purview of this Article¹

7. Suit to enforce vendor's lien.—A suit by a vendor of immovable property for recovery of the unpaid purchase money by enforcement of the charge on the property to which he is entitled under Section 55 sub section 4 clause (h) of the Transfer of Property Act, 1882, is governed by this Article¹ Time will run from the date of sale²

1 (1921) A I R 1921 Lah 292 (293), *Narasn Singh v Narayan*
(1904) 7 Oudh Cas 103 (110, 111), *Raja Mohammad Mumtaz Ali Khan v*
Wazir Khan

1 (1928) A I R 1928 Bom 264 (265) 111 Ind Cas 881, *Isram Govind Patil v Trimbak Ganpat*

1 (1934) A I R 1934 All 525 (526) 148 Ind Cas 669 Ahmad Ali v Bishan
Rasa
(1929) A I R 1929 All 121 (122) 107 Ind Cas 679, Kallu v Ram Das (Not
governed by Article 116)
(1908) 80 All 172 (174) 1908 All W N 71 3 Mad L Tim 374 5 All L Jour
243, Munirunnissa v Akbar Khan
(1936) A I R 1936 All 870 (873) 1661 C O 908 Ram Chander v Ram Chander
(1899) 21 All 454 (458) 1899 All W N 170 Har Lal v Muhamad
(1924) A I R 1924 Mad 854 (854) 82 Ind Cas 481, Authmarayana Ayar v
Krishnaswami Ayar

14 Lab 380 *Gulian*

Mal v Magh: Mal

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(1933) A I R 1933 Oudh 23 (34) 141 Ind Cas 468 8 Luck 185 *Daulat Ram v Indragit* (It is immaterial whether vendor has paid his creditors)
[See (1916) A I R 1916 Oudh 143 (144) 83 Ind Cas 527, *Mukta*]

[See also

Singh

Singh
(1921) A I R 1921 All 74 (75) 63 Ind Cas 495 43 All 544 *Bashir*
Ahmad Khan v Nazir Ahmad Khan]

[But see (1900) 24 Mad 233 (236) *Avuthala v Dayunima*]

2. (1936) A I R 1936 All 870 (873). 1661 C 908 Ram Chander v Ram Gander (1924) A I R 1924 Mad 854 (854). 82 Ind Cas 481, Authinarayana Iyer v Krishnaswami Iyer (And not from the date to which payment of purchase money is postponed)
[See however (1924) 18 Bom 48(50), Virchand Lalchand v Kumari]

A claim to recover unpaid purchase money personally from the vendee does not, of course, fall under this Article, but would be governed by Article 111, *ante*.³

Article 132
Notes
7—8

8. Suit to enforce charge in other cases. — This Article will apply to suits to enforce a maintenance allowance charged on immovable property,¹ or to enforce a payment of money charged by a document on immovable property,² or to recover *kattubadi*, which is a rent-charge.^{2a}

As to whether a co-sharer who pays off the revenue due to Government in order to save the estate has a charge on the estate for the amount in excess of his share, see Note 7 to Article 99, *ante*

In the following cases it was held that the suit was not one for the enforcement of a charge within the meaning of this Article —

1. Suit for money spent by a trustee out of his own pocket for the purposes of the trust ³
2. Suit for a share of mortgage money received by a co-owner of property who has mortgaged the same and received the mortgage money ⁴

3 (1898) 22 Bom 846 (849), *Chunnilal v. Bai Jetha*.

Note 8

- [illegible]

Article 132
Notes
8—10

- 3 Suit by a Hindu widow for recovery of money which she expended in discharge of her husband's debt ⁵
4 Suit by vendee of property for recovery of monies paid by him as per directions in the sale deed on such sale deed being set aside ⁶

See also the undermentioned cases ⁷

9. Mortgage by a Hindu father — Suit against sons to enforce pious obligation. — Where a Hindu father executes a mortgage in favour of a third person, a suit by such third person to enforce a mortgage, whether against the father or against the sons on whom such mortgage is binding, is governed by this Article ¹ Where the mortgage is not binding as such on the sons, but they are liable to pay the debts by reason of their pious obligation to pay their father's debt under the Hindu law, a suit to recover such debt in enforcement of such pious obligation would be governed by Article 120 and not by this Article See Note 49 to Article 120 and the undermentioned cases ²

10. One mortgagor paying off mortgage — Suit for contribution against co mortgagor. — Section 95 of the Transfer of Property Act 1882, as it stood before the Amending Act 20 of 1929, ran as follows —

"Where one of several mortgagors redeems the mortgaged property and obtains possession thereof, he has a charge on the share of each of the other co mortgagors in the property for his proportion of the expenses properly incurred in so redeeming and obtaining possession

In *Ahmad Wali Khan v Shamsh ul Jahan Begam* ¹ it was held by their Lordships of the Privy Council that the Section

- 5 (1928) A I R 1928 Mad 820 (923) 110 Ind Cas 613 51 Mad 815 *Muthu swami Kavundan v Ponnayya Kavundan*
6 (1923) A I R 1923 Mad 392 (396) 74 Ind Cas 416, *Gopala Iyengar v Mum machi Reddiar*
7 (1912) 17 Ind Cas 351 (352) (Cal), *Lachmi Narain v Dhanukdhari Prasad Singh*
(1921) A I R 1921 Bom 182 (183) 45 Bom 597 60 Ind Cas 903 *Chhotalal Karsandas v Vishnu Ganesh*

Note 9

- 1 (1907) 29 All 544 (553) 1907 All W N 159 4 All L Jour 424 *Ram Singh Sobha Ram*

da Das Mitra
'ath Triedy
41 *Moheshwar*

- Dutt Tetari v Kishun Singh*
2 (1916) A I R 1916 Pat 203 (204) 37 Ind Cas 184 1 Pat L Jour 497, *Jewala Prasad v Pratap Uday Nath*
(1908) 7 Cal L Jour 195 (196) *Dhagwat N Chaudhury v Suba Lal Jha*
(1916) A I R 1916 Cal 279 (282) 42 Cal 1068 29 Ind Cas 629 (F D) *Didya Prasad v Bhup Narain*

Note 10

- 1 (1906) 28 All 482 (487) 33 Ind App 81 3 All L Jour 360 10 Cal W N 626
3 Cal L Jour 481 1 Mad L Tim 143 8 Bom L R 397 16 Mad L Jour 209 8 Ear 918 (F C)

was not limited in its operation to mortgages under which possession passed, but applied also to other mortgages. A suit to enforce the charge given by the Section was held governed by this Article^{1a}. But there was a difference of opinion on the question as to the starting point of limitation for a suit to enforce such a charge. The general trend of opinion was that time began to run from the date of *payment or redemption* of the mortgage and not from the date when money became due under the mortgage². In the undermentioned case³ it was held that time ran from the date when the mortgage fell due and not from the date of redemption thereof. The present Section 95 of the Transfer of Property Act now makes it clear that the right of the redeeming mortgagor is only that of a *subrogee* to the rights of the mortgagee and that a suit for enforcement of such right of subrogation must be brought within a period of twelve years from the date when the mortgage fell due and not from the date of redemption⁴.

1a (1934) A I R 1934 Pat 612 (614) 13 Pat 356 155 Ind Cas 756, *Birendra Keshri Prasad v Saraswati Kuer*

(1918) A I R 1918 Pat 322 (323) 46 Ind Cas 479 *Mt Hira Kuer v Palku Singh*

(1932) A I R 1932 All 250 (251) 137 Ind Cas 86, *Collector of Farrukhabad v Kishore Mahan*

(1928) A I R 1928 All 241 (245) 109 Ind Cas 38 50 All 509, *Azis Ahmad Khan v Chate Lal*

(1904) 26 All 227 (233) 1904 All W N 3, *Bhagwan Das v Har Dei*

(1936) A I R 1936 Mad 500 (502) 162 Ind Cas 826, *Sriramulu v Rama krishnayya*

(1904) 1 All L Jour 276 (276), *Sagar Mal v Janki Das*

(1906) 29 All 743 (746) 1906 All W N 216, *Yakub Ali Khan v Kishun Lal Ramdas* (Plaintiff

v *Karam Hussain*

2 (1925) A I R 1925 Oudh 613 (614) 92 Ind Cas 559, *Jahan Begam v Munna Mirza*

(1934) A I R 1934 Pat 612 (614) 13 Pat 356 155 Ind Cas 766, *Birendra Keshri Prasad v Saraswati Kuer*

(1930) A I R 1930 Oudh 260 (261, 264) 125 Ind Cas 402 5 Luck 727 *Muhammad Misran v Bharat Singh*

(1932) A I R 1932 All 250 (251) 137 Ind Cas 86, *Collector of Ferukhabad v Kishore Mahan*

(1936) A I R 1936 Mad 500 (502) 162 Ind Cas 826, *Sriramulu v Rama krishnayya*

(1935) A I R 1935 Oudh 245 (250) 154 Ind Cas 267 10 Luck 690 *Nisar Ahmad Khan v Mansur Ahmad Khan*

(1928) A I R 1928 All 241 (245) 109 Ind Cas 38 50 All 509, *Azis Ahmad Khan v Chate Lal*

(1931) A I R 1931 Cal 251 (256) 58 Cal 1167 130 Ind Cas 639 (F B) *Umar Ali v Asmat Ali*

(See (1927) A I R 1927 Oudh 552 (553) 2 Luck 686 105 Ind Cas 302 *Rameshwar v Mt Sheorani* (A I R 1925 Oudh 613 Followed))

3 (1921) A I R 1921 Cal 166 (169) 57 Ind Cas 663 *Raj Kumari Debi v Mukunda Lal Bandopadhyaya* (Overruled in A I R 1931 Cal 251 (F B))

4 (1931) A I R 1931 Cal 251 (252) 58 Cal 1167 130 Ind Cas 639 (F B), *Umar Ali v Asmat Ali*

Article 132
Note 11

11. Suit against substituted security.—Where the mortgaged property is converted into another form or is transferred under circumstances in which the mortgagee will not be entitled to proceed against the mortgaged property, he will be entitled to proceed against the property into which the mortgaged property has been converted or against the proceeds received by the transfer, in the same way as he could have proceeded against the mortgaged property. This principle is recognized in Section 73 of the Transfer of Property Act which runs as follows —

“(1) Where the mortgaged property or any part thereof or any interest therein is sold owing to failure to pay arrears of revenue or other charges of a public nature or rent due in respect of such property, and such failure did not arise from any default of the mortgagee, the mortgagee shall be entitled to claim payment of the mortgage money in whole or in part, out of any surplus of the sale proceeds remaining after payment of the arrears and of all charges and deductions directed by law

“(2) Where the mortgaged property or any part thereof or any interest therein is acquired under the Land Acquisition Act, 1894, or any other enactment for the time being in force providing for the compulsory acquisition of immovable property, the mortgagee shall be entitled to claim payment of the mortgage money, in whole or in part, out of the amount due to the mortgagor as compensation

“(3) Such claims shall prevail against all other claims except those of prior encumbrancers, and may be enforced notwithstanding that the principal money on the mortgage has not become due”

The Section deals only with two cases of substituted security, viz., where the mortgaged property is sold for arrears of public demand or is acquired under the Land Acquisition Act. But the principle is of general application and applies to all cases of substituted security. Where certain mortgaged property was sold in execution of a mortgage decree and there was a surplus of the sale proceeds remaining after the decree was satisfied, it was held by their Lordships of the Privy Council in *Barham Deo Prasad v Tara Chand*¹ that the surplus moneys represented the security which a subsequent mortgagee had in the property and that a suit by the subsequent mortgagee to enforce his right by payment out of the surplus sale proceeds would be governed by this Article. See also the undermentioned cases to the same effect²

In *Muniappa v Subbiah*³ Srinivasa Iyengar, J., in dealing with the question of limitation in suits by mortgagees to enforce

Note 11

1 (1913) 21 Ind Cas 951 (954) 41 Cal 654 41 Ind App 45 (P C)

2 (1925) A I R 1925 Oudh 215 (218) 84 Ind Cas 539 *Chandra Lunwar v Sheo Dayal*

(1906) 33 Cal 92 (93, 112) 9 Cal W N 939 *Barhamdeo v Tara Chand*

3 (1917) A I R 1917 Mad 880 (882) 32 Ind Cas 901

payment out of substituted securities, observed as follows

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Note 11

" Again the mortgaged property after the date of the mortgage may assume a new form and in that new form may be in the hands of the mortgagor or of a third party. Even in such cases a suit by the mortgagee to enforce payment of his debt may be governed by Article 132. As for example, (a) the mortgaged property may have been sold for arrears of Government revenue payable by the mortgagor, (b) by a landlord for arrears of rent (c) by a first mortgagee under a power of sale, or (d) through Court in execution of a decree for sale to which mesne encumbrancers are parties.

"It might have been acquired in the exercise of the right of eminent domain. For other examples, see *Ashburner on Mortgages*, page 230, and *Jowala v Hurbuns* ⁴ In all these cases the original security in the hands of the purchaser is freed of all encumbrances subsequent to the charge for realizing which the property was sold. In fact, the charge is transferred to the surplus sale proceeds (see Sections 73 and 97 of the Transfer of Property Act), and a suit by an encumbrancer who is entitled to be paid out of it, to follow it in the hands of a person holding it, is a suit to enforce payment of money charged on immovable property, though at the time of the institution of the suit, the immovable property has assumed the shape of money. In equity, the money is still considered to be land. Again, instead of the original security, there may be a substituted security, as for instance, in cases where the original mortgage was an undivided share of immovable property for which, by a subsequent partition, a particular portion is allotted. *Bynath Lall v Ramoodeen Choudry* ⁶ In all the above cases, the person, in whose hands the substitute for the original security is, holds it subject to the right of the encumbrancers as if they were alienees of the securities."

Applying the principles referred to above it has been held that this Article would apply to all suits to enforce payment of mortgage-money from out of the substituted security⁶

4 (1859) S D N W P 569

5 (1873 74) 21 Suth W R P C 233 (236) 1 Ind App 106 3 Sar 333 2 Suther
342 (P C)

6 - 0000 1 7 10 0000 1 00 00 0 0 = " Lal & Alay

..le for arrears

(1903) 31 Cal 745 (751), *Upendra Chandra Singh v Mohari Lal Marrari*
(Do)

katoppa Rao (Where a vendee of a mortgaged house pulls down the house and utilizes the materials for other buildings or otherwise deals with them, he cannot escape his liability in respect of the

Article 132
Note 11

Time, in the above cases, will begin to run from the date when the money becomes due under the mortgage sought to be enforced and not when the security is substituted⁷

In the undermentioned case⁸ a casuarina plantation was mortgaged to the plaintiff. After some time the defendant with the connivance of the mortgagor cut and removed the trees standing on the land. The plaintiff then sued the defendant for the recovery of the value of the trees. It was held that the suit was not one for the enforcement of the payment of mortgage money out of a substituted security but was one for damages or compensation for depreciation of security and was not, therefore, governed by this Article.

Where *A* receives from *B* the money due by him under a mortgage to *C*, a suit by *C* against *A* for recovering the money so received by him is not a suit to recover money charged upon immovable property within the meaning of this Article⁹. A contrary view has been held in the undermentioned cases¹⁰. It is submitted that they are not correct.

A, a mortgagee, obtained a decree for sale of the mortgaged property against *B*, the mortgagor. He subsequently mortgaged the decree to *C*. Thereafter he purchased the mortgaged property in satisfaction of his mortgage. *C* then filed a suit against *A* to enforce his mortgage out of the property which *A* had purchased from *B* in satisfaction of the decree. It was held by the High Court of Allahabad that the suit was governed by this Article¹¹. The reason given was that though at the time of the mortgage to *C* the decree mortgaged should be considered as moveable property, it became converted into immovable property at the time of the suit, and that

mortgage as vendee of the mortgaged property and the period of limitation for the enforcement of such liability is the usual period of limitation applicable to the case of a mortgage.)

(1916) A I R 1916 Nag 81 (86) 34 Ind Cas 704 12 Nag L R 60 *Tuskanath v Shanker Lal* (Second mortgagee foreclosing and selling property to *malguzar* — Suit by first mortgagee against substituted security.)

(1923) A I R 1923 Mad 76 (80) 70 Ind Cas 648 45 Mad 827, *Abdul Kadir v Somasundaram* (Tin sheds pulled down and converted into money.)

7 (1900) 27 Cal 180 (184) *Kamala Kant Sen v Abdul Barkat*

(1906) 3 Cal L Jour 52 (58), *Umatara Gupta v Uma Charan Sen*

(1938) A I R 1938 All 221 (226) (FB), *Girdharilal v Alay Hasan Musanna*

[But see (1900) 3 Ind Cas 311 (314) (Cal) *Istri Prosad v Rai Gunga Prosad Singh Bahadur*]

8 (1917) A I R 1917 Mad 680 (681, 684) 32 Ind Cas 901, *Muniappa v Subbiah*

9 (1916) A I R 1916 Mad 524 (525) 23 Ind Cas 495 *Narayanan v Fangasami Chetty* (30 Mad 293, Followed)

10 (1909) 1 Ind Cas 732 (734) 1909 Pat Re No 37, *Sham Lal v Johri Mal*

(1920) A I R 1920 Lah 407 (407) 56 Ind Cas 944 *Mt Aso v Mt Harnam*
(1 Ind Cas 782, Followed)

11. (1917) A I R 1917 All 309 (310) 37 Ind Cas 4 39 All 74 *Mt Jamnades v Lala Ram*

C's suit was therefore a suit to enforce payment of money charged on immovable property. It is submitted that this view is not correct. At its inception the mortgage in favour of *C* was only of moveable property and the conversion of the latter subsequently into immovable property will not alter the character of the mortgage when made as one of moveable property.

12. Claim for interest due under mortgage.—Where interest is due on the contract of mortgage, the mortgagee is entitled, in the absence of any contract to the contrary, to treat the interest due under the mortgage as a charge on the estate.¹ The amount awarded as reasonable compensation for breach of penal clauses in a mortgage deed relating to interest has been held to be for purposes of limitation, a portion of the mortgage money.^{1a} A suit to enforce the payment of interest so charged on the mortgaged property would be governed by this Article.²

The general principle is that interest is accessory to the principal, unless there is an *independent* contract to pay the interest. See Note 1 to Article 63, *ante*. It follows that where the interest is accessory to the principal, a suit for interest would be barred if a suit for the principal would be barred.³ It follows also that where the principal is not barred a claim for interest will not be barred even though it may extend to more than twelve years before the date of the suit.⁴ In the undermentioned case⁵ where interest under the mortgage document was payable annually and the principal in a certain number of years, it was held that the claim for interest would be barred after twelve years from the date of the default though the

Note 12

- 1 (1924) A I R 1924 P C 183 (183) 5 Lab 425 51 Ind App 377 80 Ind Cas 820 (P C) *Ganga Ram v Natha Singh*
- 1a (1915) A I R 1915 Oudh 31 (55) 30 Ind Cas 323, *Narendra Bahadur Singh v Oudh Commercial Bank Ltd*
- 2 (1925) A I R 1925 Lah 113 (114) 82 Ind Cas 622 *Danwari Lal v Kallu Khan*
- (1926) A I R 1926 Lah 530 (532) 92 Ind Cas 762, *Ladha Singh v Sunder Singh* (A I R 1924 P O 183 Followed)
- (1923) A I R 1923 Nag 181 (189), *Aadar Wya v Chandmiga*
- (1909) 2 Ind Cas 111 (112) (Cal) *Nilmoney Sinha v Hardhan Das*
- (1925) A I R 1925 Lah 182 (182) 79 Ind Cas 24, *Ramji Lal v Munshilal*
- (1888) 1888 Pun Re No 57, *Radha Kishen v Muhamdu*
- (1883) 6 Mad 417 (418) *Dattani v Ratna* (6 Bom 719 (F B) Followed)
- (1916) A I R 1916 Mad 78 (79) 30 Ind Cas 610, *Vasudevan v Konurupettamanna* (Express provision in mortgage deed that the mortgaged properties were to be security for principal and interest — Hence Article 132 applies to claim for interest)
- (1898) 22 Bom 107 (108 110) *Manager Vithoba v Vigneshwar* (Claim for interest is not restricted to the period fixed for payment)
- (1897) 21 Cal 699 (703) 1 Cal W N 437 (F B), *Moti Singh v Ramohari Singh*
- 3 (1935) A I R 1935 Lah 516 (517) 158 Ind Cas 644, *Attar Singh v Dilip Singh*
- 4 (1934) A I R 1934 Mad 695 (696) 152 Ind Cas 617 59 Mad 266, *Suramma v Venkayya*
- 5 (1909) 2 Ind Cas 111 (112) (Cal), *Nilmoney Sinha v Hardhan Das*

Article 132
Notes
12-14

claim for interest might not have been barred. It is submitted that unless it could be said that there was an independent contract to pay in such a case, the decision cannot be accepted as correct.

Where interest is claimed, not by virtue of a stipulation in the mortgage document but as damages, this Article has no application as such interest cannot be said to be a charge on the land⁶.

A executes a mortgage to B containing a personal covenant to pay the principal and interest secured by the mortgage. A suit on the personal covenant to pay the principal is allowed by the mortgagee to be barred by limitation. But within twelve years of the date when the mortgage money fell due the mortgagee sues to enforce personally the payment of interest falling due within six years of the suit. It was held that the suit was not barred inasmuch as the principal debt continued to exist as a charge even though the claim on the personal covenant was barred⁷.

13. Suit against surety for mortgagor.—A executes a mortgage in favour of B. C stands surety for A and executes a simple bond of suretyship for that purpose. A suit against C to enforce his liability as a surety is not one to enforce payment of money charged on immoveable property within the meaning of this Article¹.

14. Suit to enforce right obtained by subrogation.—Section 92 of the Transfer of Property Act prescribes the circumstances under which a person paying off a mortgage is subrogated to the rights of the mortgagee. A suit by such person for recovery of money by enforcing the rights so obtained by him will be governed by this Article¹. The *terminus a quo* for such a suit will be the date on which money became due under the mortgage paid off². The contrary

Jour 265 Rama

(1922) A I R 1922 Lah 254 (256) 66 Ind Cas 771 3 Lah 200 (P B) *Molan Mal v Muhammad Baksh* (If the mortgagee is a defendant in a suit for redemption he is entitled to such damages for entire period of non payment.)

7 (1928) A I R 1928 Lah 653 (654) 111 Ind Cas 808 *Raha Ram v Hira Lal*
(1930) A I R 1930 Lah 737 (737) 120 Ind Cas 433 *Munshiram v Purnachand* (A I R 1928 Lah 653 Followed)

Note 13

1 (1927) A I R 1927 Mad 945 (915) 103 Ind Cas 165 *Muthu Chettiar v Rengappa Naidu*

Note 14

1 (1912) 14 Ind Cas 496 (504) 39 Cal 527 39 Ind App 68 (P C) *Mahomed Ibrahim Hossein Khan v Abdul Pershad Singh*

2 (1912) 14 Ind Cas 496 (504) 39 Cal 527 39 Ind App 68 (P C) *Mahomed Ibrahim Hossein Khan v Abdul Pershad Singh*

(1905) 2 Cal L Jour 574 (581, 582) *Dajyath Singh v Mahomed Ibrahim Hossein*

(1930) A I R 1930 Nag 166 (171, 172) 127 Ind Cas 881, *Shreeji v Bhaskar*

(1937) A I R 1937 Nag 402 (406) *Totaram Jawaharlal v Harischandra Harkisan*

(1925) A I R 1925 Nag 21 (25) 87 Ind Cas 264, *Narajan v Syed Hafez*

view, viz, that time runs from the date of payment, has been held in the undermentioned case³ It is submitted that this view is against the decision in *Mahomed Ibrahim Hossein Khan v. Ambika Pershad Singh*,⁴ and is not correct

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There is a difference of opinion as to the starting point of limitation where a decree had been obtained on the mortgage at the time of payment It was held in the undermentioned decisions⁵ that in such cases time will run from the date of the payment of the decree A contrary view, viz, that time will run only from the date when the money becomes due under the mortgage, has been held in other cases⁶ It is submitted that the latter view is correct

15. Renewal of mortgage — Suit on renewed mortgage. — Where one mortgage is renewed by another, the starting point of limitation for a suit on the latter mortgage would be the date on which such mortgage falls due and not the date on which the earlier mortgage falls due, even though the mortgagee is entitled to priority over intermediate incumbrancers to the extent of the amount due under the earlier mortgage¹ See also Section 19 Note 36, *ante*

1864 JJ

3 (1930) A I R 1930 All 561 (506) 125 Ind Cas 754, *Paras Ram v Mt Mewa Kunwar*

4 (1912) 14 Ind Cas 496 (504) 89 Cal 527 39 Ind App 68 (F C)

5 (1922) A I R 1922 All 153 (155) 63 Ind Cas 604 44 All 67, *Shib Lal v Yunnai Lal*

(1936) A I R 1936 All 33 (43) 58 All 602 160 Ind Cas 541 (F B), *Alam Ali v Beni Charan*

(1936) A I R 1936 All 578 (581) 58 All 1056 165 Ind Cas 7 (F B), *Ram Dhan v Mt. Chunni Kunwar*

(1930) A I R 1930 All 561 125 Ind Cas 754, *Paras Ram v Mt Mewa Kunwar*

(1926) A I R 1926 Nag 84 (86) 92 Ind Cas 118 24 Nag L R 92, *Suryabhan v Renuka*

6 (1927) A I R 1927 Mad 631 (635) 50 Mad 626 102 Ind Cas 316 *Kotappa v Raghavayya*

(1925) A I R 1925 Mad 80 (82) 81 Ind Cas 771 *Parvati v Venkatarama*

(1936) A I R 1936 All 636 (637) 58 All 912 164 Ind Cas 725 *Ram Sarup v Bhagwati Prasad*

(1922) A I R 1922 Pat 493 (501) 1 Pat 760 68 Ind Cas 707, *Sibanand Misra v Jagmohan Lal*

(1914) A I R 1914 Oudh 251 (254) 17 Oudh Cas 33 23 Ind Cas 449, *Deputy Commissioner of Lucknow v Sukhnandan*

(1917) A I R 1917 Nag 152 (154) 42 Ind Cas 596 13 Nag L R 217, *Nathuram v Sheolal*

[See also (1937) A I R 1937 Mad 626 (S30) *Madappaya v Mahabala Rao*]

Note 15

1 (1935) A I R 1935 Mad 64 (65) 153 Ind Cas 2 58 Mad 270 (F B) *Surya narayana Rao v Venkataraya*

16. Person interested not made party to mortgage suit.— Subsequent suit against him.— Where a prior mortgagee sues upon his mortgage without making the subsequent mortgagee or other person interested in the mortgaged property a party to the suit, the latter is not bound by the decree passed in such suit. A fresh suit on the prior mortgage against such person is governed by this Article.¹ As to the starting point of limitation for such suits, it has been held in the undermentioned cases² that time would run from the date on which money would be due under the mortgage. In the cases cited below,³ however, a different view was taken and it was held that where a subsequent purchaser of the mortgaged property in court auction was not made a party to the mortgage suit by reason of the fact that the mortgagee was not aware of such purchase, time for a fresh suit against such purchaser on the mortgage would run from the date when such purchaser took possession under his purchase and not from the date of the mortgage. These decisions seem to rest on grounds of hardship and do not seem to be reconcilable with any established principle of law.

17. Suit against trespasser.—A suit for the enforcement of the mortgage against a third person who has entered on the mortgaged property subsequent to the mortgage and has been in possession adversely to the mortgagor, is governed by this Article.⁴ Such a suit

(1932) A I R 1932 Oudh 314 (316) 7 Luck 26 139 Ind Cas 626, *Ram Sahai v Kunuar Sah*]

Note 16

- 1 See the cases cited in Foot Notes (2) and (3) below
- 2 (1931) A I R 1931 Mad 542 (544, 549) 133 Ind Cas 497, *Chandramma v Seethan Naidu*
- (1928) A I R 1928 Rang 189 (191) 6 Rang 297 111 Ind Cas 132 *T C Bose v Obedur Rahman*
- (1933) A I R 1933 All 908 (910) 56 All 134 147 Ind Cas 575 *Bansidhar v Shiv Singh*
- (1931) A I R 1931 All 468 (461) 53 All 1023 134 Ind Cas 1 (F B) *Fam Sanah Lal v Janki Prasad*
- (1935) A I R 1935 Cal 199 (141) 62 Cal 75 154 Ind Cas 669 *Jagat Chandra De v Abdul Rashid*
- (1933) A I R 1933 Cal 912 (913) 60 Cal 1193 147 Ind Cas 803 *Surendra Lal v Ahmmad Ali*
- (1922) A I R 1922 Bom 334 (335) 69 Ind Cas 165 *Dattatraya Mangeshaya v Venkatesh Vasudeo*
- (1906) 3 Cal L Jour 104n, *Aughore Nath Banerjee v Deb Narain Gait*
- 3 (1935) A I R 1935 Mad 650 (682) 157 Ind Cas 1050 *Gopalan Nair v Moudeen Madar Routhen*

Sambanta

Iar Per

shad v Dalmardan Singh

Note 17

- 1 (1916) A I R 1916 Mad 990 (1000) 51 Ind Cas 412 39 Mad 811 (F B) *Vyapuri v Sonamma Bai Ammani*
- (1917) A I R 1917 Mad 880 (882) 52 Ind Cas 901, *Muniappa v Subbiah*
- (1923) A I R 1923 Mad 160 (163) 99 Ind Cas 631, *Sundaram Aiyar v Thiyagaraja Pillai*

is not barred by the fact that the third party has perfected his title by prescription against the mortgagor²

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17—19

18. Suit for personal decree.—It was held in some old cases¹ that this Article would apply even to suits claiming a personal decree in respect of money due under a mortgage or charge. It is now settled that this is not correct and that this Article has no application to such suits. Such suits will now be governed by Article 116 or Article 120. See Notes 19, 20 and 21 under Article 116 and the undermentioned cases²

19. Immovable property.—The Article applies only to suits for enforcement of payment of money charged upon *immovable property* and not moveable property^{1a}. This Act does not define the expression 'immovable property'. The expression must, therefore, be understood in the sense in which it is defined in the General Clauses Act, 1897. Under that Act the expression has been defined as including land, benefits arising out of land, and things attached to the earth, or permanently fastened to anything attached to earth. The following have been held to be "immovable property" within the meaning of this Article

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- (1914) A I R 1914 All 95 (96) 24 Ind Cas 907 86 All 567 (F B) *Raj Nath v Narain Das*
 (1918) A I R 1918 Cal 933 (936 939) 37 Ind Cas 277 44 Cal 425 *Priya Sakhi Debi v Bireswar Samanta*
 [But see (1916) A I R 1916 Cal 311 (312) 28 Ind Cas 917, *Bireswar Samanta v Priya Sakhi Debi*]
 2 (1916) A I R 1916 Mad 990 (998) 31 Ind Cas 412 39 Mad 811 (F B) *Vijayapuri v Sonamma Bai Ammani*
 (1924) A I R 1924 Oudh 19 (27) 73 Ind Cas 429 *Galstaun v Abid Hussain*

Note 18

- 1 (1881 82) 6 Bom 719 (724) (F B) *Lallubhai v Naran* (Overruling 5 Bom 463)
 (1883) 1883 Bom P J 28 (23) *Narayan v Rajaram*
 (1886) 9 Mad 218 (219, 220) 10 Ind Jur 162 *Aliba v Nanu*
 2 (1899) 20 All 386 (388) 1899 All W N 83 *Hamid ud-din v Kedar Nath*
 (1890) 14 Bom 877 (880) *Bulakh v Ganu Shet v Tukarambhat*
 (1896) 23 Cal 397 (402) *Raghunath Sahay v Lalji Singh*
 (1867) 8 Suth W R 834 (335) *Gora Chand Dutt v Loke Nath Dutt*
 (1876) 1876 Pun Re No 73 *Shankar Das v Ghanta*
 (1923) A I R 1923 Lah 23 (24) 72 Ind Cas 697, *Rukhan Din v Hassan Din*
 (1898) 21 Mad 242 (243) 8 Mad L Jour 81 *Unslaman v Ahmad Kutti*
 (Suit under Section 68 Transfer of Property Act)
 (1916) A I R 1916 Pat 350 (352) 35 Ind Cas 43 *Laja Ram v Hanuman*
 (1934) A I R 1934 Pat 604 (627) 152 Ind Cas 837 *Kirti Narayan v Surendra Molan*
 (1913) 20 Ind Cas 175 (175) (All) *Sheo Prasad v Sheo Prasad*
 (1897 1901) 2 Upp Bur Rul 513 (500 501) *Maung Shwe Dok v Ma Le*
 (Article 120 applied)
 (1913) 20 Ind Cas 360 (362) (1913) 1 Upp Bur Rul 164 *Yga Tol v Yga E Gyan* (Claims arising in equity—Article 120 applies.)

Note 19

- 1a (1904) 27 Mad 525 (530) 13 Mad L Jour 445, *Mahalinga v Ganapa Subben*

Article 132
Notes
19—20

- 1 The right of a landlord to recover rents and profits from his tenant¹
- 2 Standing trees²
- 3 A usufructuary mortgage right in immovable property³
- 4 A simple mortgage right in immovable property⁴
- 5 Jahagir income, such income being a 'benefit to arise out of land'⁵
- 6 A house which is built on a site with foundation laid in it⁶

The following have been held not to be immovable property within the meaning of this Article

- 1 A right to a turn of worship in a temple⁷
- 2 A decree on a mortgage⁸

20. Explanation, clause (a) — A *malikana* is a deduction from the assets of a Government settled estate of a sum which is payable to its proprietors in consideration of their position as such and of their relation to Government as the payers of revenue¹. The *hagqs* referred to in this Explanation are fixed charges upon immovable property, of which payment can be enforced by the sale of the property charged². Zamindary dues called *bhet* and *khurak* fall within the Explanation to this Article^{3a}. As has been seen in Note 1 *malikanas* and *hagqs* were, under the Act of 1859, regarded as interests in immovable property. Under the Explanation, such allowances are to be deemed as money charged upon immovable property.

- 1 (1885) 7 All 120 (123, 124) 1884 All W N 233 *Muhammad Zaki v Chatku*
(1916) A I R 1916 Oudh 176 (177) 18 Oudh Cas 880 33 Ind Cas 555 *Ram Juan v Jadunath*
(1938) A I R 1938 Pat 16 (17) 178 Ind Cas 64 *Shaukh Ramzan Ali v Babu Lal Singh*
(1907) 3 Nag L R 164 (170, 171) *Singh, Murkudhar v Lal Prem Arain*
(Dissenting from 3 Nag L R 81)
- 2 (1887) 1887 All W N 59 (60) *Ram Ghulam v Manohar Das*
(1911) 9 Ind Cas 478 (478) (All) *Mangal Sen v Mt Naoli* (Mortgage of grove of mango trees standing upon the holding)
- 3 (1927) A I R 1927 Lah 373 (375) 103 Ind Cas 742, *Munilal v Kishore Chand*
- 4 (1927) A I R 1927 Lah 373 (375) 103 Ind Cas 742 *Munilal v Kishore Chand*
- 5 (1894) 1894 Pun Re No 4 *Ram Pershad v Kisan Singh*
- 6 (1926) A I R 1926 Mad 343 (344) 91 Ind Cas 754 *Punnayya v Venkatappa Rao*
- 7 — — — — — Cas 25 *Narasimha*
overns the suit
- 8 — — — — — *Mt Jannadai v*
Lala Ram

Note 20

- 1 (1967) 9 Suth W R 102 (102) *Heryanund Shoo v Mt Oseerun*
 - 2 (1978 80) 2 All 353 (361) *Kirath v Ganesh* [A zamindari due customarily payable on the sale of a house situated in a mohalla is not a *hagq*
- Cas 49 33 Ind
Jagjivan Balsh
of a village

and if the right to such allowance is not lost by prescription the claim for arrears will not be barred if such arrears became due within twelve years of the suit³

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But in order that this Article may apply, the plaintiff must claim the allowance as a charge upon the immovable property concerned⁴ Where the allowance claimed is not a charge upon immovable property, a suit for such allowance is not governed by this Article⁵ A suit by one co sharer in *tatan* against another co sharer who has improperly received the plaintiff's share of certain *haqq*s is not governed by this Article⁶ The reason is that the Article applies only to suits against the person *originally* liable for the payment of the *haqq*

21. Explanation, clause (h). — Before the introduction of clause (h) of the Explanation in the year 1927, there was a difference of opinion on the question whether a suit on a mortgage made to secure a loan in kind was governed by Article 132, some cases holding that the Article would not apply,¹ and other cases holding

- 3 (1836) 1696 Bom P J 873 (373) *Majmudar v Chandrasangji* (Haqq)
(1926) A I R 1926 Cal 552 (554) 91 Ind Cas 411 *Manohar Das v Brojendra Lal* (Do)
(1880) 5 Cal 921 (922) 6 Cal L R 133, *Hurmuti Begum v Hirdaynarain* (Mahikana)
(1906) 10 Cal W N 151 (152) *Jagannath Pershad Singh v Kharath Lal* (Do)
(1915) A I R 1915 Cal 552 (553) 21 Ind Cas 779 *Moheers Prasad Singh v Day Nath*
(1919) A I R 1919 All 331 (334) 49 Ind Cas 737 41 All 259 *Nathu v Ghansham Singh*
(1908) 1908 All W N 209 (210) *Manohar Lal v Kashi Ram*
(1913) 19 Ind Cas 63 (64) 85 All 185 *Shasda Ali v Phullo*
(1921) A I R 1921 Pat 47 (48) 61 Ind Cas 190 6 Pat L Jour 84, *Rameshwar Singh v Suraj Narain Jha*
- 4 (1905) 33 Cal 998 (1000) *Kallar Roy v Ganga Pershad* (If plaintiff does not seek to enforce charge Article 115 is applicable)
(1919) A I R 1919 All 331 (334) 49 Ind Cas 737 41 All 259 *Nathu v Ghansham Singh*
(1934) A I R 1934 Pat 44 (45) 154 Ind Cas 1013 *Padhum Lal v Tribeni Singh*
(1912) 14 Ind Cas 505 (505) 34 All 246 *Lachmi Narain v Turab un Nissa*
- 5 (1869) 6 Bom H C R A C 86 (58) *Raoji Munor v Desai Kallian Roy Hukmat Rai* (Pagadi allowance paid by Government to certain person on account of desaigiri haqq is not charge on land)
(1867) 68) 4 Bom H C R A C 189 (190) *Maharana Fatehsangji v Desai Kalyanraya* (Toda Garas paid in cash is not a charge on land)
- 6 (1883) 7 Bom 191 (193) *Harmulh Gouri v Harisulh Prasad* (Such a suit is governed by Article 60)
(1895) 22 Bom 669 (671) *Chaman Lal v Dapubhas*
(1884) 8 Bom 426 (431) *Desai Maneklal Amrutlal v Desai Shitalal Bhogilal* (Suit by one sharer against another is governed by three years limitation)
(See also (1885) 9 Bom 111 (114) *Dulab v Bannadhar Rai*)
(But see (1880-81) 5 Bom 68 (70) *Chhagan Lal v Dapubhas* (Twelve years limitation))

Note 21

- 1 (1915) A I R 1915 Cal 943 (943) 44 Ind Cas 518 *Kandarpa Narayan Jardal v Sridhar Roy* (Article 116 or Article 120 applies)

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a contrary view ² Clause (h) now makes it clear that this Article will apply to such cases

22. Explanation, clause (c).—This clause was introduced into this Article by Section 9 of Act 21 of 1929. The reason for such introduction was given by the Select Committee in their Report as follows :

"There is much conflict of decisions regarding the period of limitation which governs a suit to recover the money due on a mortgage by the deposit of title deeds. Some Courts have held that it is sixty years, while others hold that it is twelve years. We think that this conflict should now be set at rest, and as the preponderance of opinion is in favour of providing a twelve years' rule in such cases, we propose to bring these mortgages under Article 132 of the Indian Limitation Act, 1908 "

23. "When the money sued for becomes due."—The question when the money sued for 'becomes due' has necessarily to be decided with reference to the terms of the particular document in question ¹ Where the deed fixes no time for payment, time will run from the date of the deed ² Where a period is fixed, time would run from a

(1917) A I R 1917 Cal 519 (520) 37 Ind Cas 805, *Rash Bihari Das v Kunjabihari Patra*

2 (1921) 64 Ind Cas 310 (311) (Cal), *Gnanendra Nath Gosh v Panch Kour Garam*

(1921) 64 Ind Cas 210 (211) (Cal), *Joy Narain Gole v Mangobinda Bera*

(1922) A I R 1922 Nag 23 (24) 18 Nag L R 111 65 Ind Cas 697, *Somlal v Dhanua*

(1909) 2 Ind Cas 111 (112) (Cal) *Nilmoney Sinha v Hardhan Das*

(1921) A I R 1921 Cal 172 (174) 48 Cal 625 61 Ind Cas 539 (F B) *Ramchand Sur v Iswarachandra Giri*

(1920) A I R 1920 Cal 583 (584) 47 Cal 125 51 Ind Cas 849, *Indra Narain Shao v Djabar Samanta*

(1919) A I R 1919 Cal 476 (477) 50 Ind Cas 608, *Sridhar Chandra v Ram Gobinda Jana*

(1919) A I R 1919 Cal 325 (325) 51 Ind Cas 241, *Mohesh Ghose v Umesh Chandra Ghose*

(1920) A I R 1920 Cal 855 (856) 60 Ind Cas 715, *Dina Bandhu Mahto v Bishnu Beua*

(1919) A I R 1919 Cal 860 (860) 46 Ind Cas 384 *Hrishikesh Singh v Lakhs Narain Singh* (A suit on a mortgage for a sum of money on which the interest is payable in paddy)

Note 23

1 (1931) A I R 1931 Pat 285 (290) 134 Ind Cas 609 11 Pat 112, *Mulhdeo Singh v Harakh Narayan Singh*

(1930) A I R 1930 P C 188 (192) 126 Ind Cas 417 57 Ind App 194 54 Bom 495 (P O) *Nilkanth Balwant v Vidya Naraynn Dharathi* (It was held that on the facts of the case the money did not become due until demand was made)

2 (1893) 20 Cal 269 (272), *Nilcomal Pramanick v Kamini Koomar Dasu*

(1927) A I R 1927 All 499 (502) 103 Ind Cas 160 (F B), *Dhusrai v Ganesh Rai*

(1921) A I R 1921 Mad 624 (626) 70 Ind Cas 759, *Jagana Sanyasiah v Alchanna Naidu* (Clause in mortgage saying mortgagor would pay

date so fixed³ Where the mortgage money is payable *on demand* then on the principles discussed in Note 6 to Article 59, time would run from the date of the document⁴ unless the condition of demand is an integral term of the contract of mortgage⁵

Article 132
Note 23

Illustrative cases

1 A mortgage bond executed on 24th July 1892 provided that the money due under it should be paid in eight yearly instalments Each instalment had to be paid on *Magh Sudi Purnamashi* of each year The last payment was to be made on *Magh Sudi*

after discharging another mortgage on some of the mortgaged properties—Time for limitation is not postponed)

(1915) A I R 1915 Oudh 111 (112) 18 Oudh Cas 86 27 Ind Cas 540 *Gajraj Singh v Raghubar*

(1926) A I R 1926 Lah 225 (226) 92 Ind Cas 656 *Ziada v Gurdas Ram* (Where according to the terms of the mortgage deed the mortgagor is at liberty to pay at any time the mortgagee is equally at liberty to foreclose and limitation under Article 132 of Sch I to the Limitation Act begins to run at once)

3 (1928) A I R 1928 All 159 (162) 108 Ind Cas 152 50 All 828 *Ashiq Husain v Chaturbhuj*

(1931) A I R 1931 All 203 (204) 133 Ind Cas 311 *Ram Dayal v Aminuddin*

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(1922) A I R 1922 Oudh 102 (104) 65 Ind Cas 408 *Mahadeo Tewari v Sitta Bakhsh Singh* (Where a deed of further charge provides that the borrower is entitled to pay the debt at any time prior to the date on which the original mortgage is to be redeemed the deed fixes a date for payment and the limitation for the recovery of the money due on it does not begin to run from the date of its execution)

(1923) A I R 1923 Oudh 214 (215) 121 Ind Cas 286 *Sheo Bahadur Singh v Naudat Singh*

(1911) 9 Ind Cas 482 (483) (All) *Mahabir Prasad v Durbhaya Rai* (Subsequent mortgage providing money should be paid at the time of redemption of earlier one—Time runs from the date of redemption of earlier mortgage)

[See also (1919) A I R 1919 Cal 520 (521) 50 Ind Cas 71 *Bhut Nath Das v Kail Prasad* (Mortgage bond fixing period of repayment but providing that on default three years produce is to be given to the mortgagee and if not given amount and interest was to be recovered — No cause of action till after expiry of period of latter condition)]

4 (1919) A I R 1919 All 56 (59) 52 Ind Cas 684 42 All 70 *Rani Barkhatunnissa v Mahboob Ali Khan* (Rule applies also to transferee of mortgage rights)

(1934) A I R 1934 Mad 644 (645) 152 Ind Cas 437 *Kamalambal v Purushottam Naidu*

(1928) A I R 1928 Rang 189 (191) 111 Ind Cas 132 6 Rang 297 *T C Dose v Obedur Rahman Chowdhury*

(1898) 21 Mad 139 (140) 17 Mad L Jour 315 *Peranna Goundan v Muthu Veera Goundan*

(1916) A I R 1916 Mad 456 (457) 31 Ind Cas 335 *Surayya v Dapirazu*

5 (1933) A I R 1933 Rang 188 (190) 147 Ind Cas 231 11 Rang 373 *Tan Soon Thye v Lionel Emile Du Berni*

(1934) A I R 1934 Rang 51 (53) 148 Ind Cas 221, *Valla v Petley*

Article 132
Note 23

Puranmash: 1956 corresponding to 14th February 1900 It was held that the whole question turned upon the intention of the parties and that the money became due in that case on 14th February 1900 and not on 24th July 1900⁶

2 Where immovable properties were hypothecated to secure the payment of rent reserved by a lease and the lien could not be enforced in a Revenue Court nor in a Civil Court until a decree for arrears had been obtained in the Revenue Court, it was held that time for enforcing the security ran from the date of the decree of the Revenue Court⁷

3 A mortgage bond dated 14th June 1876 stipulated that the money should be repaid in the month of *Jeth* 1289 *Fash*, being a period of six years, the last of *Jeth* 1289 answering to 1st June 1882 The six years' period ended on 14th June 1882 and the suit was filed on 13th June 1894 It was held that the suit was in time the money having become due on 14th June 1882⁸

4 A mortgage fixed a date of payment Subsequent thereto the mortgagor became insolvent It was held that time ran from the date so fixed in the document and that the order of adjudication did not give a fresh cause of action⁹

5 A mortgagee made a sub mortgage in favour of a third person and subsequently redeemed it He then sued the mortgagor for the mortgage money and claimed that limitation must be reckoned from the date of the redemption of the sub mortgage It was held that the redemption did not furnish a fresh cause of action¹⁰

6 Where A makes a mortgage with possession in favour of B and the mortgagee is subsequently dispossessed, time for a suit by the mortgagee for sale of the property would run from the date of dispossession¹¹ Similarly, where a mortgagor covenants to give possession of the mortgaged property in default of payment of the mortgage-money on a particular date and commits default in such payment time for a suit to enforce the mortgage was held to run from the date of the failure to give possession¹²

6 (1915) A I R 1915 All 272 (272 273) 29 Ind Cas 980, *Dwarka Prasad v Raja Ram*

7 (1921) A I R 1921 All 301 (303) 63 Ind Cas 504 43 All 539 *Mahadeo Das v Baldeo Das*

8 (1897) 24 Cal 882 (884), *Latsfunnessa v Dhan Kunuar*

9 (1918) A I R 1918 Mad 1122 (1123) 38 Ind Cas 169, *Paramasivan Pillai v Aristotle Chakona*

10 (1902) 25 Mad 220(231) (F B) *Narayana Ayyar v Venkataramana Ayyar*

11 (1930) A I R 1930 Cal 703 (704) 129 Ind Cas 108 *Afiruddi v Joj Chandra Nalla*

(1922) A I R 1922 All 197 (199) 64 Ind Cas 768 44 All 77, *Muhammad Hanif v Ishra Prasad*

(1928) A I R 1928 Pat 582 (584) 112 Ind Cas 655 8 Pat 68, *Mt Jugeri Auer v Aftab Chand*

12 (1926) A I R 1926 All 551 (552) 93 Ind Cas 100, *Khan Sahai v Maharmun*
[See also (1883) 1883 All W N 216 (216) 6 All 71 *Jaglal Singh v Nandlal Singh*]

Where in a mortgage there is a personal covenant to pay, the cause of action for enforcement of the security as well as the personal covenant is the same namely, the date when the money becomes due at the expiry of the term fixed¹³

Article 132
Notes
23—24

24. Mortgage for a term certain with default clause — Starting point. — A executes a mortgage document to B with a stipulation that the mortgage money is to be paid within a period fixed. There is a further stipulation that interest is to be paid annually or at particular periods and that on default of payment of interest as provided the whole amount shall become due or that the mortgagee shall be entitled to call for the whole amount. A commits a default in the payment of interest as stipulated in the document. A executes a mortgage document to B with a stipulation that the amount is to be paid in a certain number of instalments. There is a further stipulation that in default of payment of one or more instalments the whole shall become due. What is the starting point of limitation for a suit to enforce payment of the mortgage money in such cases? Before the decision of the Privy Council in *Lasa Din v Mt Gulab Kunwar*,¹ there was a considerable conflict of opinion among the High Courts on this question. It was held in the under-mentioned cases² that the money became "due" as soon as it could

13 (1936) A I R 1936 Sind 14 (15) 161 Ind Cas 518 29 Sind L R 361
Nenmal Jamal v Chandumal Assanmal

(1934) A I R 1934 All 397 (404) 148 Ind Cas 951 56 All 954 (F B),
Mahomed Hussain v Sanwal Das

Note 24

1 (1932) A I R 1932 P C 207 (211) 138 Ind Cas 779 7 Luck 442 59 Ind App 876 (P C)

2 (1915) A I R 1915 All 189 (192, 194) 37 All 400 28 Ind Cas 910 (F B),
Gayadin v Jhuma Lal

(1927) A I R 1927 All 244 (244) 99 Ind Cas 762 *Anant Ram v Khushal Singh*

(1926) A I R 1926 All 493 (494, 495) 94 Ind Cas 849 49 All 302 *Sheoram Singh v Babu Singh*

(1923) A I R 1923 All 1 (5) 69 Ind Cas 991 45 All 27 (F B) *Shib Dayal v Uaherdan*

(1922) A I R 1922 All 524 (524) 67 Ind Cas 160 *Ram Das v Muhammad Said Khan*

(1921) A I R 1921 All 296 (297, 298) 63 Ind Cas 441 43 All 536, *Pancham v Anwar Hussain*

(1921) A I R 1921 All 192 (193) 63 Ind Cas 886 43 All 671, *Nathi v Turn*

(1922) A I R 1922 All 37 (39) 66 Ind Cas 171 44 All 360 *Collector of Jaunpur v Jamma Prasad*

(1916) A I R 1916 Oudh 1 (1) 32 Ind Cas 551, *Tulshi Ram v Muhammad Haidi*

(1929) A I R 1929 Oudh 536 (538) 123 Ind Cas 390 *Lasa Din v Mt Gulab Kunwar* (Reversed by the Privy Council in A I R 1932 P C 207)

(1915) A I R 1915 Lab 292 (293) 31 Ind Cas 803, *Sham Sundar v Abdul Akad*

(1906) 93 Ind Cas 249 (250) (411) *Mendasi Lal v Dulare Lal*

(1909) 2 Ind Cas 653 (653) (Cal) *Jagdeo Singh v Bal Govind Singh*

(1897) 20 Mad 245 (248) 7 Mad L Jour 222 *Perumal Ayyan v Alagirisami Bhagarathar*

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Note 24

legally he demanded, that is, upon the first default. In some cases³ it was held that the mortgagee could waive such default and sue on the basis of the next default. In the third class of cases⁴ it was held that a default clause was inserted in the mortgage document for the benefit of the mortgagee and that time did not begin to run before the date fixed in the document for payment of the money unless the mortgagee exercised his option of enforcing the payment before the date fixed. This conflict has now been set at rest by the decision in *Lasa Din's case*¹ referred to above. In that case the mortgage document provided as follows —

"In case of default, the said creditor shall, at all times within and after the expiry of the stipulated period of six years aforesaid, have the power to realise the entire mortgage money and the remaining interest and the compound interest due to him, in a lump sum, through Court."

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- (1928) A I R 1928 Mad 952 (953, 954) 103 Ind Cas 786, *Shanmuga Kent v Ramalingam Pillai*
- (1900) 1900 Pun Re No 23 1900 Pun L R 178 *Mulki Ram v Achhru Mal*
- (1930) A I R 1930 Lah 993 (994) 129 Ind Cas 201 *Sahib Singh v Gurdial Singh*
- (1922) A I R 1922 Lah 231 (284) 3 Lah 59 74 Ind Cas 137, *Ram Chand v Bank of Upper India Ltd Delhi*
- (1930) A I R 1930 Bom 297 (298) 125 Ind Cas 701 *Ganpati Bala v Bhiku Sakharam*
- (1920) A I R 1920 Cal 840 (840) 61 Ind Cas 208, *Sakhawat Ali Khan v Amir Pramanik*
- (1897) 24 Cal 231 (285) 1 Cal W N 229 *Sital Chand Nahar v Hyder Malla*
- (1917) A I R 1917 Cal 171 (172) 33 Ind Cas 606 *Rayasaddin v Ashraf Ali Pal*
- loo
Mt
- Sakina Begam*
- (1918) A I R 1918 Oudh 323 (324) 47 Ind Cas 655 *Lachmi Narain v Daya Shankar*
- [See (1929) A I R 1929 All 903 (909) 120 Ind Cas 552 *Ramadhar v Raj Narain* (Default—No clear provision in mortgage empowering mortgagee to sue for debt — Time runs from date fixed and not from date of first default)]
- [See also (1876) 1876 Bom P J 4 *Nathu v Krishna*]
- 3 (1924) A I R 1924 Cal 139 (141) 79 Ind Cas 271, *Surendranath v Raja Reshee Case Law*
- (1916) A I R 1916 Lah 451 (451) 29 I C 854 *Jahan Khan v Chand Shah*
- (1924) A I R 1924 Lah 702 (706, 707) 75 Ind Cas 1049 *Nanak Chand v Meer Mohamad Khan*
- (1918)
- 4 (1929)
- Comynath
Rago v
ook the
he same
- (1928) A I R 1929 Mad 637 (639) 107 Ind Cas 650, *Rangaswamy Pillai v Kuppuswamy Deekshatar*
- (1926) A I R 1926 Mad 160 (160) 49 Mad 403 90 Ind Cas 1033, *Muthia Chettiar v Venkatasubbarayulu Naidu*
- (1917) A I R 1917 Oudh 177 (178) 40 Ind Cas 232 20 Oudh Cas 192 *Ram Prasad v Mt Qadro*
- (1928) A I R 1928 Oudh 493 (494) 111 Ind Cas 106 *Ganga Dajal v Mathura Prasad*

Their Lordships of the Privy Council after referring to the decision in *Pancham v Ansar Hussain*,⁵ a previous decision of the Board, observed as follows.

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"There can be no doubt that, as pointed out by Lord Blanesburgh, a proviso of this nature is inserted in a mortgage deed 'exclusively for the benefit of the mortgagees,' and that it purports to give them an option either to enforce their security at once, or, if the security is ample, to stand by their investment for the full term of the mortgage. If on the default of the mortgagor—in other words by the breach of his contract—the mortgage money becomes immediately 'due,' it is clear that the intention of the parties is defeated and that what was agreed to by them as an option in the mortgagees is in effect, converted into an option in the mortgagor. For, if the latter after the deed has been duly executed and registered finds that he can make a better bargain elsewhere, he has only to break his contract by refusing to pay the interest and 'eo instanti,' as Lord Blanesburgh says, he is entitled to redeem. If the principal money is 'due' and the stipulated term has gone out of the contract, it follows in their Lordships' opinion that the mortgagor can claim to repay it, as was recognised by Wazir Hasan J., in his judgment in the Chief Court. Their Lordships think that this is an impossible result. They are not prepared to hold that the mortgagor could in this way take advantage of his own default. They do not think that upon such default he would have the right to redeem and in their opinion the mortgage money does not 'become due' within the meaning of Article 132 of the Limitation Act, until both the mortgagor's right to redeem and the mortgagees' right to enforce his security have accrued. This would of course also be the position if the mortgagee exercised the option reserved to him."

- (1931) A I R 1931 Pat 285 (292) 134 Ind Cas 609 11 Pat 112 *Vukhdeo Singh v Harakh Narayan Singh*
 (1917) A I R 1917 Mad 951 (953) 39 Mad 951 35 Ind Cas 418 *Narna v Ammaniamma*
 (1918) A I R 1918 Mad 1122 (1123) 38 Ind Cas 169, *Paramanvan Pillai v Aristotle Chakona*
 (1906) 16 Mad L Jour 364 (365), *Vythilinga Nadan v Narayana Sami Ayyan*
 (1921) 62 Ind Cas 762 (763) (Mad) *Kaliappa Nadar v Sami Iyer*
 (1919) A I R 1919 Mad 562 (563) 51 Ind Cas 721, *Ramadh Bibi Ammal v Kandasami Pillay*
 (1919) A I R 1919 Mad 843 (844) 48 Ind Cas 191, *Laelakhammal v Sollayya Naich*
 (1899) 22 Mad 20 (22) 8 Mad L Jour 167, *Vettikaruppa Gaundan v Kumarsami Gaundan*

- Golind Ram
439 112 Ind

Ind Cas 270
per dictum of

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The view expressed in *Lasa Din's case*¹ has been followed in the undermentioned cases⁶

Where the mortgagee *does* exercise the option, time will run from the default. Where the mortgagee exercised his option to enforce the mortgage on default, by sending a registered notice to the mortgagor demanding payment of the mortgage money, it was held, following the decision in *Lasa Din's case*,¹ that time ran from the date of the default.⁷ See also the undermentioned case⁸

A mortgage bond provided for the repayment of the principal sum in twenty instalments with a stipulation that on default of payment of any one instalment, the mortgagee could recover the entire sum with interest. It was held that the cause of action in respect of any particular instalment was different from the cause of action in respect of other instalments or in respect of the entire sum and that the plaintiff could recover all the instalments falling due within twelve years of the suit.⁹

25. Suspension or revival of cause of action.—The fact that the mortgaged property becomes submerged under water does not cause any suspension of the period of limitation for a suit to enforce the mortgage.¹

Where a conveyance of a portion of the mortgaged property in discharge of the claim under the mortgage subsequently turns out to be inoperative, the mortgagee gets a fresh cause of action and a suit instituted within twelve years of such cause of action is in time.²

26. Failure to sue on mortgage in time — Effect of.—
 Section 28, *ante*, is confined to suits for possession and does not

- 6 (1934) A I R 1934 Nag 101 (192) 30 Nag L R 290 152 Ind Cas 438, *Punaji v Govinda Raghoba*.
 (1936) A I R 1936 Sind 14 (14) 29 Sind L R 361 161 Ind Cas 518, *Nenu mal Jamal v. Chandumal Assanmal*.
 (1933) A I R 1933 Oudh 66 (67) 8 Luck 242 112 Ind Cas 60 (F B), *Far bats v Mahomed Abraham*.
 (1935) A I R 1935 All 421 (422) 157 Ind Cas 675, *Hoti Lal v Mithu Lal*.
 (1934) A I R 1934 All 152 (153) 56 All 496 151 Ind Cas 900, *Abdul Ghalman v Sheo Dayal*.
 (1934) A I R 1934 All 397 (400, 401) 148 Ind Cas 951 56 All 954 (F B), *Muhamamad Hussain v Sanual Das*.
 (1935) A I R 1935 Mad 884 (885) 159 Ind Cas 172, *Tharthagira Udayan v Venkatarama Chetty*.
 (1934) A I R 1934 Mad 227 (228, 229) 148 Ind Cas 811, *Bappu A Venkata chalapathi Iyer*.
 7 (1934) A I R 1934 Oudh 473 (474) 151 Ind Cas 856, *Rajendra Bahadur Singh v Paghudir Singh*.
 8 (1928) A I R 1928 Mad 637 (640) 107 Ind Cas 650, *Rangaswami Pillai v Kuppuswamy Deekshatar*.
 9 (1935) A I R 1935 Pat 383 (385), 15 Pat 1 156 Ind Cas 475, *Raghunandan Singh v Aishun Singh*.

Note 25

- 1 (1933) A I R 1933 Pat 693 (693) 146 Ind Cas 856, *Raghunath Bhagat v Meghu Mander*.
 2 (1905) 1 Cal L Jour 397 (345), *Surjiram Marwari v Darhamdeo Persad*.

apply to mortgage suits¹ Even though, therefore, the right to enforce the mortgage security may be barred under this Article, the right of the mortgagee is not extinguished² Thus, in a suit for redemption by the mortgagor the mortgagee can, in defence, claim payment of the principal as well as the unpaid interest even though a suit on the mortgage either for principal or for interest might have become barred on the date of the redemption³ On the same principle a subsequent mortgagee whose right to sue for recovery of money under his mortgage is barred by limitation under this Article, can, nevertheless, sue for redemption of a prior mortgage⁴ Similarly, a prior mortgagee in possession may set up his mortgage as shield against a subsequent mortgagee who is suing on his mortgage, although the period of limitation for the enforcement of the prior mortgage may have expired⁵

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Where a defendant mortgagee is in possession under a usufructuary mortgage and also holds a simple mortgage, he cannot, in a suit for redemption of the usufructuary mortgage, claim that the simple mortgage should also be redeemed,⁶ unless there is a contract to the contrary⁷ See Section 61 of the Transfer of Property Act

27. Claim by mortgagee disallowed — Suit to enforce mortgage. — Where a mortgagee prefers an objection to an attachment to an execution of a decree and the same is disallowed under Order 21 Rule 62 of the Civil Procedure Code, he is bound to file a suit to establish the right claimed by him within one year of the

Note 26

¹ See Note 4, Section 28, *ante*

² (1933) A I R 1933 Bom 25 (26) 141 Ind Cas 811, *Nathmal Motiram v. Nilkanth Vishnu*

Das
v. Halim

⁴ (1933) A I R 1933 Bom 25 (26) 141 Ind Cas 811 *Nathmal v. Nilkanth*

⁵ (1929) A I R 1929 Mad 465 (467) 116 Ind Cas 641 *Karuppan Chettiar v. Venkata Perumal*

47 Bom 652 *Rangappa*

⁷, *Mathura Prasad v. Ghansham Das*

(1900) 27 Cal 185 (187) *Aminali v. Asjarali Msa*

⁶ (1919) A I R 1919 Mad 52 (61) 49 Ind Cas 123 41 Mad 1043 *Manjeshwar Narain Rao v. Shiva Rao*

[But see (1918) A I R 1918 Mad 1332 (1335) 37 Ind Cas 56 *Athan Kutti v. Sutarjanam*]

⁷ (1932) A I R 1932 All 558 (559) 138 Ind Cas 492 *Paras Ram v. Shree Dhan*
(1930) A I R 1930 All 416 (417) 122 Ind Cas 411 52 All 533, *Jokhu Bhunja v. Sula Balish Singh*

[See also (1910) 8 Ind Cas 353 (354) (1910) 1910 Pan Re No 93, *Surem Singh v. Karam Balish*]

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date of the order and cannot claim to enforce his mortgage within the period prescribed by this Article ¹

Article 133

133. [Omitted by Section 3 of the Indian Limitation (Amendment) Act (1 of 1929).]

Note. — This Article is now re enacted as Article 48A See Article 48A and the Notes thereunder

Article 134

134.* To recover possession of immoveable property conveyed or bequeathed in trust or mortgaged and afterwards transferred by the trustee or mortgagee for a valuable consideration.	Twelve years.	When the transfer becomes known to the plaintiff.
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Synopsis

1. Legislative changes.
2. Scope of the Article.
3. Suit to recover possession.
4. "Conveyed or bequeathed in trust."
5. Property comprised in Hindu, Muhammadan or Buddhist religious or charitable endowment.

* Act of 1877, Article 134

134 — To recover possession of immoveable property conveyed or bequeathed in trust or mortgaged, and afterwards purchased from the trustee or mortgagee, for a valuable consideration	Twelve years	The date of the purchase
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Act of 1871, Article 134

134 — To recover possession of immoveable property conveyed in trust or mortgaged and afterwards purchased from the trustee or mortgagee in good faith and for value	Twelve years	The date of the purchase
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Act of 1859, Section 5

5 In suits for the recovery of property purchased from a deposi- tary, pawnnee, or mortgagee, no such suit shall be maintained unless brought within the time limited by Clause 15, Section 1	5 In suits for the recovery of him of any property purchased bona fide and for valuable consideration from a trustee, depository, pawnnee or mortgagee the cause of action shall be deemed to have arisen at the date of the purchase
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Provided that,

in the case of purchase from a deposi-
tary, pawnnee, or mortgagee, no such suit shall be main-
tained unless brought within the time limited by Clause 15,
Section 1

Note 27

1 (1927) A I R 1927 All 593 (591) 102 Ind Cas 792 49 All 903, Debi Das v
Rupchand

6. Section 10 and Article 134.
7. Transfer must be for valuable consideration.
8. "Transfer" — Valid transfer.
9. Transfer, if includes execution sale.
10. Good faith.
11. Nature of transfer by mortgagee contemplated by Article.
12. Transferee getting possession subsequent to transfer — Effect.
13. "Mortgagee."
14. Mortgage, if should be one with possession.
15. Mortgagee transferring but subsequently getting re-transfer — Effect.
16. Starting point of limitation.
17. Time for redemption by mortgagor not ripe at date of transfer by mortgagee — Limitation for mortgagor's suit against transferee.
18. Adverse possession against mortgagee, whether adverse possession against mortgagor.
19. Mortgagor's estate in the hands of a limited owner at the time of transfer by mortgagee — Suit by person succeeding to estate on termination of limited estate.

Other Topics

.	.	.	.	.	See Note 4 Pt 1
.	.	.	.	.	See Note 5
.	.	.	.	.	See Note 19
.	.	.	.	.	See Note 7 Pt 1
.	.	.	.	.	rendered is for valuable considera
.	.	.	.	.	See Note 7 Pt 3
.	.	.	.	.	See Note 11, Pt 2
.	.	.	.	.	See Note 9 Pt 3
.	.	.	.	.	See Note 10

tion
 Sub-mortgage is not transfer
 Suit for declaration of invalidity of sale by trustee
 Transfer by trustee and transfer by mortgagee

1. Legislative changes.

- 1 Section 5 of the Act of 1859 (which corresponded to the present Article) contained a proviso under which the rule (enacted by the Section) that limitation ran from the date of the *transfer* was subject to the condition that in the case of a transfer by a *mortgagee*, the suit against his transferee could not be brought after the expiry of the period of limitation that would have been applicable to a suit against the mortgagee himself. There is nothing corresponding to this proviso in the later enactments.
- 2 The corresponding Article in the Act of 1871 contained the words "conveyed in trust." The words "conveyed or bequeathed in trust" were substituted in the later Acts.
- 3 The words "*transferred*" by the trustee or mortgagee in the present Act were inserted in place of the words "*purchased from the trustee or mortgagee*" which appeared in the corresponding Articles in the earlier Acts^{1a}. The word "*purchase*"

Article 134 — Note 1

1a (1923) A 1 R 1923 Bom 155 (162) 67 Ind Cas 701, *Bank of Bombay v Farulbhoy Fakhim*

Article 134
Note 1.

was held to include only the transfer of an absolute interest and not a right lesser than that¹ In this view a permanent lease² or a mortgage³ was held not to be covered by the Article In some other cases it was held that leases⁴ and mortgages⁵ were *pro tanto* "purchases" The latter view was, however, rejected by the Privy Council,^{6a} by which it was held that the term "purchase" in the Article only included transfers of ownership and not transfers of a limited interest like permanent leases, etc The present Act, by using the word 'transfer', makes the Article applicable to all kinds of transfer so as to include permanent leases⁶ and mortgages⁷

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- 1 *Valia Raja v Kesava Poturall*
Jdpa v Venkataramana Bhatta
Ind Cas 290, *Naths Pujari v*
- 2 (1905) 2 Cal L Jour 546 (551), *Ram Kana Ghosh v Hare Narayan Singh Deo Bahadur*
(1903) 27 Bom 373 (377) 5 Bom L R 241, *Narayan Manjaya v Shri Rama chandra Devasthan* (Permanent lease)
(1914) A I R 1914 Cal 813 (815) 42 Cal 536 24 Ind Cas 899 *Hulada Prasad Deghorva v Kalidas Naick*
(1909) 3 Ind Cas 93 (95) (Cal) *Jnananyan Banerji v Adoremoney Dasse*
411 W N 123 (F B) *Behari Lal v*
v Fakirchand (Under Act of 1877
held that though a mortgagee (from the mortgagee) was a 'purchaser' within the meaning of Article 134 he was not an out and out purchaser but has only purchased the right to hold till debt is paid)
- (1891) 15 Bom 583 (585) *Yesu Ramji v Balkrishna Lakshman*
(1901) 24 Mad 471 (437 438) (F B) *Manavikraman Ettan Tamburan v Ammu* (Before the Act of 1908, this Full Bench of the Madras High Court)
- (1911)
- 5a (1903) 36 Cal 1003 (1015) 36 Ind App 148 4 Ind Cas 449 (P C) *Abhiram Gowami v Shama Charan Nandi* (There being no absolute title conveyed—33 Cal 511, Reversed)
Ind App
11 Iyer
- 6 (1922)
- (1918)
- 15 795 1919 Pun Re No 99
43 Ind Cas 31 (F B) *Seeth*
43 Cal 34 29 Ind Cas 337,
Rameshar Malia v Jiu Thalur Gowami (Annual rent—
to on 45 Bom 503
handra v Pandu)

4 The corresponding Article in the Act of 1871 contained the words "in good faith" with reference to the purchaser.⁸ These words have been omitted in the subsequent Acts. As to whether good faith in the transferee is still essential notwithstanding the omission of those words, see Note 10, *infra*.

5 The starting point of limitation under this Article was the date of the transfer. By the Amending Act 1 of 1929, it is now the date on which the transfer becomes known to the plaintiff.

2. Scope of the Article. — Commenting on Section 5 of the Act of 1859 which corresponded to this Article, their Lordships of the Privy Council in *Radhanath Doss v Gisborne & Co.*,¹ observed as follows:

"Their Lordships desire to say that the provision of the Section is founded, no doubt, upon considerations of high policy — of a policy which their Lordships do not at all doubt is one which is extremely beneficial to India, having regard to the circumstances of that country. But their Lordships cannot fail to observe that the provisions of the Section are of an extremely stringent kind. They take away and cut down the title, which, *ex hypothesi* is a good title of a *cestus que trust* or of a person who has deposited, pawned or mortgaged property: they cut down that title as regards the number of years that the person would have had a right to assert it: from a very great length of time, sixty years, they cut it down to twelve years. It is, therefore, only proper that any person claiming the benefit of this Section should clearly and distinctly show that he fills the position of the person contemplated by this Section, as a person who ought to be protected."

The above observations were quoted with approval by the Privy Council in *Juggernaut Sahoo v Syud Sha Mahomed*,² which was also a decision bearing on Section 5 of the Act of 1859. The view laid down by the Privy Council in the above cases is regarded as applicable to the Article in its present form also and the Article has been regarded in the light of a provision which cuts down the period of limitation which would have otherwise applied to the class of suits mentioned in the Article.³ The reason for thus abridging

(1925) A I R 1925 Rang 377 (378). 3 Rang 367. 90 Ind Cas 1011, *A T A R M M Chetty Firm v M A M Mahomed Kanim*.

(1920) A I R 1920 Cal 379 (382). 47 Cal 566. 58 Ind Cas 705, *Narain Das v Abdur Rahim*.

[See (1919) A I R 1919 Mad 972 (980). 40 Mad 1010. 43 Ind Cas 31 (F B), *Seetha Kutti v Pathumma*.]

8 Section 5 of the Act of 1859 also applied only to a "bona fide" purchaser of property from a trustee or mortgagee.

Note 2

p 1 2 Suther 397 2 Sar

3 Suther 61 14 Beng L

3 (1938) A I R 1938 Mad 594 (595), *Krishnaswami Ayyar v Sabarathnam Chetti*.

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Notes
 2—4

the period of limitation that would have otherwise applied has been stated¹ as follows

"The underlying idea may be that the creator of the trust or the original mortgagor put the trustee or mortgagee in a position to deal with the property wrongly as well as rightly and that after a limited time neither the *cestui que trust* nor the mortgagor shall be permitted to question those dealings'

3. Suit to recover possession. — A suit for *redemption* is a suit for recovery of possession within the meaning of this Article¹

A suit by worshippers of a *thakurdwara* for *ejectment* of the transferee and restoration of the property to the trustee is not a suit for possession within this Article (even if otherwise this Article will apply to the suit)²

A suit for a *declaration* that a sale by a trustee is invalid is not within the Article, the suit not being one for possession³

The Article applies to a suit against the representative of a transferee as well as to a suit against a transferee⁴

4. "Conveyed or bequeathed in trust." — The expression "trust" seems to be used in the Limitation Act in a general sense as including both express and constructive trusts (See Notes to Section 2 clause 11, *ante*) But it has been held by the Privy Council that the expression "conveyed or bequeathed in trust" in this Article must be taken in the same sense as the expression "vested in trust for a specific purpose" has in Section 10 *ante* and that the Article only applies to cases of *express* trusts¹

(1919) A I R 1919 Mad 972 (981) 40 Mad 1040 43 Ind Cas 31 (F B) *Seetha Kutti v Pathumma*

4 (1920) A I R 1920 Cal 379 (382) 47 Cal 866 59 Ind Cas 705, *Narain Das v Abdur Rahim*

Note 3

1 (1927) A I R 1927 AH 807 (810) 102 Ind Cas 135 *Lakshmi Das v Mt Badla*

(1919) A I R 1919 Mad 972 (987) 40 Mad 1040 43 Ind Cas 31 (F B) *Seetha Kutti v Pathumma* (Per Srinivasa Iyengar J)

(1926) A I R 1926 Oudh 547 (548) 1 Luck 423 97 Ind Cas 874 29 Oudh

57 Ind Cas
 26 (In the
 an assignee
 ty itself))
 as v Rikhi

Ram

[But see (1897) 24 Cal 418 (429) *Sajedur Raja v Gour Mohun Das Bais/nai*]

3 (1914) A I R 1914 Mad 708 (711) 24 Ind Cas 369 38 Mad 1064 *Fenlati chala Reddissar v Collector of Trichinopoly* (Article 120 applies)

4 (1919) A I R 1919 Mad 972 (983) 40 Mad 1040 43 Ind Cas 31 (F B) *Seetha Kutti v Pathumma* (Per Srinivasa Iyengar J)

Note 4

1 (1922) A I R 1922 P O 123 (126) 49 Ind App 302 44 Mad 831 65 Ind Cas 161 (P O), *Idya Varuthi Tirtha Swamikal v Baluswamy Appar*

[See also (1922) A I R 1922 Lah 271 (272) 65 Ind Cas 722 *Divan Singh v Sham Das*]

5. Property comprised in Hindn, Minhammadan or Buddhist religious or charitable endowment. — Before the decision of the Privy Council in *Vidya Varuthi v Baluswamy*,¹ there was a conflict of decisions as to whether the property comprised in a Hindu or Muhammadan religious or charitable endowment was "property conveyed in trust" within the meaning of this Article. It was generally held that such property was property conveyed in trust within this Article and that a suit for the recovery of such property (where it had been improperly alienated by the manager of the endowment) was governed by this Article.² The contrary view was held in the undermentioned cases.³ This conflict was set at rest by the decision of the Privy Council in *Vidya Varuthi v Baluswamy*.⁴ In that case, it was held by the Privy Council that the expression "property conveyed or bequeathed in trust" in this Article must be understood in the same sense as the expression "property vested in trust for a specific purpose" has in Section 10 *ante* and that the property of a Hindu or Muhammadan religious or charitable endowment was not such property. It was therefore held that this Article did not apply to a suit for the recovery of such property. It was

Note 5

- 1 (1922) A I R 1922 P C 123 (129) 48 Ind App 302 44 Mad 331 65 Ind Cas 161 (P C)
- 2 (1885) 9 Bom 169 (172), *Rupa Jagat v Krishnaji Govind*
(1898) 1898 Bom P J 97, *Allima Gaisumiya v Murari*
(1920) A I R 1920 Cal 772 (773) 60 Ind Cas 689, *Mohamad Kasimuddin v Sobha Khatun (Wakf)*
(1920) A I R 1920 Cal 379 (382) 47 Cal 868 58 Ind Cas 705, *Narain Das v Abdur Rahim*
(1912) 16 Ind Cas 927 (928) (Cal) *Madhu Sudhan Mandal v Radhika Prasad Das*
(1905) 2 Cal L Jour 548 (549, 550), *Ram Kanai Ghosh v Hari Narayan Singh Deo*
(1903) 31 Cal 814 (817) *Jagamba Goswamins v Ram Chandra Goswami*
(1869) 11 Suth W R 19 (14) 2 Beng L R A C 155, *Brojo Soondures Debia v Luchmee Koonicaree*
(1869) 11 Suth W R 36 (37) *Gobind Nath Roy v Luchmee Koomaree*
(1868) 10 Suth W R 458 (459), *Bhurruck Chunder Sahoo v Golam Shuruff*
(1919) A I R 1919 Mad 571 (571, 572) 52 Ind Cas 914 *Nataraja Denkar v Vallammai Achi* (Property not conveyed to the mahant for his personal use but for the benefit of the mutt — The transaction is a conveyance in trust)
(1879) 2 Mad 175 (179) 3 Ind Jur 558, *Sammantha Pandara v Sellappa*
(1918) A I R 1918 Oudh 345 (347) 45 Ind Cas 292, *Basdeo Ban v Ram Saran*
- 3 See (1897) 1897 Bom P J 146, *Venkatesh v Timmappa*
(1878) 20 Suth W R 471 (472), *Burni Surroop Dass v Khaishe Jha*
(1866) 6 Suth W R P C 3 (9) 2 Moo Ind App 320 (P C), *Jewan Dass Saku v Kubeer ud-deen*
(1910) 5 Ind Cas 4 (11, 16) 33 Mad 265 (F B), *Kanlaxam Pillai v Nataraja Tambiran*
[See also (1913) 19 Ind Cas 553 (559) 37 Bom 271, *Mahamad Gaus Dadashah v Rajbar Roshanbur*]
- 4 (1922) A I R 1922 P C 123 (129) 48 Ind App 302 44 Mad 331 65 Ind Cas 161 (P C)

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Note 5

further held in the above case that such a suit would be governed by Article 144. As regards the starting point of limitation, it was held that limitation would begin to run from the termination of the tenure of office of the alienating manager and not from the date of the alienation. In other words, the possession of the alienee would become adverse to the institution within the meaning of Article 144 only from the termination of the tenure of office of the alienating manager. This view was based on the ground that an alienation by the manager of a religious endowment was good during the period he was in office and it was only on his ceasing to be manager that the possession of the alienee became unlawful.

After the above decision of the Privy Council, it was settled law that this Article did not apply to cases where the property sought to be recovered was property comprised in a Hindu, etc. religious or charitable endowment,⁵ except where property was transferred to a specific person to be held in trust by him for the benefit of a certain religious or charitable institution so as to constitute such person an express trustee.^{6a} It was also clear that Article 144 applied to such suits.⁶ But it was held in some decisions that the rule laid down in *Vidya Varuthi's case*⁴ regarding the starting point of limitation was not applicable to the following cases:

- 1 Where the alienation sought to be impeached was an out and out sale and not merely a transfer of a limited interest like a permanent lease.⁷
- 2 Where the transfer had been made by the *dharmakarta* or manager of a temple.⁸

5 (1933) A I R 1933 All 19 (19) 54 All 909 148 Ind Cas 452 *Sarabdeo Bharthi v Ram Bai*

(1933) A I R 1933 Bom 217 (222) 57 Bom 709 148 Ind Cas 385 *Hamid miya Sarfuddin v Nagindas Jwanji*

(1926) A I R 1926 Cal 568 (574, 575) 94 Ind Cas 235 *Gangaprosad Chaudhury v Kuladananda Roy*

(1926) A I R 1926 Cal 287 (288) 90 Ind Cas 567, *Behari Lal v Murah dhar*

(1936) A I R 1936 Lah 784 (784) 165 Ind Cas 48 *Dwarka Das v Rukhi Ram*

(1925) A I R 1925 Mad 822 (822, 823) 86 Ind Cas 231 *Ranga Das v Lal chuma Dasan*

(1924) A I R 1924 Mad 827 (827) 95 Ind Cas 845 *Venkataramana v Sampa*

(1935) A I R 1935 Oudh 425 (426) 156 Ind Cas 92 *Wahid Ali v Mahboob Ali Khan*

[See (1926) A I R 1926 Cal 322 (324) 90 Ind Cas 761 *Jabeda Khatun v Mohammad Mozaffar Ali*]

5a (1926) 95 Ind Cas 699 (700) (Lah) *Narain Dass v Sardul Singh* (On the terms of the endowment held that it was a trust)

6 See cases in Foot Note 5 above

7 (1933) A I R 1933 Bom 217 (224) 57 Bom 709 148 Ind Cas 385, *Hamid miya Sarfuddin v Nagindas Jwanji*

(1929) A I R 1929 Mad 614 (622) 110 Ind Cas 691 *Vadlamudi Sastriulu v Venkateshaya*

8 See (1929) A I R 1929 Mad 614 (622, 623) 110 Ind Cas 691, *Vadlamudi Sastriulu v Venkateshaya*

It was held that in the above two cases limitation would run from the date of the alienation and not from the date of the termination of the tenure of office of the alienating manager.

In this state of the law, Section 10 *ante* was amended by Act 1 of 1929 by the addition of a new paragraph. Under this paragraph, property comprised in a Hindu, Muhammadan or Buddhist religious or charitable endowment must be deemed to be property vested in trust for a specific purpose and the manager of such property must be deemed to be a trustee. But the provision in the paragraph is expressly confined to the interpretation of the words "trust" and "trustee" for the purpose of Section 10. Hence, for the purpose of this Article, the ruling in *Vidya Varuthi's case*⁹ is still applicable and it must be held that property comprised in a Hindu or Muhammadan religious or charitable endowment is not property conveyed or bequeathed in trust within the meaning of this Article. Hence, where such property is transferred for consideration by the manager of the endowment and a suit is brought by the succeeding manager for the recovery of the property, this Article will not apply to the suit. The Legislature has, however, enacted a specific provision with regard to such suits in Article 134 B which was introduced into the Act by Act 1 of 1929. This Article prescribes a period of twelve years for such suits and the period of limitation under the Article begins to run from the termination of the tenure of office of the alienating manager. The Article applies equally whether the transfer impeached is a transfer of a limited interest or is an out and out sale. The Article also applies to all kinds of endowments and is not inapplicable to alienations by *dharmakartas* or managers of temple property.

In rulings of the Privy Council delivered after the enactment of Article 134 B, it has been held that even under the previous law, the rule that limitation began to run only from the termination of the tenure of office of the alienating manager and not from the date of the alienation was equally applicable, whether the alienation was a transfer of a limited interest or was an out and out sale and whether the alienor was a *dharmakarta* of a temple or the *mohunt* of a *mutt*.⁹

Thus, Article 134 B does not effect any change in the law of limitation applicable to the class of suits dealt with therein. The

⁹ (1936) A I R 1936 P C 183 (186) 162 Ind Cas 465 59 Mad 809 63 Ind App 261 (P C), *Ponnambala Denkar v Periyann Chetty* (Alienation by *dharmakarta*—Time runs from date of death or removal from office of alienor.)

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Article only embodies a *specific* provision relating to such suits whereas under the previous law such suits were held to fall under the *general* and residuary provisions of Article 144. See also the undermentioned case¹⁰ and Notes under Articles 134 A to 134 C

6. **Section 10 and Article 134.**—Section 10 *ante* provides *inter alia* that a suit for recovery of property vested in trust for a specific purpose and transferred by the trustee *without consideration* can be brought at any time. In other words, Section 10 creates a total exemption from the bar of limitation in regard to such suits. Where the transfer is one for *valuable consideration*, a suit for the recovery of the property from the transferee is not governed by Section 10 and is not exempt from the bar of limitation.¹ This Article and Articles 134 A to 134 C prescribe the period of limitation for such suits.

7. Transfer must be for a valuable consideration — The Article applies only to transfers for *valuable consideration*. It will not therefore apply to cases of *gift*,¹ or to a transfer for an alleged consideration which however is inserted nominally to serve as a cloak to cover what is really a gift.² But a "gift" by a trustee of trust property in *return for services* rendered or to be rendered by the donees in connection with the trust temple is for valuable consideration.³ An exchange of one land for another is a transfer for valuable consideration, though it may turn out subsequently that the land exchanged has to be surrendered to a third party claiming in his own right.⁴

8. "Transfer"—Valid transfer.—The transfer must be valid as between the transferor and the transferee, though it may not be

- 10 (1936) A I R 1936 Lah 764 (784) 165 Ind Cas 48 *Dwarka Das v Rikhi Ram*
(Suit by worshippers of temple for ejectment and not for possession
against alliance is not governed by Article 134)

Note 6

- 1 (1918) A I R 1918 Bom 183 (184) 45 Ind Cas 19, Ramacharya v Shrinivasacharya
(1879) 4 Cal 897 (919) 4 Cal L R 193 4 Ind Jur 287, Greender Chunder Ghose v Mackintosh
[See also (1919) A I R 1919 Lah 410 (411) 53 Ind Cas 577 1919 Pun Re No 109 Jamiat Singh v Mt Raja]

Note 7

- 1 (1912) 13 Ind Cas 375 (376) (Upp Bur) *Nga Paw v Nga Lu Gale*
(1904) 6 Bom LR 88 (41) *Vithu v Keshav*
2 (1930) A I R 1930 Mad 293 (300) 126 Ind Cas 279, *Subba Rao v Veeranjaneyaswami*; (Eight annas rent p m to temple for house in a valuable locality is not valuable consideration) 30 All NR 323, 65 Ind Cas

property held not for consideration 1)

- S (1918) A I R 1918 Bom 183 (183) 45 Ind Cas 19 Ramacharya Venkat
Venkatramanacharya (Perform
transcendent importance for

Rajagopalan v Somasundara

operative against a trust or other person. Where therefore there is no transfer but the alleged transferor only states that though the property stands in his name it really belongs to the alleged alienee and has no objection to the municipal authorities transferring the property to the name of the alleged alienee there is no transfer for the Article to operate.¹

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9 Transfer, if includes execution sale — In *Subbiah v Mohammad Mustafa*¹ where in execution of a decree against a trustee the trust property was sold in court auction and the question arose whether this Article or Article 144 applied to a suit for possession against the auction purchaser it was held that the Article did not apply to such cases and their Lordships of the Privy Council observed. This is not in fact a transfer by a trustee himself for valuable consideration though there is little difference between a transfer under an adverse execution and sale by the trustee himself. A similar view has been taken in the undermentioned cases.²

It has however been held that a court auction purchaser in execution of a decree against a mortgagee must be considered to be only a mortgagee for the purposes of this Article and that if such auction purchaser transfers by private treaty to a third person a suit for possession against such transferee would be governed by this Article.³

Note 8

- 1 (1930) A I R 1930 Mad 293 (299) 128 Ind Cas 279 *Subba Rao v Veeranjanyaswami*

Note 9

- 1 (1923) A I R 1923 P C 175 (177) 46 Mad 751 50 Ind App 295 74 Ind Cas 492

v *Buda Sen*

- (1923) A I R 1923 Cal 1 (6) 74 Ind Cas 630 50 Cal 49 *Charu Chandra Pramanik v Nahush Chandra Kundu*

- (1927) A I R 1927 Mad 1028 (1029 1030) *Thiruvikrama Ayyar v Vyapuri Natchen*

- (1918) A I R 1918 Mad 974 (978) 40 Ind Cas 50 *Subbaya Pandaram v Mahamad Mustapha Maracayar*

- (1919) A I R 1919 Oudh 159 (157) 52 Ind Cas 159 22 Oudh Cas 72 *Mohammad Mohsin v Mohammad Abid*

- (1902) 25 Mad 99 (102) 11 Mad L Jour 323 (F B) *Ahamed Kull v Raman Nambudri* (12 Mad 316 Overruled)

P ~ v

- (1925) A I R 1925 S ed 167 (170) 79 Ind Cas 466 19 Sind L R 268 *Mahomed Moosa v Kasi Fatehullah*

- (1903) 6 Oudh Cas 805 (321) *Nawab Farrukh Begum v Sheikh Ahmad Ali* (Purchaser of mortgagor's right title and interest — Article does not apply)

- [See (1910) 5 Ind Cas 877 (878) (Cal) *Nidhiram Bandopadhyaya v Sarbessur Biswas*

- (1885) 11 Cal 121 (131) 11 Ind App 218 4 Bar 578 8 Ind Jur 638 (P C) *Kalidas Mullick v Kanhaiya Lal Pandit*]

- 3 (1930) A I R 1930 All 417 (418) 124 Ind Cas 409 *Abdul Aziz v Munni Lal*

Article 134
Note 10

10. Good faith.—The words "*bona fide*" and "in good faith" were used in the Limitation Acts of 1859 and 1871 respectively. It was held in cases arising under the said Acts that it was necessary to prove a belief in good faith on the part of the purchaser that he was acquiring an absolute title¹

The said words were omitted in the later Acts, and the question has arisen whether the protection of the Article is available only to a transferee who has taken the transfer *bona fide* without notice of the restriction in the title of the transferor. In the case of a transferee from a trustee, there is an almost complete consensus of opinion that want of good faith on the part of the transferee is immaterial²

But there has been a conflict of opinion in India, very often in the same Court, as to whether the Article applies to a transferee from a mortgagee who has not taken the transfer in good faith. The basis of the conflict lies in the fact that there is a distinction between a transfer by a trustee and a transfer by a mortgagee, in that the trustee, who is vested with a full title to the property can transfer a full title, whereas a mortgagee, who is vested only with a limited interest in the property, cannot transfer more than what he has himself got. In *Radhanath Doss v Gisborne & Co*,^{2a} which was a case under Section 5 of the Limitation Act of 1859 wherein the word "purchase" was used instead of the word "transfer" and it was also provided that the purchase must be *bona fide*, Lord Cairns in delivering the judgment of the Board observed as follows

- (1915) A I R 1915 All 423 (423) 30 Ind Cas 564, *Ghani Ram v Mt Kusna*
(1918) A I R 1918 Mad 1201 (1203) 38 Ind Cas 194, *Kannusami Thangarayan v Muthusami Pillai*

Note 10

- 1 (1866) 5 Suth W R 120 (121) *Luteefun v Dejo Jan* (Act of 1859—*Bona fides* considered material)
(1866) 5 Suth W R 238 (239), *Khyroomissa v Salehoomissa Khatoon* (Do)
[See (1876) 1 Bom 269 (279 281), *Maniklal Atmaram v Manchershik Dinsha* (Even under the Act of 1871 the view was held that mere notice of existence of a trust is not against *bona fides* of transferee)]
2 (1931) A I R 1931 Cal 113 (115 116 120) 58 Cal 234 130 Ind Cas 275, *Baikunthanath Roy v Ahmedulla*
(1920) A I R 1920 Cal 379 (381, 382) 47 Cal 866 58 Ind Cas 705, *Narain Das v Abdur Rahim*
(1924) A I R 1924 Oudh 44 (45) 77 Ind Cas 737 26 Oudh Cas 197, *Gomti Misra v Deola Din Singh*
(1919) A I R 1919 Oudh 313 (314) 53 Ind Cas 168, *Muhammad Abbas v Mt Namban*
(1926) 95 Ind Cas 699 (700) (Lah) *Narain Das v Sardul Singh*
[See also (1931) A I R 1931 Lah 129 (130) 130 Ind Cas 780, *Fazal Din v Mohammad Haffiz*]
[But see (1905) 2 Cal L Jour 448 (456, 457), *Ram Churn Tewary v Protab Chandra Dutt* (Act of 1877—if transfer with knowledge of defect of title, Article 144 applies)
(1899) 9 Mad L Jour 93 (96) *Ambalavana Desigar v Dippu Low Jagadip* (Do)]
2a (1871) 15 Suth W R P O 24 (27) 14 Moo Ind App 1 (15, 16) 6 Beng L R 530 2 Suther 397 2 Bar 636 (P C)

"Their Lordships think that, in order to claim the benefit of this Section, a defendant must show three things first, that he is a purchaser according to the proper meaning of that term second, that he is a purchaser *bona fide*, and, third, that he is a purchaser for valuable consideration

"Now what is the meaning of the term 'purchaser' in this Section? It cannot be a person who purchases a mortgage as a mortgage, because that would be merely equivalent to an assignment of a mortgage, it would be the case of a person taking a mortgage with a clear and distinct understanding that it was nothing more than a mortgage. It, therefore, must mean, in their Lordships' opinion, some person who purchases that which, *de facto*, is a mortgage, upon a representation made to him, and in the full belief, that it is not a mortgage but an absolute title"

The Calcutta High Court³ has held that the question as to good faith is now immaterial as those words have been deliberately omitted from the Article and as there are no words therein compelling a contrary view, the only restriction provided in the Article being the passing of valuable consideration. The Nagpur High Court has held that the question as to 'good faith' is now immaterial,⁴ and that there is no distinction in this respect between a transferee from a trustee and a transferee from a mortgagee.⁵ In Oudh, some cases⁶ have proceeded upon the view that Article 134 applies only to transferees in good faith, the view being based on the decision of the Privy Council in *Radhanath Doss's case*.^{7a} Other cases⁷ have held that the question of good faith of the transferee is immaterial

- 3 (1931) A I R 1931 Cal 113 (116, 121) 58 Cal 234 180 Ind Cas 275
Baskunthanath Roy v Ahmedulla (Costello, J, still felt a doubt whether actual knowledge of the defect of title instead of constructive notice is immaterial)

4 (1909) 17 P 1000 N 1007 (1909) 17 P 1000 N 1007

5

Byas
 actual
 notice

is 64,
 ng to
 transfer as vendee from mortgagor—Transferee taking *bona fide*—
 Article 134 protects the latter though it may appear later that mort-
 gagee had really no sale in his favour)

- (1919) A I R 1919 Oudh 313 (314, 315) 53 Ind Cas 168, *Muhammad Abbas v Mt Nasban*
 (1926) A I R 1926 Oudh 492 (493) 95 Ind Cas 143, *Hanoman Singh v. Umrao Kaur* (Actual notice alone disentitles transferee to protection—Not mere constructive notice)
 (1920) A I R 1920 Oudh 17 (21) 23 Oudh Cas 125 37 Ind Cas 497, *Mahbub Ali v Mohammad Hussain*

Oudh
 and

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Note 10

In *Pandu v Vithu*,⁸ the High Court of Bombay held that the principle of *Radhanath Doss's case*^{2a} applied also to the interpretation of the present Article and that the Article applied only to transferees in good faith. And this view has been affirmed in subsequent cases.⁹

The High Courts of Allahabad,¹⁰ Lahore,¹¹ Madras¹² and the

- (1933) A I R 1933 Oudh 38 (40) 140 Ind Cas 182, *Raghunandan Misra v Mahadeo* (A I R 1926 Oudh 537 (F B), Followed)
- 8 (1895) 19 Bom 140 (144)
- 9 (1930) A I R 19 Bom 292 (294) 125 Ind Cas 699, *Shivaji v Channava* (Notice of only mortgagee rights in transferor disentitles transferee from benefit of this Article)
- (1925) A I R 1925 Bom 417 (417) 89 Ind Cas 189, *Vithwa Nath v Tuka Ram Vithu* (Transferee from mortgagee knew that transferor was only a mortgagee and also had the mortgagee's title deeds given to him at the transfer—Article 134 does not apply)
- 10 (1915) A I R 1915 All 425 (426) 37 All 660 30 Ind Cas 956, *Durgpal Singh v Kallu*
- (1929) 118 Ind Cas 659 (660) (All), *Behari Lal v Babu Ram* (A I R 1915 All 425, Followed)
- (1915) A I R 1915 All 422 (423) 30 Ind Cas 564, *Ghasi Ram v Mt. Krishna*
- (1930) A I R 1930 All 417 (418) 124 Ind Cas 403, *Abdul Aziz v Muni Lal*
- (1927) A I R 1927 All 807 (809) 102 Ind Cas 135, *Lakshmi Das v. Badla*
- (1887) 9 All 97 (102) 1886 All W N 303, *Bhagwan Sahai v Bhagwan Din* (Act of 1877)
- (1915) A I R 1915 All 203 (204, 206) 29 Ind Cas 403, *Panna Lal v Rameshar Sahai*
- 11 (1931) A I R 1931 Lah 464 (464) 132 Ind Cas 184, *Mehnga v Zaman Ali Shah*
- (1926) A I R 1926 Lah 676 (677) 96 Ind Cas 886, *Zaman Ali Shah v Rura*
- (1924) A I R 1924 Lah 468 (469) 80 Ind Cas 321, *Wajir Chand v Nathu Ram*
- (1923) A I R 1923 Lah 219 (221) 71 Ind Cas 577, *Sri Ram v Matkala Ram*
- [But see (1931) A I R 1931 Lah 129 (130) 130 Ind Cas 780, *Fasal Din v Mahomed Hafiz* (Addison, J)]
- 12 (1933) A I R 1933 Mad 656 (658) 26 Ind Cas 1, *Singaram Chettiar v Kalyanasundaram Pillai*
- (1917) A I R 1917 Mad 996 (997) 32 Ind Cas 265, *T'holasinga Mudali v Nagalinga Chetty* (The substitution of words "transferred by" for "purchased from" makes no change in this respect)
- (1915) A I R 1915 Mad 656 (658) 26 Ind Cas 1, *Singaram Chettiar v Kalyanasundaram Pillai*
- (1917) A I R 1917 Mad 996 (997) 32 Ind Cas 265, *T'holasinga Mudali v Nagalinga Chetty*
- (1926) A I R 1926 Mad 81 (82, 84) 49 Ind Cas 812, *Venku Shettishi v Ramachandrayyar* (Obiter—The case was really one of bona fides)]

Court of the Judicial Commissioner of Sind¹³ have also held that the Article does not apply unless the transferee has taken the transfer in good faith

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10—11

Whichever view should prevail, there can be no doubt that when a person has taken a transfer for valuable consideration and is in possession of the property and time has begun to run against the plaintiff, a *subsequent knowledge* on the part of the transferee of the transferor's limited rights will not prevent time running in favour of the transferee¹⁴

11. Nature of transfer by mortgagee contemplated by Article. — The transfer by a mortgagee contemplated by this Article is a transfer which the mortgagee purports to make as the owner of the property and not as the mortgagee. Hence, the Article does not apply where a mortgagee merely purports to transfer his rights as mortgagee¹. Thus, a sub-mortgage is not a 'transfer' contemplated by this Article, inasmuch as it is only an assignment of mortgagee rights². But, where the mortgagee purports to transfer

13 (1926) A I R 1926 Sind 145 (148) 91 Ind Cas 87 20 Sind L R 277, *Suleman Hashim v Esso* (Transferee with notice of mortgage—Article not applicable)

14 (1922) A I R 1922 Bom 234 (234) 46 Bom 903 67 Ind Cas 808, *Keshav Raghunath v Gafur Khan Daim Khan*

Note 11

1 d Cas
2 2

(1927) A I R 1927 All 689 (689, 690) 103 Ind Cas 235, *Puttu Lal v Ram Chandar* (The deed of transfer not being clear whether the mortgagee's right was transferred or the mortgagor's right itself, it was presumed that the transfer conveyed only such right as the mortgagee possessed)

(1925) A I R 1925 All 707 (712, 717) 47 All 803 92 Ind Cas 63, *Naunihal Singh v A G Skinner*.

(1887) 9 All 97 (102) 1886 All W N 303 *Bhagwan Sahai v Bhagwan Din*

(1905) 1905 All W N 56 (57) . 2 All L Jour 234, *Sheo Nath Singh v Mahipal Singh*

(1881) 1881 All W N 122 (122), *Kamta Prasad v Bakar Ali* (Onus of proof

(1912) 15 Ind Cas 609 (610, 611) (Mad), *Veerabadra Tevan v Veerappa Tevan* (Onus is on defendant to prove purchase of an absolute interest and not mortgage interest)

(1906) 29 Mad 501 (507) 1 Mad L Tim 290 16 Mad L Jour 358, *Vythilingam Pillai v Kuthiravatta Navr*.

(1889) 12 Mad 316 (318, 319) 13 Ind Jur 253, *Muthu v Kambalinga*

(1916) A I R 1916 Ondh 84 (85) 92 Ind Cas 314, *Mirza Far Ali Beg v Danush Ali*

2 (1894) 18 Bom 397 (389), *Saralaram v. Genu*

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the property as the *owner* of it and not merely as mortgagee, the Article will apply,³ whatever may be the nature or extent of the rights which he intends to transfer. It is not necessary that the transfer must purport to be a *sale*. Thus, a mortgage executed by the mortgagee purporting to act as the owner of the property, will be within the Article.⁴

The guardian of a mortgagor who was a minor sold the equity of redemption to another person without any legal necessity. The latter redeemed the mortgage and obtained possession of the property from the mortgagee. The minor on attaining majority sued to set aside the sale by the guardian and for possession of the property. It was held that this Article did not apply to the suit. The reason was that the mortgagee in handing over possession of the property to the purchaser of the equity of redemption acted only as *mortgagee* and did not profess to act as the *owner* of the property.⁵

Where there is no transfer by the mortgagee and he merely suffers another to take possession of the mortgaged property this

(1910) 5 Ind Cas 932 (932) (Mad) *Parameswaran v Keethalaiah Alesma*
(1925) A I R 1925 Rang 140 (142) 2 Rang 561 84 Ind Cas 984 *Ma Myat Gyi v Ma Ma Nyan*

3 (1918) A I R 1918 All 352 (353) 45 Ind Cas 549, *Abhisakh Dhalphora v Laladhar Dhalphora*

(1907) 29 All 471 (478) 1907 All W N 133 4 All L Jour 375, *Husain Khanam v. Ali Husain Khan* (Transfer by assignee of mortgagee)

(1881) 1881 All W N 169 (169) *Raja Rai v Wali Muhammad*

(1924) A I R 1924 Bom 417 (418) 80 Ind Cas 763, *Krishnaji Sonji v Sadanand*

(1886) 12 Bom 552 (556) *Vishnu Chintaman v Balaji*

(1927) A I R 1927 Mad 1028 (1029) *Thiruvakkrama Ayyar v Vyapuri Naicken*

(1918) A I R 1918 Mad 1201 (1202) 68 Ind Cas 194 *Kannusami Thanji royan v Muthusami Pillai*

(1918) A I R 1918 Mad 974 (977) 40 Ind Cas 50, *Subbaya Pandaram v Mahamed Mustapha Maracayar*

(1896) 21 Mad 151 (152) *Rego v Abdu Behari* (Mortgagee purchasing equity of redemption from mortgagor after latter has already sold the equity to another is only a mortgagee and a sale by him is within the Article)

(1870 71) 5 Mad H C R 383 (389) *Sitha Ammal v Rengasami Iyengar*

(1926) A I R 1926 Oudh 547 (548) 29 Oudh Cas 353 97 Ind Cas 674
1 Luck 423 (F B), *Sri Ram v Najibullah*

(1909) 2 Ind Cas 250 (253) 12 Oudh Cas 84 *Dal Singh v Gur Prasad Singh*
om 933 *Talukhdars*

5 (1932) A I R 1932 Bom 23 (24) 134 Ind Cas 306, *Shidlingara Sadappa v Rajara Tanesahab*

[See also (1883) 1883 Pun Re No 124 *Azim v Mahmud* (Party not really interested in equity of redemption redeeming from mortgagee in possession — Subsequent possession by such person for more than 12 years — Adverse possession — Right of party to redeeming to defeat suit for redemption by representative of mortgagor), plea of 12 years adverse possession — Article 148 applicable — No abridgment of the period allowable under Article 134]

Article does not apply to the suit against the person thus taking possession⁶

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12. Transferee getting possession subsequent to transfer—Effect.—Is the Article contemplates a suit for possession it clearly presupposes that the defendant is in possession at the date of the suit. But, suppose the transferee from the trustee or the mortgagee gets possession not on the date on which the deed of transfer is executed but *subsequently*. Is the Article applicable to such cases and if it applies, what is the starting point of limitation under the Article? There is a conflict of views on these questions.

The *first* view is that the transfer contemplated by the Article is a transfer *with possession*¹. Thus, according to this view, a simple mortgage by the trustee or mortgagee will not be a "transfer" within the meaning of this Article although as a result of subsequent developments, the simple mortgagee may obtain possession of the property². According to this view, also where the transferee is given possession under the transfer but is given such possession some time after the deed of transfer, the "transfer" referred to in

(1937) A I R 1937 Mad 451 (456) 172 Ind Cas 47 *Peethi Aelu v Chel*

Barred UNDER ARTICLE 134 JJ

6 (1913) 21 Ind Cas 348 (350) 7 Low Bur Rul 97, *Maung Shwe Pe v Ma Yu Ma*

Note 12

1 (1919) A I R 1919 Mad 972 (980 982) 40 Mad 1040 43 Ind Cas 31 (F B), *Seethi Kutti v Pathumma* (Per Abdur Rahim and Seethagiri Iyer, JJ)

(1907) 29 All 471 (480) 1907 All W N 133 4 All L Jour 375, *Museni Begum v Collector of Cawnpore* (Transfer by way of mortgage—Mortgagee foreclosing and obtaining possession—Limitation under Article runs only from date of obtaining possession)

(1899) 23 Bom 614 (618 619) 1 Bom L R 102 *Ramchandra Vithal v Sheikh Mohidin*

(1933) A I R 1933 Mad 533 (534) 144 Ind Cas 541 *Arumugam Pillai v Mohideen Sheriff Sahib*

(1938) A I R 1938 Mad 394 (396) *Krishnaswami Aiyar v Sabarathnam Chetti*

(1926) A I R 1926 Oudh 594 (601) 97 Ind Cas 922 1 Luck 529, *Achche Mirza v Ahmad Shah*

(1925) A I R 1925 Rang 377 (379) 5 Rang 367 90 Ind Cas 1011, *A T A R M M Chetty Firm v M A M Mahomed Kasim*

against such mortgagee)

(1899) 23 Bom 614 (618) 1 Bom L R 102 *Ramchandra v Sheikh Mohidin* (Simple mortgage—Subsequent mortgage with possession to same mortgagee—Article does not apply to former mortgage)

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the Article will not be complete till delivery of possession and therefore limitation will commence to run under the Article only from the date on which possession is given to the transferee³

The *second* view is that this Article will also apply to a transfer without possession, where subsequently the transferee gets possession of the property, and the limitation for a suit for possession against the transferee will commence to run in such cases not from the date on which the transferee gets possession but from the date on which the transfer is effected⁴

The *third* view is that the word "transfer" in the Article does not necessarily mean a transfer with possession but that the Article does not apply to cases in which the transferee does not get possession of the property on the date of the transfer. The view proceeds on the ground that as limitation commences to run under the Article (as it stood before 1929) from the date of the transfer, the Article must be held to apply only to cases in which the cause of action for the suit has arisen on such date⁵

Though there is a divergence of views as to the interpretation of this Article with reference to the question under discussion, there is a *general* consensus of judicial opinion that limitation for a suit for possession against a transferee from a trustee or mortgagee cannot begin to run before he gets possession⁶. The *second* view set forth above, viz that limitation will commence to run from the date of the transfer independently of the question whether the transferee gets possession on such date, is against the weight of authority and is not good law.

As to the period of limitation applicable to suits for possession against transferees from trustees or mortgagees in cases where this Article does not apply, see Notes under Articles 144 and 148, *infra* and the undermentioned cases⁷

See also Note 17, *infra*

13. "Mortgagee."—This Article will apply to a suit against an alleged transferee from a mortgagee only where it is shown that at

3 (1919) A I R 1919 Mad 972 (980 983) 40 Mad 1040 43 Ind Cas 31 (F B) *See also Kullu v Pathumma* (Per Abdur Rahim and Seshagiri Iyer JJ)

4 (1919) A I R 1919 Mad 972 (980 983, 986) 40 Mad 1080 43 Ind Cas 31 (F B), *See also Kullu v Pathumma* (Per Wallis C J and Courts Trotter J)

5 (1919) A I R 1919 Mad 972 (980 983 984 987) 40 Mad 1040 43 Ind Cas 31 (F B) *See also Kullu v Pathumma* (Per Seshagiri Iyer and Srinivasa Iyengar JJ)

6 (1919) A I R 1919 Mad 972 (980 983 984 987) 40 Mad 1040 43 Ind Cas 31 (F B) *See also Kullu v Pathumma* (Per Seshagiri Iyer and Srinivasa Iyengar JJ)

7 (1930) 1930 Mad W N 1148 (1150) *Veeranna v Venkudu* 43 Ind Cas 31 (F B) *See also* — Article 144 applied) and Cas 546 Ram Prasad v

the time when the transfer was made there was a *subsisting* mortgage on the property and that the transfer was made by the *mortgagee*¹

Article 134
Note 13

Illustrations

- 1 *A* a prior mortgagee, sued on his mortgage without impleading *B*, a puisne mortgagee, and obtained a final decree for foreclosure. *A* then sold the property to *C*. In a suit by *B*, the puisne mortgagee, to enforce his rights against the property in the hands of *C*, it was held that this Article did not apply to the suit. The reason was that at the time of the sale to *C*, *A* had acquired the equity of redemption also in the property and had ceased to be a mortgagee².
- 2 *A*, a prior mortgagee of certain property sued on the mortgage without impleading *B*, a puisne mortgagee of the property. A decree was passed in the suit and in execution of the decree the property was sold and purchased by *C* who then sold the property to *D*. In a suit for redemption brought against *D* by *B*, it was held that this Article did not apply to the suit, the reason being that *C* by purchasing the property in execution of the mortgage decree, did not become the *mortgagee* of the property³.
- 3 A mortgagee in possession the right of redemption against whom is barred by limitation, sells the property to another. No suit for redemption of the property in the hands of the *purchaser* can be brought on the ground that the plaintiff is entitled under this Article to a period of twelve years from the date of the sale. The reason is that at the date of the sale to the defendant the vendor had become absolute owner of the property and had ceased to be a mere mortgagee of it⁴.
- 4 Under the law prior to the amendment of Section 95 of the Transfer of Property Act by Act 20 of 1929 a co mortgagee redeeming the mortgaged property and obtaining possession of the property had only a *charge* on the shares of the other co mortgagees for their proportions of the mortgage money. Hence it was held that such a redeeming co mortgagee was not a *mortgagee* within the meaning of this Article⁵.

Note 13

- 1 (1917) A I R 1917 Oudh 290 (291) 20 Oudh Cas 164 39 Ind Cas 582
Chhoti Begam v Ram Prasad
- 2 (1914) A I R 1914 All 63 (64) 36 All 327 23 Ind Cas 559 *Munna Lal v Munnu Lal*
- 3 (1917) A I R 1917 Oudh 290 (291) 20 Oudh Cas 164 39 Ind Cas 582
Chhoti Begam v Ram Prasad
- 4 (1871) 16 Suth W R 96 (97) *Ram Dhun Bhuggut v Guneshee Maltoon*
(Mortgagee and heirs enjoying the mortgaged property for over 100 years—Subsequent sale)
- 5 (1916) A I R 1916 All 134 (196 137) 33 All 133 34 Ind Cas 214 *Jas Kishen v Budhanand*
(1894) 1894 Bom P J 149 *Datto Narsinh v Babaji Bachhyaji*

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Notes
13—14

- 5 A transfer by a *sub mortgagee* is not a transfer by a *mortgagee* within the meaning of this Article ⁶
- 6 In a suit for redemption of a mortgage, *X*, who was in possession of the property, was also impleaded as a defendant. It was held that this Article did not apply to the claim against *X*, inasmuch as he claimed his title from a third party and not from the mortgagee ⁷
- 7 *A* mortgages a certain property to *B*. He then grants a life estate in the property to *C* with remainder to *D*. During the subsistence of the life estate of *C*, his rights in the property are acquired by *B* at a court sale. *B* then sells the property to *E*, purporting to do so as an absolute owner. After *C*'s death *D* sues *E* for redemption of the mortgage and possession of the property. It was held that the acquisition by *B* of the rights of *C* does not make *B* the absolute owner of the property inasmuch as *C* had only a life interest in the property and that he continues to be only a *mortgagee* of the property for the purposes of this Article. But, inasmuch as the sale to *E* takes place during the subsistence of the 'particular' estate of *B*, the Article applicable to *D*'s suit is Article 140 and not Article 134 ⁸
- 8 Where a transfer is made by a mortgagee purporting to be a transfer of the absolute title to the property, this Article is not rendered inapplicable merely because at the time of the transfer the mortgagee *thinks* that he is the absolute owner of the property and not merely a mortgagee ⁹
- 9 A mortgagee, getting a decree against the mortgagor by which possession is ordered to be given to the mortgagee till the debt is paid off, continues to be a mortgagee for the purposes of this Article ¹⁰

14. Mortgage, if should be one with possession. — Where a mortgagee is not entitled to possession under or by virtue of his

[But see (1910) 5 Ind Cas 123 (124) 32 All 160, *Sasuddin Khan v Ratan Lal* (Redeeming co mortgagor held to be a mortgagee); (1886) 8 All 295 (299, 300) 1886 All W N 98, *Nura Bibi v Jagat Naram*]

6 (1927) A I R 1927 All 177 (179) 90 Ind Cas 280, *Munawar Ali v Jagamalan Ram*

7 (1889) 1889 Fm R No 161, *Nihal Singh v Mutsaddi*

8 (1929) A I R 1929 P C 153 (161) 56 Ind App 192 51 All 367 117 Ind Cas 22 *James Richards R Skinner v Naunihal Singh*

[See also (1915) A I R 1915 Mad 656 (658) 26 Ind Cas 1, *Singaram Chelluar v Kalyansundaram Pillai* (Mortgage by *A* to *B*—*C* succeeding to *A*'s estate, as a Hindu widow—*C*'s rights transferred to *B*—Suit by reversioner against *B*—Article 141 applies)]

9 (1929) A I R 1929 P C 158 (161) 51 All 367 56 Ind App 192 117 Ind Cas 22 (P C) *James Richards R Skinner v Naunihal Singh*

10 (1905) 10 Bom 140 (143), *Pandu v Yithu*

mortgage, but obtains possession subsequently in some other way and then transfers the property to a third person, and the mortgagor sues for possession such third person, does this Article apply? The question arose in *Naunihal Singh v. Alice Georgiana Skinner*,¹ but the learned Judges constituting the Bench differed in their views. According to Mr. Justice Lindsay, this Article will apply to such a case, the reason being that the Article does not say "mortgaged with possession," that there is no reason why it should make any difference to the transferee whether the possession which his transferor has at the time of the transfer arose directly out of the mortgage or was prior to the date of the transfer, acquired in some other way, and that even if the mortgage was a simple one and the mortgagee subsequently got possession of the mortgaged property otherwise, as for example, by purchase in execution of a simple money decree obtained by another creditor, the Article will still apply if it is established that at the time of the transfer the mortgagee was in possession, no matter under what title. Kanhaiya Lal, J., dissented from this view and held that the Article applied only to the case of a mortgage with possession or followed by possession as a necessary incident or ingredient of it, inasmuch as a mortgagee who is not in possession cannot transfer possession to another or give what he does not possess. The case went up on appeal to the Privy Council in *Skinner v. Naunihal Singh*² and the view of Lindsay, J. was affirmed.

15. Mortgagee transferring but subsequently getting re-transfer — Effect. — A mortgagee cannot improve his position by purporting to transfer the mortgaged property to a third person and subsequently getting the re-transfer of the same from the transferee. His position would be just what it was before the transfer was made, and a suit for redemption of the mortgage by the original mortgagor would be governed by Article 148 and not by this Article.¹ In the undermentioned case² the defendant, a mortgagee, purchased in execution of a money decree the share of one of two mortgagors. He then sold the shares of both the mortgagors in one of the fields purchased by him to a third person, as if he had become owner of the equity of redemption of both the mortgagors. Subsequently, he

Note 14

- 1 (1925) A I R 1925 All 707 (712, 717) 47 All 603 92 Ind Cas 63
- 2 (1929) A I R 1929 P C 158 (161) 117 Ind Cas 22 51 All 367 56 Ind App 192 (P C)

Note 15

- 1 (1919) A I R 1919 Oudh 150 (151) 22 Oudh Cas 72 52 Ind Cas 159, *Mohammad Mohsin v. Mohammad Abid* (Mortgagee after making temporary transfer gets back possession before transferee acquires adverse rights)
- 2 (1920) A I R 1920 Bom 20 (20) 44 Bom 849 59 Ind Cas 39, *Kalu v. Rupchand*

Article 134
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15—18

purchased the said field from the third person. In a suit by the other co mortgagor whose share was not sold in the execution sale the mortgagee claimed the protection of this Article as a purchaser for valuable consideration. It was held that he could not do so and that he must be treated as a mortgagee and not as an innocent transferee without notice.

16. Starting point of limitation. — Before the amendment of the Article in 1929, the starting point of limitation under the Article was the date of the transfer. The above amendment has substituted the words "when the transfer becomes known to the plaintiff" in the place of the words "the date of the transfer which occurred before." Thus, under the amended Article, limitation commences to run from a later date than would have been the case under the Article before the above amendment. Where a right to sue had accrued under the unamended Article and had become time barred under that Article, it cannot be revived in consequence of the amendment.¹ See Preamble, Note 26, *ante*.

The burden of proving that the transfer became known to the plaintiff within twelve years of the suit is on the plaintiff.² (See Section 3, Note 38.)

See also Note 12 above.

17. Time for redemption by mortgagor not ripe at date of transfer by mortgagee—Limitation for mortgagor's suit against transferee. — Where at the date of the transfer by a mortgagee, the period fixed for the redemption of the mortgage has not expired, and consequently the mortgagor is not entitled to sue for redemption or possession of the property at such date, this Article cannot apply to a suit for possession against the transferee by the mortgagor. The reason is that the Article contemplates suits for which the cause of action has arisen at the date of the transfer, such date being the date on which limitation begins to run under the Article (as it stood before the amendment in 1929).¹

18. Adverse possession against mortgagee, whether adverse possession against mortgagor. — See Notes under Article 144, *infra*.

Note 16

1 (1933) A I R 1933 Oudh 33 (40) 140 Ind Cas 182, *Raghunandan Misra v Mahadeo*

2 (1933) A I R 1933 Oudh 33 (39, 40) 140 Ind Cas 182 *Raghunandan Misra v Mahadeo*

Note 17

1 (1939) A I R 1938 Mad 691 (896), *Krishnaswami Ayyar v Sivarathnam Chetty*

(1919) A I R 1919 Mad 972 (991, 995) 43 Ind Cas 31 40 Mad 1040 (F B) *Seetha Kutti v Pathamma* (Per Brinivasan Iyengar, J.)

19. Mortgagor's estate in the hands of a limited owner at the time of transfer by mortgagee—Suit by person succeeding to estate on termination of limited estate.—A mortgages a certain property to B. A then makes a will by which the mortgaged property is given to C, D and E, his sons, for their lives in succession with remainder to his daughter, F. After A's death, C, his eldest son, succeeds to the property. C's interest in the property is purchased by B in execution of a money decree against him. B then sells the property to G. C, D and E die one after another. F, on succeeding to the estate on E's death, sues G for redemption of the mortgage and for possession of the property. It was held by the Privy Council that the transfer to G by B must be deemed to be a transfer by a "mortgagee" within the meaning of this Article, but that inasmuch as such transfer was made during the existence of the "particular" estate of C, the suit is governed by Article 140 and not this Article.¹

A mortgagor (a Hindu) died leaving a daughter. The mortgagee then sold the property to the defendant as if he was the full owner of it. The daughter did not sue for the recovery of the property during her lifetime. On the daughter's death, her son succeeded to the estate as the next reversioner. The son then sued the defendant for the recovery of the property. It was held by the Madras High Court that the suit was governed by this Article and not by Article 141.² It is submitted that the decision seems to be inconsistent with the decision of the Privy Council above referred to and that therefore the correctness of the decision is open to doubt.

In the undermentioned case,³ A, a Hindu, mortgaged a certain property and died leaving a widow. The widow transferred her right in the property to the mortgagee who thereafter sold the property to the defendant. After the termination of the widow's estate, the next reversioner who succeeded to the estate sued the purchaser from the mortgagee for redemption. It was observed by the Madras High Court that seeing that the transferor from whom the defendant claimed title acquired the equity of redemption in the suit property from the widow of the mortgagor, there were strong grounds for holding that Article 141 was applicable to this as to other alienations (if any) by the widow.

Note 19

- 1 (1929) A I R 1929 P C 158 (161) 51 All 367 117 Ind Cas 22 56 Ind App 192 (P C), *James Richards R Skinner v Naunihal Singh*
- 2 (1921) A I R 1921 Mad 272 (273, 276) 41 Mad 951 68 Ind Cas 734 *Narasimham Nair v Periasamy Odayar*
- 3 (1915) A I R 1915 Mad 656 (658) 26 Ind Cas 1, *Singaram Chelliar v Kalyansundram Pillai*

Article 134A	134A. To set aside a transfer of immoveable property comprised in a Hindu, Muhammadan or Buddhist religious or charitable endowment, made by a manager thereof for a valuable consideration.	Twelve years.	When the transfer becomes known to the plaintiff.
Article 134B	134B. By the manager of a Hindu, Muhammadan or Buddhist religious or charitable endowment to recover possession of immoveable property comprised in the endowment which has been transferred by a previous manager for a valuable consideration.	Twelve years.	The death, resignation or removal of the transferor.
Article 134C	134C. By the manager of a Hindu, Muhammadan or Buddhist religious or charitable endowment to recover possession of moveable property comprised in the endowment which has been sold by a previous manager for a valuable consideration.	Twelve years.	The death, resignation or removal of the seller.

Articles 134A, 134B & 134C.

Synopsis

1. Legislative changes.
2. Scope of the Articles.
3. Retrospective effect of Articles.
4. Suit by persons interested in endowment to set aside alienation of endowment property (Article 134A).
5. Suit by manager of Hindu etc. religious or charitable endowment for possession of immovable property transferred by a previous manager (Article 134B).
6. "Manager."
7. Transferred for valuable consideration.
8. Sale in execution of decree against manager — Suit for recovery of possession from auction-purchaser.

9. "Death, resignation or removal of the transferor" (Article 134B).

10. Acquisition of prescriptive title by alienee.

Articles
134 A to 134 C
Notes
1—3

1. Legislative changes.—Articles 134 A to 134 C were inserted in the Act by Act 1 of 1929

2. Scope of the Articles. — The property of a Hindu, Muhamadan or Buddhist religious or charitable endowment is not alienable except for legal necessity¹ Where such property is alienated by the manager of the endowment without any legal necessity, the alienation can be set aside A suit for setting aside such alienation and for restoring to the manager possession of the property (where possession also has been transferred to the alienee) can be brought by persons interested in the endowment, such as worshippers, etc (See Note 4, *infra*) Article 134 A will apply to such suits where the property alienated is immovable property Where it is moveable property and the alienation is a sale, Article 48 B, *ante*, will apply to the suit

Even where the alienation is not set aside, it will be good only during the tenure of office of the transferring manager On the termination of his tenure of office, the alienation will cease to have any effect and the succeeding manager will be entitled to sue the alienee for possession of the property Article 134 B will apply to such suits where the property alienated is immovable property Where the property alienated is moveable property and the alienation is a sale, Article 134 C will apply to the suit.

3. Retrospective effect of Articles. — The general principle being that the law of limitation applicable to a suit is the law in force at the date of the institution of the suit, Articles 134 A to 134 C apply to all suits instituted after their coming into force although the transfer sought to be avoided by the suit might have been made before the coming into force of the Articles¹ But the Articles cannot apply to suits already instituted at the date of their coming into force²

Articles 134 A, 134 B & 134 C—Note 2

1 (1909) 4 Ind Cas 449 (451) 36 Cal 1003 36 Ind App 148 (P C), *Abhiram Goswami v Shyama Charan Nandi*

(1938) A I R 1938 Mad 415 (416), *Alam Khan Sahib v Karuppannasamy Nadan*

Note 3

1 (1937) A I R 1937 Cal 805 (807) 172 Ind Cas 315 I L R (1937) 2 Cal 242 *Sri Raghunath Jiu v Ganga Gounda*

(1937) A I R 1937 Lah 9 (10) 169 Ind Cas 792 *Abdul Qadir v Siraj ud-din*

2 (1935) A I R 1935 P C 44 (46) 57 All 159 62 Ind App 47 153 Ind Cas 1100 (P C) *Mahadeo Prasad v Karna Bharthi*

(1938) A I R 1938 Mad 415 (416) *Alam Khan Sahib v Karuppannasamy Nadan*

(1930) A I R 1930 Pat 455 (467) 9 Pat 885 127 Ind Cas 817, *Naurang Lal v Ram Charan Das*

4. Suits by persons interested in the endowment to set aside alienation of endowment property (Article 134 A). — Before the enactment of Article 134 A, there was a conflict of decisions as to the period of limitation applicable to a suit brought by persons interested in any endowment (other than a succeeding manager) for declaration that an alienation by the manager of the endowment was invalid and for ejectment of the transferee and restoration of the property to the manager of the endowment. On the one hand, it was held by the Calcutta¹ and Madras² High Courts that such a suit was one for possession and as such was governed by Article 134 or—if that Article was held not applicable—by Article 144. But on the other hand, it was held by the Lahore High Court³ that such a suit was not a suit for possession and was governed by Article 120. It is conceived that such suits would virtually be suits for the setting aside of alienations made by the manager of the endowment and would be governed by Article 134 A now.⁴

5. Suit by manager of Hindu, etc. religious or charitable endowment for possession of immovable property transferred by a previous manager (Article 134 B). — Prior to the decision of the Privy Council in *Vidya Varuthi v Baluswamy*¹ it was generally held that the property of a Hindu or Muhammadan religious or charitable endowment was property conveyed in trust within the meaning of Article 134 and that a suit by the manager of such endowment for the recovery of immovable property which had been transferred for valuable consideration by a previous manager would come within the provisions of that Article.² But this view

Note 4

- 1 (1897) 24 Cal 418 (429) *Sayedur Raja Chaudhari v Gour Mohun Das*
- 2 (1918) A I R 1918 Mad 464 (461) 41 Mad 124 42 Ind Cas 966, *Chidambaranatha Thambiran v Nallasiva Mudahar*
- 3 (1919) A I R 1919 Lah 12 (12) 1 Lah 66 51 Ind Cas 755 *Shadi v Abdur Rahman*.
- (1904) 1904 Pun Re No 9 page 42, *Asa Ram v Parsoram* (Following 1899 Pun Re No 8)
- 4 See Report of Select Committee

Note 5

- 1 (1922) A I R 1922 P O 123 (128) 65 Ind Cas 161 48 Ind App 302 44 Mad 831 (P C) (Explaining A I R 1916 P C 256)
2. (1898) 20 All 482 (490) 1898 All W N 123 (F B) *Behari Lal v Muhammad Mulla*
- (1909) 3 Ind Cas 93 (95, 96) (Cal) *Jnananjan Banerjee v Adoremoney Dassee*
- (1903) 27 Bom 500 (518 514) 5 Bom L R 303, *Sagun v Kaji Hussien* (Property dedicated to mosque Following 27 Bom 363)
- (1916) A I R 1916 Cal 728 (729) 43 Cal 84 29 Ind Cas 337, *Rameshwar Malla v Jiu Thakur*
- (1920) A I R 1920 Cal 379 (392) 47 Cal 866 59 Ind Cas 705, *Narain Dass v Abdur Rahim* (Muhammadan wakf)

was overruled by the Privy Council in the above decision and it was held that such suits would not be governed by Article 134 but by Article 144. It was further held by the Privy Council in the above case that the starting point of limitation under Article 144 in such cases was the date of the termination of the tenure of office of the transferring manager and not the date of the alienation. In other words, the possession of the alienee became "adverse" to the institution only from the date of the termination of the tenure of office of the alienating manager. This view was based on the ground that the alienation of property belonging to a Hindu, etc. endowment by the manager was good (where it was not set aside in proper proceedings taken for the purpose) so long as the alienating manager held office, and the possession of the alienee became unlawful only on the cessation of the transferring manager's term of office. The above view was also adopted in several later decisions of the Privy Council³ and of the High Courts^{3a}. In some of these later decisions of the

(1911) 9 Ind Cas 193 (134) (Cal), *Purna Chandra Chowdhuri v Kinkar Manjhi*

(1897) 24 Cal 418 (429), *Sajedur Raja v Gour Mohun*

(1908) 27 Bom 373 (377) 5 Bom L R 241, *Narayan Manjaya v Shri Ramachandra*

(1908) 1908 Pun Re No 127 page 575 1908 Pun W R No 128 (F B), *Har Gaiu Das v Baldeo Das*

(1919) A I R 1919 Lah 12 (12, 13) 1 Lah 66 51 Ind Cas 755, *Shadi v Abdur Rahman*

See also cases in Section 10 Note 25 Foot Note 2

[See also (1896) 28 Cal 536 (545) *Nilmoney Singh v Jagabandhu Ray* (Limitation runs from date of alienation)]

(1913) 18 Ind Cas 319 (320) 16 Oudh Cas 109, *Mian Hamsid ud din Ali Shah v Court of Wards Nanpara District Bahraich* (Do)]

3 (1935) A I R 1935 P C 44 (46) 62 Ind App 47 57 All 159 153 Ind Cas 1100 (P C), *Mahadeo Prasad v Karia Bharthi*

(1933) A I R 1923 P C 75 (77, 78) 142 Ind Cas 214 12 Pat 251 60 Ind App 124 (P C) *Ram Charan Das v Naurang Lal* (Reversing A I R 1930 Pat 455)

(1936) A I R 1936 P C 183 (186) 162 Ind Cas 465 63 Ind App 261 59 Mad 809 (P C) *Dairankamoni Ponnambala Deskar v Periyannan Chetty*

(1923) A I R 1923 P C 175 (177) 50 Ind App 295 46 Mad 751 74 Ind Cas 492 (P C) *Subbiah Pandram v Md Mustafa Markayar*

[See also (1926) A I R 1926 P C 9 (12) 53 Ind App 24 93 Ind Cas 280 5 Pat 312 (P C) *Lal Chand Marwari v Ramrup Gur*

3a (1926) A I R 1926 Cal 913 (915) 95 Ind Cas 644, *Raja Manindra Narain v Executors Bhuban Chandra Estate*

(1923) A I R 1923 Cal 130 (134) 69 Ind Cas 707, *Gajendra Nath Day v Ashraf Hossain*

(1937) A I R 1937 Lah 9 (11) 169 Ind Cas 732, *Abdul Qadir v Suraj Ud din*

(1938) A I R 1938 Mad 415 (416) *Alam Khan Sahib v Karuppannasami Nadan*

Articles
134A to 134C
Note 8

Privy Council,⁴ the earlier decisions of that Tribunal in *Gnana Sambanda v Velu Pandaram*⁵ and *Damodar Das v Lakhan Das*,⁶ in which it had been held that limitation ran from the date of the alienation, were distinguished on the ground that in them the alienation was not only of an item or items of property belonging to an endowment but was of the *mutt* and its properties which was void *ab initio*, so that the possession of the alienee was unlawful from the beginning. It was also made clear that the principle that limitation runs only from the date of the termination of the tenure of office of the alienating manager and not from the date of the alienation,

(1933) A I R 1933 Mad 533 (536 537) 144 Ind Cas 541 *Arumugam Pillai v Mohideen Seriff*

(1932) A I R 1932 Mad 328 (331) 137 Ind Cas 487, *Periyann Chetty v Govinda Rao* (Article 144 applies to such suits)

(1926) A I R 1926 Mad 769 (771) 49 Mad 543 96 Ind Cas 371 *Fama Reddy v Ranga Dassan*

(1926) A I R 1926 Pat 239 (241) 5 Pat 341 93 Ind Cas 303 *Badri Narayan Singh v Kailash Gir* (Time runs from the death of previous mahant and not from the time of succession of the plaintiff mahant)

(1922) A I R 1922 Pat 178 (181) 63 Ind Cas 231, *Ram Padarath Singh v Mahanth Basdeo Das*

(See also (1925) A I R 1925 Mad 796 (796) 95 Ind Cas 1002, *Lakshmi narayana Kulluraya v Rajamma* (Property of Hindu etc religious endowment is not property conveyed in trust within Article 134))

(1922) A I R 1922 Lab 271 (272) 65 Ind Cas 722, *Duan Singh v Sham Das* (Do)

(1923) 73 Ind Cas 711 (714) (Fesh) *Ghulam Haidar v Manager, Committee Samadh Baba Phula Singh* (Do))

In the following cases which were decided before *Vidya Varuthi* a case (A I R 1922 P C 123) it was held that adverse possession of the alienee only commenced from the termination of the tenure of office of the alienor and not from the date of the alienation —

(1916) A I R 1916 Mad 332 (335 336) 19 Ind Cas 694 (698) 38 Mad 556
Aluthusamiyer v Methanithi Swamiyer

(1896) 6 Mad L Jour 270 (272), *Syed Gulam Nabi Sahib v Nagammal*

(1886) 10 Bom 34 (41), *Jamal Sahib v Murgaya Swami*

(1866) 6 Suth W R P C 3 (9) 2 Moo Ind App 390 1 Suther 100 (P C)
Jewan Doss Sahu v Kubeeroodin

(1878) 20 Suth W R 471 (472), *Burn Suroop Dass v Ahashee Jha*

(See also (1908) 1908 Pun Ra No 30 p 195 1908 Pun L R No 162
1908 Pun W R No 35 (F B) *Basheshar Lal v Natha Singh*
(Case before *Vidya Varuthi* a case—Article 134 in Act of 1877
only applicable to sales and not mortgages)

4 (1935) A I R 1935 P O 44 (46) 153 Ind Cas 1100 57 All 153 62 Ind App 47 (P C) *Mahadeo Prasad v Karia Bharthi*

(1933) A I R 1933 P O 75 (77, 78) 142 Ind Cas 214 12 Pat 251 60 Ind App 124 (P C), *Ram Charan Das v Naurangi Lal*

5 (1900) 23 Mad 271 (279) 27 Ind App 69 4 Cal W N 329 10 Mad L J 29 2
Dom L R 537 7 Bar 671 (P C) (Reversing 19 Mad 213)

6 (1910) 7 Ind Cas 240 (240) 37 Cal 885 37 Ind App 147 (P C)

applied equally to all classes of endowments and not merely to mutts.⁷ Further, the principle applied to all kinds of alienations of the endowment property and not only to leases⁸ executed by the manager of the endowment as was the case in *Vidya Varuthi v Baluswamy*¹

Articles
134 A to 134 C
Notes
8—6

Thus, even under the law as it stood prior to the enactment of Article 134 B, a suit by the manager of a Hindu, etc. religious or charitable endowment for recovery of possession of immovable property alienated by a previous manager was governed by a twelve years' period of limitation running from the date of the termination of the tenure of office of the alienating manager. Article 134 B gives legislative effect to this view.⁹ The enactment of the Article does not, therefore, effect any change in the law of limitation applicable to such suits, except for the fact that while under the previous law such suits were governed by the residuary and general Article, Article 144, there is now a specific Article dealing with them.

6. "Manager." — Articles 134 B and 134 C contemplate a suit by the *manager* of the endowment. A suit by a person who is in actual possession of the *mutt* or other institution, as the case may be, and who sues for the recovery of the property for the benefit of

7 (1936) A I R 1936 P C 183 (186) 162 Ind Cas 465 59 Mad 803 63 Ind App 261 (P C), *Davankhamoni Ponnambala Descar v Periyannan Chetty*

(1938) A I R 1938 Mad 415 (417) *Alam Khan Sahib v Karuppannaswami Nandan*

[See also (1923) A I R 1923 P C 175 (177) 50 Ind App 295 46 Mad 751 74 Ind Cas 492 (P C), *Subbiah Pandaram v Md Mus Jafa*

(1890) 13 Mad 277 (280), *Mahomed v Ganpati*.

(1927) A I R 1927 Mad 1163 (1164) 104 Ind Cas 355 *Vellachami Naicker v Alagarasami Naicker*

(1926) A I R 1926 Mad 193 (194) 91 Ind Cas 377, *Govinda Rao v Chinnathurai Pillai*

(1927) A I R 1927 Mad 850 (850) 104 Ind Cas 125, *Chinnathurai Pillai v Govinda Rao*.

[But see (1922) A I R 1922 Pat 248 (247) 1 Pat 475 67 Ind Cas 401 *Ramruppur v Lal Chand Martari*. (In this case it was held that the above rule did not apply to cases where the title to the property was in the idol and not the mahant—Submitted that the view is not correct.)]

1 Pat 251 60 Ind

22 d Cas 27 2 Luck 239 *Parkasdas v. Janki Ballabha* (In this case it was held that the alienation being an out and out transfer and not a lease, adverse possession would commence immediately on the alienee getting possession—Submitted that the distinction made is wrong.)]

9 (1936) A I R 1936 Mad 189 (190) 161 Ind Cas 234 *Jagathambal Anni v Periyambal*

(1937) A I R 1937 Lah 660 (661) 172 Ind Cas 319, *Backini Singh v Ganpat Rai*

Articles
134 A to 134 C
Notes
6—8

the institution and not for his personal benefit, will be within the Articles¹

A suit by a committee of management appointed by the Court on the removal of a previous manager will be one by a "manager" within the Articles²

7. Transferred for valuable consideration.—A lease¹ or a mortgage² is a transfer for valuable consideration within the meaning of Article 134 B. The transfer need not be an out and out sale.

It has been held by the Madras High Court with reference to the law as it stood prior to the enactment of Article 134 B that where the alienation amounts to a *negation* of the trust, it will be void *ab initio* and that the possession of the alienee will be adverse to the institution from the beginning and limitation will start running from the time of the alienee getting possession under the transfer. Thus, where the manager transfers property belonging to the endowment not as endowment property but as being his *private* property, the transfer will amount to a negation of the trust and will be void *ab initio*, so that, limitation will commence to run in such cases immediately and not from the cessation of the term of office of the alienating manager³.

In *Vidya Varuthi v Baluswami*,⁴ the head of a *mutt* granted a permanent lease of certain lands belonging to the *mutt* on a quit rent of rupees twenty four a year. The Privy Council observed as to this that it will be ridiculous to hold that the rent reserved was "valuable consideration" within Article 134 of the Act.

8. Sale in execution of decree against manager—Suit for recovery of possession from auction-purchaser.—In *Subbaya*

Note 6

- 1 (1933) A I R 1933 P C 75 (76) 142 Ind Cas 214 12 Pat 251 60 Ind App 124 (P C) *Ram Charan Jiu v Naurang Lal*
- (1935) A I R 1935 P C 44 (46) 57 All 159 62 Ind App 43 153 Ind Cas 1100 (P C), *Mahadeo Prasad Singh v Karia Bharthi*
- 2 (1937) A I R 1937 Lah 660 (661) 172 Ind Cas 319, *Bachint Singh v Ganpat Rai*

Note 7

- 1 (1937) A I R 1937 Cal 305 (307) 1 I L R (1937) 2 Cal 212 172 Ind Cas 615, *Sri Raghunath Jiu v Ganga Gobinda*
- 2 (1937) A I R 1937 Lah 660 (661) 172 Ind Cas 319, *Bachint Singh v Ganpat Rai*
- 3 (1938) A I R 1938 Mad 60 (61), *Venkatasubramaniam v Sivagurunatha Chettiar*.
- (1938) A I R 1938 Mad 415 (416, 418), *Alam Khan Sahib v Karuppanna swamy* (Property dealt with as his own and act amounting to repudiation of trust—Time runs immediately)
- 4 (1922) A I R 1922 P C 123 (131) 65 Ind Cas 161 49 Ind App 301 41 Mad 831 (P C)

*Pandaram v Mohamad Mustafa*¹ (which was a case decided under the law as it stood before Act 1 of 1929), it was held by the Privy Council that the argument that an alienation by the manager of a religious endowment is good during the tenure of office of the alienor and that the possession of the alienee becomes adverse to the institution only from the cessation of the term of office of the alienor, did not apply to a case where property had been acquired under an execution sale. But the above decision of the Privy Council has not been treated in later decisions² as an authority for the unqualified proposition that in the case of execution sales, the adverse possession of the auction purchaser commences immediately on his getting possession under the sale and not on the cessation of the term of office of the manager in execution of a decree against whom the property is sold. The decision is taken as illustrating the principle that where the alienation of the endowment property takes place in *negation of the trust*, it is void *ab initio* and the adverse possession of the alienee commences immediately³. It is pointed out that in *Subbaya Pandaram's case*⁴ the sale was in execution of a decree for the *personal debts* of the manager. See also the undermentioned cases⁵.

Articles
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9. "Death, resignation or removal of the transferor" (Article 134 B).—The starting point of limitation under Article 134 B is the death, resignation or removal of the transferor. Where the *mahant* of a *mutt* disposed of all the property of the *mutt* and dedicated it to the deity of another sect, it was held that this determined the tenure of office of the *mahant* and that time under Article 134 B ran from the date of such disposal¹.

Suppose *A*, the *mahant* of a *mutt*, transfers for consideration certain property belonging to the *mutt* and dies. *A* is succeeded by *B*. *B* does not sue for the recovery of the property from the alienee. *B* is succeeded, on his death, by *C*. Limitation for a suit by *C* will commence to run from the death of *A*, the *alienating mahant*, and not from the death of *B*, the plaintiff's immediate predecessor in

Note 3

- 1 (1923) A I R 1923 P C 175 (177) 46 Mad 751 50 Ind App 295 74 Ind Cas 492 (P C)
- 2 (1938) A I R 1938 Mad 60 (64) *Venkatasubramania v Sivagurunatha*
(1938) A I R 1938 Mad 415 (416) *Alam Khan Sahib v Karuppannaswamy*
- 3 (1938) A I R 1938 Mad 60 (64) *Venkatasubramania v Sivagurunatha*
- 4 (1911) 12 Ind Cas 926 (927) 36 Bom 135, *Pandurang Balaji v Dnyanu Babaji* (Sale in execution of decree against manager—Adverse possession commences immediately on auction purchaser getting possession)
- (1926) A I R 1926 Cal 913 (915) 95 Ind Cas 644 *Manindra Narain v Executors Bhuvan Chandra Estate*

Note 9

- 1 (1938) A I R 1938 Pat 143 (144) 174 Ind Cas 391, *Pamlagan Gossain v. Nandipati Mahlon*

Articles
134 A to 134 C
Notes
9—10

office² Even in the cases which were decided before the coming into force of the Article and in which Article 144 was held to apply to such cases, it was held that time ran only from the termination of the tenure of office of the transferor and not from the termination of the tenure of office of the plaintiff's immediate predecessor³

Suppose *A*, the manager of a religious endowment, grants a permanent lease of property belonging to the endowment *A* dies and is succeeded by *B* Though the lease granted by *A* comes to an end on his death, it is open to his successor *B* to grant a *fresh* lease to take effect in continuation of the lease granted by *A* Suppose *B* does so and dies afterwards He is succeeded by *C* In such circumstances, limitation for a suit for possession by *C*, *B*'s successor in office, will only commence to run from the death of *B* and not from the death of *A* This was the view taken with reference to the law prior to the coming into force of Article 134 B⁴ It is submitted that the same will be the rule now also

10. Acquisition of prescriptive title by alienee. — Where a suit for possession of property improperly alienated by the manager of an endowment is not brought within the period prescribed by Article 134 B, the alienee who has obtained possession under the transfer will acquire, under Section 28, *ante*, a title to the property¹

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- 2 (1938) A I R 1938 Mad 415 (416), *Alam Khan Sahib v. Karuppannasamy* (23 Mad 271 (P C) and 23 Cal 536, Followed)
- 3 (1926) A I R 1926 Cal 913 (914) 95 Ind Cas 644, *Raja Manindra Narain v. Executors, Bhuban Chandra Estate*
- (1927) A I R 1927 Pat 49 (51) 97 Ind Cas 637, *Gopal Charjya v. Bhim Kahi* (Each successor as mahant does not acquire fresh limitation from his succession to challenge transfer of debutter property)
- (1912) 16 Ind Cas 927 (928) (Cal), *Madhu Sudan v. Radhika Prosad Das*
- (1922) A I R 1922 Mad 406 (407) 70 Ind Cas 369, *Madura Devasthanam v. Samia Pillai*
- 4 (1922) A I R 1922 P C 123 (135) 65 Ind Cas 161 48 Ind App 302 44 Mad 831 (P C) *Vidya Varulki Thirtha Swamikal v. Balusamy Ayyar*
- (1936) A I R 1936 P C 183 (187, 189) 59 Mad 809 63 Ind App 261 162 Ind Cas 465 (P O), *Dairavakkhamoni Ponnambala Desikar v. Periyannan Chetty*
- (1938) A I R 1938 Mad 415 (417) *Alam Khan Sahi v. Karuppannasamy*
- (1916) A I R 1916 Mad 332 (336) 38 Mad 356 19 Ind Cas 694 *Muthu samier v. Methanathi Swamikal*
- (1931) A I R 1931 Lah 675 (675), *Har Nath v. Mohar Singh* (Held in the circumstances of the case that the action of the succeeding mahant created tenancy from month to month)

Note 10

1. (1937) A I R 1937 Cal 805 (807, 809) I L R (1937) 2 Cal 212 172 Ind Cas 315, *Thakur Sri Srs Raghunath Jiu v. Ganga Govindopati*
- (1938) A I R 1938 Mad 415 (416), *Alam Khan Sahib v. Karuppannasamy* (But see (1923) A I R 1923 Mad 345 (530) 72 Ind Cas 789 *Jaggi Row v. Gars Dabi* (Submitted not correct))

135.* Suit instituted in a Court not established by Royal Charter by a mortgagee for possession of immoveable property mortgaged.	Twelve years.	When the mortgagor's right to possession determines.	Article 135
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Synopsis

1. Legislative changes.
2. Scope of the Article.
3. Suit must be for possession.
4. Suit for possession, if one for specific performance of contract.
5. Suit against persons claiming through mortgagor.
6. Suit by puisne mortgagee against prior mortgagee and mortgagor for redemption and possession.
7. Starting point.
8. Effect of acknowledgment or part payment.
9. Mortgage by conditional sale.

Other Topics

Suit against stranger	See Note 5, Pt 2
Suit by simple mortgagee for sale of mortgaged property	See Note 2, Pt 4
Suit for declaration	See Note 3, Pt 1
Suit for ejectment of mortgagor tenant	See Note 2, Pt 1

1. **Legislative changes.**—There was no provision corresponding to this Article in the Act of 1859 and suits in the *mofussil* by mortgagees for possession were governed by the twelve years' rule prescribed by clause 12 of Section 1¹ Article 135 was first introduced in the Act of 1871 but the third column contained the words "when the mortgagee is first entitled to possession" These words

* Act of 1877, Article 135

Same as above

Act of 1871, Article 135

Columns one and two same as above

The third column ran Where the mortgagee is first entitled to possession

Act of 1859

No corresponding provision

Article 135 — Note 1

- 1 (1868) 9 *South W R* 170 (174) *Beng L R Sup Vol* 679, *Surwan Hossein v Shaharadah Golam*
 (1876) 1 *Cal* 163 (168) 25 *South W R* 84 3 *Ind App* 1 3 *Suther* 222 3 *Sar* 581 (P C), *Juneshwar Dass v Mahabeer Singh*

Article 135

Notes

1—2

were changed into when the possession of the mortgagor determines. But the change in the wording of the third column has not according to the Bombay High Court, effected any change in the starting point of limitation.

2 Scope of the Article — This Article governs suits instituted in a Court not established by Royal Charter by a mortgagee for possession of the property mortgaged. Limitation for such a suit instituted in a Court established by Royal Charter is provided for by Article 146 *infra*.

The Article applies only to suits for possession where the mortgagee *as such* claims possession. Where the mortgagee leases the mortgaged property to the mortgagor as his tenant and subsequently sues the mortgagor for ejectment the claim for possession is not by the mortgagee *as such* but by virtue of the mortgage and consequently this Article does not apply. Article 139 *infra* would apply to such case.¹ Similarly where a mortgagee by conditional sale entitled under the instrument to possession only after foreclosure forecloses the mortgage and thereafter sues the mortgagor for possession the claim for possession is as a proprietor and not as a mortgagee and consequently Article 144 and not this Article applies.² Again where the mortgagee gets possession under the mortgage but the mortgagor subsequently dispossesses the mortgagee or gets into possession with the permission of the mortgagee and then refuses to vacate it a suit by the mortgagee for possession would not be governed by this Article.³

The Article obviously does not apply to a suit by a simple mortgagee for sale of the mortgaged property.⁴ Such a suit is firstly

- 2 (1933) A I R 1933 Bom 439 (443) 147 Ind Cas 919 57 Bom 593 Ganpat Bhuwang v Hanamgorda Shidaga da

Note 2

1

1
Tada v Mohan
Raj v Jamal Singh
1

- 2 (1918) A I R 1918 Lah 199 (200) 1918 Pan Be No 79 45 Ind Cas 563
Rata v Das v Mt Guram

- 3 (1913) 22 Ind Cas 65 (67) 9 Nag L R 179 Atjun a Islamia v Hissimal
(1899) 27 Cal 185 (188) Anan Ali v Argar Ali
[See also (1928) A I R 1928 Pat 582 (584) 8 Pat 68 112 Ind Cas 555
Mt Jugess, Kuer v Aftab Chand]

- 4 (190) 30 Mad 476 (434) 31 Ind App 186 4 All L Jour 625 9 Bom L R 1104 12 Cal W N 1005 1 Cal L Jour 39 17 Mad L Jour 441 2 Mad L Tim 333 (H C) Pesudeta Mital ar v Srinivas P
(Simple mortgagee's suit to enforce the charge by sale of the mortgaged property is governed by Article 132.)

- (1883) 5 All 1 (6) 9 Ind App 99 3 Shome L R 80 4 Bar 382 (P C) Karan Singh v Bahar Ali Khan

- (1914) A I R 1914 All 95 (96) 36 All 567 21 Ind Cas 597 (F B) Rajma v Nara n Das

- (1933) A I R 1933 Bom 415 (416) 6 Ind Cas 217 Paghunath Bhat v Malhar Raut

- (1915) A I R 1915 Cal 933 (937 940) 41 Cal 473 8 Ind Cas 271 Prasad Sah v Debi v Bresswar Samanta

not one by a mortgagee entitled to possession as such, nor is it a suit for possession. Nor does the Article apply to a mortgagee by conditional sale who is not entitled to possession.⁵

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Notes
2—5

3. Suit must be for possession.—The Article has no application unless the suit is one for possession. A suit for a declaration is not one for possession.¹

4. Suit for possession, if one for specific performance of contract. — Where the instrument of mortgage stipulates that the mortgagor should give possession to the mortgagee, a suit for possession in enforcement of this stipulation may be regarded as a suit for specific performance of a contract governed by Article 113, *ante*. But since it is also a suit by the mortgagee for possession within this Article which must be regarded as a specific Article governing such cases, the Article that must be taken to govern such a case is this Article and not Article 113, in accordance with the general principle of interpretation of statutes that a special Article will prevail over a general one.¹

Where the instrument of mortgage recites that possession has been given to the mortgagee, a suit by the mortgagee for possession which in fact had not been given is not a suit for specific performance of any contract and is clearly governed only by this Article.²

5. Suit against persons claiming through mortgagor. — The suit contemplated by this Article is not restricted to a suit against a mortgagor only. It would apply to suits also against persons deriving

(1896) 19 Mad 249 (253) 23 Ind App 32 6 Mad L Jour 53 7 Sar 10 (P C) *Sri Rajah Papamma Rao v Sri Vira Pratapa*

(1900) 23 Mad 37 (40) 9 Mad L Jour 258, *Nallamuthu Pillai v Betha Naicken*

(1916) A I R 1916 Mad 990 (997) 39 Mad 811 31 Ind Cas 412 (F B) *Vyapuri v Sonamma Dos Ammani*

[See also (1902) 25 All 35 (38) 1902 All W N 175, *Ramlal v Masum Ali Khan*

(1919) A I R 1919 All 56 (59) 42 All 70 52 Ind Cas 684 *Barhat un nissa Begam v Mahboob Ali Mian*]

5 (1893) 20 Cal 269 (272) *Nilcomal Pramanick v Kamsi Koomar Basu*

(1884) 10 Cal 68 (73) 13 Cal L R 51 *Modun Mohun Chowdhry v Ashad Ally Beparee*

(1916) A I R 1918 Lah 198 (201) 45 Ind Cas 563 1918 Pun Re No 79 *Ratan Das v Mt Guran*

[See also (1926) A I R 1926 Lah 302 (303) 93 Ind Cas 688 *Sardari Mal v Ganga Ram*]

Note 3

1 (1908) 1908 Pun W R No 115 (page 390) 1908 Pun Re No 57, *Nagar v Saudagar*

Note 4

1 (1884) 1884 All W N 123 (123) *Gopal Rao v Daji Lal*

(1890) 1890 Pun Re No 96, *Kankya Lal v Mohru*

2 (1910) 7 Ind Cas 646 (647) (All) *Ram Chand v Behari*

(1883) 1883 Pun Re No 134 *Ram Chand v Gyan Chand*

Article 135
Notes
5—7

title from the mortgagor¹ But it would not apply to a suit against a stranger not deriving any title from the mortgagor²

6. Suit by puisne mortgagee against prior mortgagee and mortgagor for redemption and possession. — Where a puisne mortgagee sues the prior mortgagee in possession and the mortgagor for redemption and recovery of possession, it has been held that this Article does not apply¹ The reason is that it cannot be said that at the time of the subsequent mortgage the mortgagor's right to possession was determined inasmuch as the prior mortgagee was in possession on that date and such possession could not be considered to be that of the mortgagor

7. Starting point. — As has been seen in Note 1 *ante*, suits such as those contemplated by this Article were governed by Section 1, clause 12 of the Act of 1859 and time ran from the date of the cause of action¹ Under the Act of 1871, time ran, under the Article

Note 5

- 1 (1924) A I R 1924 Oudh 374 (377) 81 Ind Cas 581, *Gokul Prasad v Sukru* (1885) 12 Cal 614 (620) 10 Ind Jur 458 *Shurnomoyee Das v Srinath Das* (Suit against the mortgagor's vendee)
- (1889) 16 Cal 693 (701) 16 Ind App 85 18 Ind Jur 132 5 Sar 315 (P C), *Srinath Das v Khetter Mohun Singh*
- (1891) 4 C P L R 99 (100), *Gopal Jhira v Mt Gora* (Suit against purchaser from mortgagor)
- (1916) A I R 1916 Mad 990 (1000) 89 Mad 811 31 Ind Cas 412 (F B) *Vyapuri v Senamma Bai Amman* (Per Srinivasa Iyengar, J Article 135 applies to suits for possession against both mortgagors and strangers This must be taken to mean person deriving title from mortgagor inasmuch as 12 Cal 614 is cited and that case is of a person deriving such title)
- (1906) 83 Cal 1015 (1019) 10 Cal W N 904 *Amadar Mondul v Makhan Lal Dey* (Suit by purchaser in execution of decree against mortgagor)
- (1871) 16 Suth W R 83 (35) 2 Suther 480 2 Sar 711 8 Beng L R 104 14 Moo Ind App 144 (P C) *Brayanath Kundu Chowdhry v Khetri Chandra* (Do)
- (1871) 16 Suth W R 19 (20) 8 Beng L R 122 14 Moo Ind App 101 2 Suther 457 (P C) *Anand Maya Das v Dharandra Chandra Mookerjee* (Do)
- (See also (1886) 8 All 86 (91) 1886 All W N 11 *Durga Prasad v Shambhu Nath* (Do))
- (1866) 6 Suth W R 183 (194) *Huro Chunder Gooho v Guditkar Koondoo*
- (1901) 1901 Pan L R No 81 page 257 1901 Pan Re No 10 *Kear Singh v Thakar Das*]
- 2 (1919) A I R 1919 Lah 133 (133) 50 Ind Cas 762 1919 Pan Re No 117, *Channam Mal v Mela Ram* (The Article applies only to a suit by a mortgagee against the mortgagor or a person deriving title from him)

Note 6

- 1 (1911) 10 Ind Cas 20 (21) (Lah), *Gandu Mal v Udho*

Note 7

- 1 (1876) 1 Cal 163 (168) 25 Suth W R 81 3 Ind App 1 3 Suther 272 3 Sar 581 (P C), *Junestwar Dass v. Mahabhar Singh*
- (1868) 9 Suth W R 170 (174) Beng L R Sup Vol 879 *Surwan Hossain v. Shaharidah Gelam*.
- (1864) 2 M H O R 51 (54), *Chetty Gaundan v. Sunjaram Pillai*

corresponding to this, from the date "when the mortgagee was first entitled to possession" The Act of 1877 substituted the above words in quotation by the words "when the mortgagor's possession determines"^{1a} It has been held that this substitution does not really effect any change in the starting point of limitation, inasmuch as the time when the mortgagee first becomes entitled to possession is the time when the right of the mortgagor to possession ceases²

Where, under the mortgage, the mortgagee is entitled to possession, and the mortgagor is in possession on the date, time begins to run under the Article from the date of the mortgage itself³ The fact that subsequent to the mortgage, possession of the property was taken by a prior mortgagee,⁴ or the fact that the land became submerged and was taken possession of by the mortgagee on its re appearance,⁵ will not stop time running from the date of the mortgage

But where on the date of the mortgage possession is with a prior mortgagee, time will run only from the date when possession is recovered by the mortgagor from the prior mortgagee⁶

Where the mortgage deed provides that the mortgagee would be entitled to take possession on default by the mortgagor in payment of mortgage money or of the interest due, the mortgagee would be entitled to take possession only on such default, and consequently time will run only from that date⁷ Where the mortgagee has an

(1866) 6 Suth W R 209 (276), *Khetut Chunder Ghose v Tarachand Koondo Chowdhry*

1a See (1914) 22 Ind Cas 65 (67) 9 Nag L R 179 *Anyuman Islamia v Hisamal*

2 (1933) A I R 1933 Bom 439 (443) 57 Bom 593 147 Ind Cas 919 *Ganpat Bhujang v Hanamgouda*

3 (1915) A I R 1915 All 393 (393) 31 Ind Cas 804 *Narbhay Sinha v Tulsi Ram*
[See also (1890) 12 All 203 (207) 1890 All W N 87, *Hakmatulla Khan v Imam Ali*]

4 (1924) A I R 1924 Lah 40 (41) 4 Lah 90 71 Ind Cas 435, *Hukam Chand v Shahab Din*

5 (1925) A I R 1925 Lah 627 (627) 92 Ind Cas 178, *Barhat v Relu Mal*

6 (1933) A I R 1933 Bom 439 (443) 57 Bom 593 147 Ind Cas 919 *Ganpat Bhujang v Hanamgouda*

(1922) A I R 1922 Lah 91 (92) 63 Ind Cas 679 *Indar Singh v Basanta*

(1919) A I R 1919 Lah 402 (403 404) 48 Ind Cas 916 *Budha v Mul Raj*

(1920) A I R 1920 Lah 504 (508), *Basanta v Indar Singh*

(1894) 1894 Pun Re No 88, *Ghanaya v Chajju Ram*

(1876) 1 All 325 (329) 4 Ind App 15 3 Suther 357 3 Sar 673 (P C) *Narain Singh v Shimbhoo Singh*

(But see (1916) A I R 1916 Oudh 197 (199) 18 Oudh Cas 280 32 Ind Cas 341, *Mt Hussains v. Ramcharan* (Observations leading to the contrary inference cannot be held to be correct law))

7 (1934) A I R 1934 Lah 933 (993) 156 Ind Cas 42, *Jaimal v Ram Rattan* (Deed reciting that if interest is not paid for any year of the mortgage term of six years mortgagee can take possession—Limitation begins from default of first instalment)

(1930) A I R 1930 Lah 327 (329) 121 Ind Cas 190, *Atra Ram v Shadi Khan*

(1921) 27 Ind Cas 500 (500) 11 Ind App 15 3 Suther 357 3 Sar 673 (P C) *Narain Singh v Shimbhoo Singh* (Mortgage money would be payment of any instalment—Limitation—Limitation)

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Notes
7—9

option under the instrument of mortgage to take possession or to take some other remedy, the mortgagee's right to possession cannot be said to be determined so long as the mortgagee has given no intimation of the exercise of his option to take possession of the property.⁸

8. Effect of acknowledgment or part payment. — See Notes under Sections 19 and 20, *ante*

9. Mortgage by conditional sale. — Before the Transfer of Property Act, there was no provision of law under which a suit for foreclosure could be filed. In cases governed by the Bengal Regulation 17 of 1806, the mortgagee by conditional sale who wished to foreclose the mortgage had to get a notice issued to the person entitled to redeem, of his intention to foreclose. The person entitled to redeem had one year of grace allowed to him from the date of such notice to redeem the mortgage. After the expiry of the year of grace the mortgagee became the full owner of the property and the mortgagor's right of redemption was foreclosed and lost.¹

After the Transfer of Property Act, 1882, the said Regulation is not in force in the Provinces in which the Act is in force. In some Provinces, however, to which the Transfer of Property Act does not apply, the said Regulation is still in force and foreclosure must be had only in the method prescribed by the Regulation.

A suit for foreclosure in cases governed by the Transfer of Property Act is governed by Article 147 of this Act.² A proceeding under the Bengal Regulation for foreclosure is not barred as long as the mortgage subsists.³

A mortgage by conditional sale will not, however, subsist where the mortgagee being entitled to possession does not get it and fails to sue for possession within the period of limitation prescribed by this Article. In such a case the mortgagee's right gets extinguished by the operation of Section 29 *ante*, and he can no longer either sue

, Ind Cas 931

(1905) 8 Oudh Cas 256 (237) *Sheo Darshan Singh v Court of Wards Trust Estate*

fact that Intere I was
in subsequent years
v that the d fault was
original position

8 (1919) A I R 1919 Oudh 217 (224) 51 Ind Cas 935, *Basant Singh v Rampal Singh*

Note 9

1 (1889) 16 Cal 693 (701) 16 Ind App 85 13 Ind Jur 132 5 Sar 315 (P C) *Srinath Das v Khetter Mohan Singh*

2 (1895) 8 C P L R 65 (66) *Jaymohan v Chaitu*

3 (1905) 1905 Pan W R No 115 p 370 1903 Pan R No 57, *Nagar v Sanku*
 327

for possession⁴ or for foreclosure⁵ or, as the case may be, take proceedings under the Bengal Regulation, 1806 In the undermentioned cases⁶ where the foreclosure proceedings were taken after the twelve years prescribed by the Article for a suit for possession, it was held that a subsequent suit for possession as owner on the basis of such foreclosure was barred Where, however, the mortgagee takes steps to foreclose within the period prescribed by this Article for a suit for possession and in such proceedings the right to redeem is foreclosed but after the expiry of the period prescribed by this Article, the mortgagee becomes the owner and, as such, is entitled to a period of twelve years under Article 144 from the date of foreclosure to sue for possession⁷

Article 135
Note 9

136.* By a purchaser at a private sale for possession of immovable property sold when the vendor was out of possession at the date of the sale.	Twelve years.	When the vendor is first entitled to possession.
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Article 136

* Acts of 1877 and 1871

Same as above

Act of 1859

No corresponding provision

- 4 (1889) 16 Cal 693 (701) 16 Ind App 85 13 Ind Jur 132 5 Sar 315 (P C), *Srinath Das v Khettar Mohan Singh*
- 5 (1906) 9 Oudh Cas 147 (152), *Janki v Mt Jas Dei*
(1895) 8 C P L R 83 (85) *Muratsingh v Ramlal*
(1912) 15 Ind Cas 240 (243) (All) *Ram Dattar Ray v Birgu Ray* (Suit for possession barred under Section 1, clause 12 of Act of 1859)
- 6 (1917) A 1 R 1917 Lah 441 (442) 39 Ind Cas 242, *Beh Ram v Thakur*
(1912) 15 Ind Cas 275 (276) 1912 Pun Re No 94, *Nand Lal v Goojar*
(1899) 1899 Pun Re No 35 *Moman v Ishri Pershad*
- 7 (1895) 1895 Pun Re No 90 (F B), *Bhandari v Mt Jasodhan*
(1880) 6 Cal 566n (567) 7 Cal L R 580, *Ghnamaram Dobey v Ram Monaruth Dobey*
(1880) 6 Cal 564 (568) 7 Cal L R 583 4 Shome L R 52, *Burmamoye Dassse v Dinobundhoo Ghose*
(1870) 13 Suth W R 364 (365) 5 Beng L R 359, *Sm Sarandala Debi v Nand Lal Sen*
(1911) 9 Ind Cas 1038 (1039) (Oudh), *Tilak Singh v Shih Singh*
(1908) 1908 Pun W R No 115 p 390 1908 Pun Re No 57, *Nagar v Saudagar*
(1908) 1908 Pun W R No 68 p 242, *Mangal Singh v Sher Singh*
(But see (1874) 22 Suth W R 90 (94) 14 Beng L R 87, *Denomath Gangooly v. Nurning Prashad Dass* (Foreclosure does not furnish a foreclosure of action—In this case, however, the foreclosure proceedings were taken after twelve years of the date when the mortgagee became entitled to possession))

Article 136
Notes
1—2

Synopsis

1. Legislative changes.
2. Scope of Article.
3. "When the vendor was out of possession."
4. Suit against vendor who subsequently gets possession.
5. Suit by purchaser from Government.
6. Starting point of limitation.
7. Onus of proof.

Other Topics

Delay in completion of sale cannot postpone starting point	See Note 6, Pt 2
Possession includes actual or constructive possession	See Note 3, Pt 1
Possession of co-owner	See Note 3, Pts 4 & 5
Property in possession of lessee of vendor	See Note 3, Pt 3
Successive vendors	See Note 6

1. **Legislative changes.**—There was no *specific* provision corresponding to this Article in the Act of 1859. The suits contemplated by this Article were held to be governed by the general provisions of clause 12 of Section 1 (corresponding to the present Article 144)¹

The Article was first enacted in the Act of 1871 and it has continued unaltered in the later enactments.

2. **Scope of Article.**—This Article applies to a suit for possession of immovable property by a purchaser of the property at a private sale, where at the date of the purchase the vendor was not in possession.¹ But where possession cannot be sued for without first obtaining some other relief as a condition precedent, the suit, although framed as a suit for possession by the purchaser, must be treated as a suit for the former relief and will be governed by the Article applicable to a suit for such relief. Thus, where possession cannot be sued

Article 136 — Note 1

- 1 (1865) 3 Suth W R 176 (176), *Bhikaree Pandah v Ajoodhya Pershad*
 (1859) 4 Suth W R P C 37 (39) 7 Moo Ind App 323 1 Suther 367 1 Sar
 692 (P C), *Prannath Chowdry v Ram Hutton Roy*
 (1872) 17 Suth W R 377 (377), *Brindabun Chunder Sircar v Diopal*
Chunder Biswas
 [See (1869) 11 Suth W R P C 29 (30) 12 Moo Ind App 366 2 Beng
 L R P C 75 2 Suther 292 2 Sar 455 (P C), *Rajah Fnyet*
Hossein v Girdhars Lal
 (1873) 20 Suth W R 114 (116) 11 Beng L R 237, *Brindabun Chunder*
Roy v Tara Chand Dannerjee]

Note 2

- 1 (1880) 2 All 718 (720), *Sheo Prasad v Uday Singh*
 (1916) A I R 1216 Oudh 123 (123) 32 Ind Cas 353, *Raghunath Prasad v*
Mt Keith
 (1875) 7 N W P H C R 169 (173) *Ganga Baksh v Wali Baksh*

for without first setting aside a certain order of Court, a suit for possession brought after the period of limitation applicable to a suit for setting aside the order will be time-barred²

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A purchases certain property in execution of a decree but does not obtain possession of the property. A then sells the property by a private sale to B. It has been held in decisions³ under the Act of 1877 that to such a suit Article 138 *infra* and not this Article applies. The reason given is that reading Articles 136 and 138 together, Article 138 applies not only to suits by auction-purchasers but also their assigns, and this Article (Article 136) does not apply to suits by persons deriving their title from court auction purchasers.

The question was of practical importance under the Act of 1877, as under Article 138 of that Act limitation ran from the date of the sale, so that if Article 138 was held to apply to the above cases, limitation would have begun to run from the date of the sale, whereas if Article 136 was held to apply, limitation would have begun to run from the date of the confirmation of the sale, that being the date on which the vendor would have been "first entitled to possession" within the meaning of Article 136. But the question is only of academic importance now. The reason is that under Article 138 of the Act of 1908, limitation begins to run from the date when the sale becomes absolute, which will also be the date when the vendor "is first entitled to possession" if Article 136 is held to apply.

3. "When the vendor was out of possession."—The expression "possession" in this Article includes *constructive* possession as well as *actual* possession¹. Hence, where at the date of the sale the vendor is in constructive possession of the property, although not in actual possession, this Article will not apply to a suit for possession by the vendee. Thus, where at the date of the sale a third party is in possession of the property with the *permission* of the owner, the sale cannot be deemed to be by a person who is *out of possession* within the meaning of this Article². Similarly, where the property sold is at the date of the sale in the possession of a *lessee*, the vendor cannot be held to be out of possession at such date, the reason being that the possession of the lessee is in law the possession of the lessor³. So also, possession of one co-owner is deemed to be possession of all the co-owners, unless there is an *ouster* of the latter. Hence, a sale of his share of joint property by a co-owner who is not in actual

2 (1902) 26 Bom 730 (734, 735) 4 Bom L R 513, *Mahadeo v Dabhi*

3 (1902) 26 Bom 730 (734, 735) 4 Bom L R 513, *Mahadeo v Dabhi*

11.

Sen v Jogesh

Notes

1 (1934) A I R 1934 Rang 223 (224) 151 Ind Cas 357, *Saw En Hoke v Ma Po Yin*

2 (1934) A I R 1934 Rang 223 (224) 151 Ind Cas 357, *Saw En Hoke v Ma Po Yin*

3 (1905) 2 Nag L R 32 (33), *Ganpatrao Dhonsle v. Ganpatrao Gopal Ghataley*.

Article 136
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3—5

possession of the property is not a sale by a vendor who is out of possession, where there has been no ouster of such co owner by the other co owners⁴. But, where one co owner has been ousted from the joint property and the other co owners are holding the property adversely to the former, a sale by him to a third party will be one by a person who is out of possession and a suit by the vendee for partition and possession of his share will be governed by this Article⁵.

A purchases certain property in court auction and obtains formal delivery of such property. He then sells the property to B. B sues for possession. It has been held that this Article does not apply to such cases. The reason seems to be that A having obtained formal delivery of possession through Court, he cannot be said to be out of possession within the meaning of this Article⁶.

4. Suit against vendor who subsequently gets possession. — This Article only applies to a suit against a third party who is in possession. Hence, where, after the sale, the vendor gets possession of the property, a suit by the purchaser against the vendor for possession of the property is not within this Article¹.

5. Suit by purchaser from Government. — A suit by a purchaser from the Government also will be governed by this Article, although to a suit by the Government itself, Article 149 will apply¹.

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- 4 (1911) 9 Ind Cas 495 (495) (Mad) *Bhogavalli Venkayya v Bhogavalli Rama krishnamma*
 (1897) 7 Mad L Jour 186 (188), *Krishnammal v Pichannavayyan*
 (1918) A I R 1918 Cal 68 (69) 51 Ind Cas 123 *Chintamani Paramanik v Hriday Nath Kamla*
 (1934) A I R 1934 Bom 273 (275) 58 Bom 410 154 Ind Cas 621 *Anant Ganpati v Vishnu Rambhau*
 (1921) A I R 1921 Bom 77 (78) 64 Ind Cas 552, *Shitalingappa v Saljara Lazman*
 (1916) A I R 1916 All 19 (21) 36 Ind Cas 100 *Ram Parson v Kalab Hussain* (1912 A C 230, *Corea v Appuhamy* Followed)
 5 (1911) 9 Ind Cas 495 (495) (Mad) *Bhogavalli Venkayya v Bhogavalli Rama krishnamma*
 (1885) 11 Cal 680 (683) *Ram Lakhi v Durga Gharan*
 (1906) 28 All 479 (480) 1906 All W N 95 3 All L Jour 334 *Deba v Bhojya Mal*
 (1915) A I R 1915 Mad 1146 (1147) 26 Ind Cas 904 *Sinnasami Gounden v Subbanna Gounden*
 6 (1901) 25 Bom 275 (279 280) 2 Bom L R 1021, *Gopal Rao v Krishna Rao*

Note 4

- 1 (1910) 5 Ind Cas 273 (275) (All) *Gajadhar Das v Ramlakhan Das*
 (1891) 15 Bom 261 (264) *Lakshman Vinayak v. Bishannangh*
 (1896) 12 Cal 197 (199), *Ram Prasad v Lakhi Narain*
 (1899) 13 Bom 424 (423) *Syed Nyamtula v Nana*

Note 6

- 1 See (1975) 21 Suth W R 61 (65), *Doondi Roy v Funli Dunse Thakoor*

6. Starting point of limitation. — Limitation begins to run under this Article from the date when the vendor is first entitled to possession¹

A contracts with B for the purchase of certain property belonging to B but of which B is not in possession. B refuses to complete the sale and it takes five years for A to have the sale completed. Limitation for a suit for possession by A begins to run from the date when B was first entitled to possession. The delay in the completion of the sale cannot postpone the starting point of limitation²

The expression "when the vendor is first entitled to possession" relates to the circumstances under which the vendor came to be out of possession at the date of the sale and therefore the starting point of limitation under the Article is the date when the vendor is first entitled to possession *with reference to such circumstances*. Thus, A succeeded to certain property by inheritance in 1881 and continued in possession of the property till 1885 when he was dispossessed. He thereafter sold the property to B. Limitation for B's suit for possession runs from 1885 and not from 1881³. Similarly, where the sale is of a share of joint property by a co-owner, who has been excluded from the property by the other co-owners, limitation for a suit for possession by the vendee will run from the date on which the vendor is excluded and not from the date when, as a co-owner, he first became entitled to joint possession of the property⁴.

In the case of a sale of the equity of redemption in property which has been mortgaged with possession to a third party, limitation for a suit for possession by the vendee will begin to run under this Article from the date of redemption⁵.

A, a Hindu reversioner, becomes entitled to a certain property on the death of a widow. The property is at that time in the possession of a third party. A sells the property to B. Limitation for a suit for possession by B begins to run from the date of the death of the

Note 6

1 But see (1916) A I R 1916 Oudh 128 (126) 32 Ind Cas 353, *Raghunath Prasad v Mt Ketki* (The observation in this decision that limitation runs from the date of sale is not correct)

2 (1929) A I R 1929 Nag 238 (304) 116 Ind Cas 70, *Gaurishankar v Ibrahim Ali*

3 (1901) 23 All 442 (445) 1901 All W N 137 *Partapchand v Saiyada*

4 See (1903) 1903 Pun W R No 69 (p 244) *Lalshimchand v Ram Chand*

5 (1906) 1906 Pun Re No 130 p 490 1906 Pun L R No 100 1906 Pun W R No 155, *Badri Mal v Copal* (Even where mortgage is redeemable at will)

(1893) 1893 All W N 67 (67), *Mahabir Pande v Nazir Ullah* (Where in a suit for redemption a compromise was entered into between the mortgagor and his mortgagees to the effect that the former should be entitled to redeem the mortgaged property on payment of a certain

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widow, that being the date on which the vendor first becomes entitled to possession⁶

Where there have been successive vendors who have all been out of possession, the term "vendor" in the third column of the Article refers to the first in the series of vendors who have been out of possession

Illustration

In 1893, *A* sold his property to *B* but remained in possession. In 1900, *B* sold the property to *C* who also did not obtain possession. In 1909, the property was sold by *C* to *D*. Limitation for a suit for possession by *D* ran under this Article from 1893 and not 1900⁷

7. Onus of proof. — See Notes under Articles 142 and 144, *infra*

Article 137

137.* Like suit by a purchaser, at a sale in execution of a decree, when the judgment-debtor was out of possession at the date of the sale.	Twelve years.	When the judgment-debtor is first entitled to possession.
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Synopsis

1. Legislative changes.
2. Scope of the Article.
3. Suit must be for possession of immovable property.
4. "Purchaser at a sale in execution of a decree."
5. Judgment-debtor must be out of possession at date of sale.
6. Starting point of limitation.
7. Effect of symbolic delivery of possession.
8. Burden of proof.

* Act of 1877, Article 137

Same as above

Act of 1871, Article 137

Same as above, except that instead of the word "judgment debtor" in the present Article, there was the word "execution debtor"

Act of 1859

No corresponding provision

- 7 (1914) A I R 1914 Cal 733 (731) 21 Ind Cas 216, *Abbas Dhal v Man'da Karikar*
 [See also (1894) 19 Bom 620 (624-625) *Harjutan v Shyamram* (Symbolic delivery obtained by plaintiff does not interrupt running of time)]
- *Peram v Sheikh Ahmad*
 on termination of
 — Suit for possession
 of life estate)
 .. Krishna Sarkar

*Other Topics*Article 137
Notes
1—2

Suit against judgment debtor

See Note 2 Pt 2

Suit for redemption of property—Article not applicable

See Note 3 Pt 1

Sale in execution of mortgage decree—Article not applicable

See Note 2,
Pts 2a 3

1. **Legislative changes.** — This Article was first enacted in Act 9 of 1871, and has been reproduced in the succeeding Acts. The word 'execution debtor,' which occurred in the Act of 1871, was changed into 'judgment debtor' in the later enactments.

2. **Scope of the Article.** — The Article contemplates cases where the auction purchaser has never obtained possession of the property purchased by him. Where the auction purchaser has once obtained possession, this Article will cease to apply and a suit for possession by him based on a subsequent cause of action will not be governed by this Article¹.

The Article applies to suits against *third* parties who are in possession of the property at the date of the execution sale and those claiming under them. A suit against the *judgment debtor* will not come within this Article. Thus where at the date of an execution sale a trespasser is in possession of the property, but subsequently the judgment debtor ejects him and gets possession of the property, a suit by the auction purchaser for possession against the *judgment debtor* will not be governed by this Article².

The Article only applies to cases where the auction purchaser sues as representing the interest of the *judgment debtor*^{2a}. Hence, the Article does not apply to sales in execution of mortgage decrees. The reason is that the auction purchaser at such sales acquires not only the interest of the judgment debtor but also that of the decree holder³. As to the period of limitation applicable to a suit for possession by the auction purchaser in such cases, see Notes under Article 144 and the undermentioned decisions⁴.

Article 137 — Note 2

1 (1918) A I R 1918 Lah 62 (62) 1918 Pun Re No 76 47 Ind Cas 411
Kaman v Umar

(1916) A I R 1916 Pat 324 (324) 35 Ind Cas 67 *Biswambhar Lal v Jhulan Ram Tewari*

2 (1910) 8 Ind Cas 1035 (1035) 33 All 224 *Ram Lakhan Rai v Gayadhar Rai*
(Confirming 5 Ind Cas 273)

(1890) 15 Bom 261 (264) *Lakshman Vinayak v Bisanang*

2a (1922) A I R 1922 Cal 544 (547) *Jnanendra v Umesh Chandra*

2 (1922) A I R 1922 Pat 324 (324) 35 Ind Cas 67
Palace Estate v B)
and Din v Mt

[See (1921) A I R 1921 Pat 150 (150) 59 Ind Cas 290 *Talakdhars Singh v Gour Narain*

(1917) A I R 1917 Oudh 185 (185) 42 Ind Cas 192 *Chunni v Mt Ashrafan*]

4 (1916) A I R 1916 Mad 990 (995 996) 39 Mad 811 31 Ind Cas 412 (F B),
Tyapuri v Sonamma Bos Ammans (Purchaser in execution of decree on simple mortgage not affected by adverse possession against mortgagor before purchase)

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Where there is an order in favour of the defendant under Order 21 Rule 99, Civil Procedure Code, the auction purchaser cannot sue for possession without getting such order set aside. Hence, where the period of limitation for a suit to set aside such order has expired, the suit for possession also will be barred because such a suit virtually will be one for setting aside the order.⁵

This Article is subject to the provisions of Section 16 *supra* under which, in computing the period of limitation under this Article, the time during which proceedings for setting aside the sale have been pending must be excluded.⁶

3. Suit must be for possession of immovable property.—This Article only applies to a suit for possession of immovable property. Thus, the Article is not applicable to a suit for redemption of the property.¹ So also, where the suit is for payment of a certain sum of money, and in default of payment, for possession this Article does not apply.²

4. "Purchaser at a sale in execution of a decree."—The expression "purchaser at a sale in execution of a decree" will include a decree holder purchaser and this Article will apply to a suit for possession by such purchaser also.¹ The Article applies to a suit by a person claiming through an execution purchaser as well as to a suit by an execution purchaser himself.²

5. Judgment-debtor must be out of possession at date of sale.—This Article only applies where the judgment debtor was out of possession at the date of the execution sale.¹

(1930) A I R 1930 Cal 318 (315) 126 Ind Cas 257, *Surendra Nath v Barisal Loan Co Ltd* (Adverse possession against the mortgagor does not affect the right of the mortgagee when it commences after the mortgage but this rule does not apply if it had begun before the mortgage which was effected when the mortgagor was not in possession.)

(1917) A I R 1917 Oudh 135 (135) 42 Ind Cas 192, *Chunni v Mt Ashrafan*

(1936) A I R 1936 Mad 593 (600) 167 Ind Cas 591, *Krishna Kurup v Raghukath Pokkai*

(1906) 33 Cal 1015 (1019) 10 Cal W N 904, *Amadar Mondul v Mahan Lal Dey*

(1908) 7 Cal L Jour 640 (643), *Ramjan Mahomed v Chunder Mohan Aji*

5 (1914) A I R 1914 All 495 (497) 46 All 693 63 Ind Cas 923 (F D) *Sobharam v Turnam*

6 (1917) A I R 1917 Cal 802 (803) 38 Ind Cas 517, *Promatha Nath v Kuthra Lal Saha*

Note 3

1 (1889) 1889 All W N 135 (135, 136) *Maharaja of Benares v Sita Ram Nath*

2 See (1921) A I R 1921 All 301 (303 304) 43 All 539 63 Ind Cas 301 *Mahadeo Rai v Baldeo Rai*

Note 4

1 (1922) A I R 1922 Cal 544 (545), *Jnandira Mohan Dutt v Urmesh Chandra Guha*

2 (1914) A I R 1914 Cal 527 (529 530) 23 Ind Cas 811, *Anuradha v Sayadur Lakhan*

Note 5

1 (1926) A I R 1926 Mad 966 (967) 57 Ind Cas 719 *Srinivasa Syyangar v Vellayan Ambalam* (On appeal from A I R 1925 Mad 338)

A, B and C are co mortgagers of a certain property B and C redeem the property and are in possession of the property, ready, however, to hand over to A his share on receipt of his proportionate portion of the mortgage money A's share in the property is sold in execution of a decree against him and is purchased by the plaintiff Held that this Article does not apply to a suit for possession by the plaintiff The reason given is that in such a case the judgment debtor cannot be said to be out of possession within the meaning of this Article²

In the undermentioned case³ it was held that where the property is in the possession of a mortgagee of the judgment debtor, the latter cannot be said to be out of possession The reason given is that the possession of the mortgagee is not adverse to the mortgager But, in some decisions it is assumed that the Article will apply to such cases and it is held that limitation will begin to run from the date of the redemption of the mortgage (See Note 6)

6. Starting point of limitation—Limitation under this Article begins to run from the time when the judgment debtor is first entitled to possession¹

Illustrations

- 1 Where at the date of the auction sale the property is in the possession of a mortgagee limitation for a suit for possession by

(1919) A I R 1919 Pat 207 (210) 51 Ind Cas 801 4 Pat L Jour 463
Bhikhad Bhunyan Narain Tewari v Upendranath Roy

(1881) 8 Cal 79 (84) 10 Cal L R 113 9 Cal L R 173 *Kasumunnissa Bibee v Nilratna Bose* (Defendant in possession as patnidar—Purchase of superior interest by plaintiff—Defendant's possession not adverse to plaintiff till defendant purchases also the superior interest)

2 (1938) A I R 1938 Rang 65 (66) *Ma E Khan v P S Mohamed Ali* (Disturbing 20 Bom 557)

3 (1930) A I R 1930 Cal 15 (16) 56 Cal 1130 121 Ind Cas 407 *Harant Golder v Jaladhar Biswas* (The fact that the mortgage has been paid off does not make the mortgagee's possession adverse to the mortgagor)

Note 6

1 (1918) A I R 1918 Cal 659 (659) 40 Ind Cas 662 *Abdul Majid Khan v Baksha Ali*

(1888) 1888 All W N 156 (156) *Abid Hussain v Ballu Ram* (First auction sale and actual delivery in favour of A—Same property sold again in execution of another decree against same judgment debtor and purchased by B—Suit for possession by B against A—Time runs from date of delivery of possession to A)

(1922) A I R 1922 Cal 544 (545) *Jnanendra Mohan v Umesh Chandra*

(1925) A I R 1925 Mad 1140 (1141) 86 Ind Cas 439 *Dharmala Kamayya v Bhimarasetti Pariden*

(1897) 1897 Bom P J 25 *Alisahab v Mahomed Khan*

(1874) 21 Sutb W R 282 (282) *Ahmed Ali v Haree Chand*

[But see (1925) A I R 1925 Mad 338 (340) 65 Ind Cas 349, *Srinivas Aiyangar v Vellayan Ambalam* (Observation that time runs from date of sale is not correct)]

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Where there is an order in favour of the defendant under Order 21 Rule 99, Civil Procedure Code, the auction-purchaser cannot sue for possession without getting such order set aside. Hence, where the period of limitation for a suit to set aside such order has expired, the suit for possession also will be barred because such a suit virtually will be one for setting aside the order.⁵

This Article is subject to the provisions of Section 16 *supra* under which, in computing the period of limitation under this Article, the time during which proceedings for setting aside the sale have been pending must be excluded.⁶

3. Suit must be for possession of immovable property. — This Article only applies to a suit for possession of immovable property. Thus, the Article is not applicable to a suit for redemption of the property.¹ So also, where the suit is for payment of a certain sum of money, and in default of payment, for possession, this Article does not apply.²

4. "Purchaser at a sale in execution of a decree." — The expression "purchaser at a sale in execution of a decree" will include a decree-holder purchaser and this Article will apply to a suit for possession by such purchaser also.³ The Article applies to a suit by a person claiming through an execution-purchaser as well as to a suit by an execution-purchaser himself.⁴

5. Judgment-debtor must be out of possession at date of sale. — This Article only applies where the judgment-debtor was out of possession at the date of the execution sale.⁵

-
- Nath v. Barisal
does not
the mort-
mortgage
(in)
- (1917) A I R 1917 Oudh 135 (135) : 42 Ind Cas 192, Chunn v. Ali Ashrafan
(1936) A I R 1936 Mad 593 (600) : 167 Ind Cas 594, Krishna Kurup v. Razhukkath Pokki.
(1906) 83 Cal 1015 (1019) : 10 Cal W N 904, Aimadar Mondul v. Mahan Lal Dey.
(1908) 7 Cal L Jour 640 (643), Ramjan Mahomed v. Chunder Mohan Aditya
5 (1924) A I R 1924 All 495 (497) : 46 All 693 : 83 Ind Cas 923 (F B), Sobharam v. Turram.
6 (1917) A I R 1917 Cal 602 (603) : 36 Ind Cas 547, Promotha Nath v. Kishore Lal Saha.

Note 3

1. (1889) 1889 All W N 135 (135, 136), Maharaja of Benares v. Sita Ram Nait.
2. See (1921) A I R 1921 All 301 (303, 304) : 43 All 539 : 63 Ind Cas 504, Mahadeo Rai v. Baldeo Rai.

Note 4

1. (1922) A I R 1922 Cal 544 (545), Jnanendra Mohan Dutt v. Umesh Chandra Guha.
2. (1914) A I R 1914 Cal 527 (529, 529) : 23 Ind Cas 811, Nanruddia v. Sayadur Rahman.

Note 5

1. (1926) A I R 1926 Mad 966 (967) : 97 Ind Cas 718, Srinivasa Ayyangar v. Veilayan Ambalam. (On appeal from A I R 1925 Mad 839)

A, B and C are co mortgagors of a certain property. *B* and *C* redeem the property and are in possession of the property, ready, however, to hand over to *A* his share on receipt of his proportionate portion of the mortgage money. *A*'s share in the property is sold in execution of a decree against him and is purchased by the plaintiff. Held that this Article does not apply to a suit for possession by the plaintiff. The reason given is that in such a case the judgment-debtor cannot be said to be out of possession within the meaning of this Article.²

In the undermentioned case³ it was held that where the property is in the possession of a mortgagee of the judgment-debtor, the latter cannot be said to be out of possession. The reason given is that the possession of the mortgagee is not adverse to the mortgagor. But, in some decisions, it is assumed that the Article will apply to such cases and it is held that limitation will begin to run from the date of the redemption of the mortgage (See Note 6)

6. Starting point of limitation.—Limitation under this Article begins to run from the time when the judgment debtor is first entitled to possession.¹

Illustrations

- 1 Where at the date of the auction sale the property is in the possession of a mortgagee, limitation for a suit for possession by

(1919) A I R 1919 Pat 207 (210) 51 Ind Cas 801 & Pat L Jour 463, *Bhikhad Bhunjan Narain Tewari v Upendranath Roy*

(1881) 8 Cal 79 (84) 10 Cal L R 113 9 Cal L R 173, *Kasumunnissa Biba v Nairaina Bose* (Defendant in possession as patnidar—Purchase of superior interest by plaintiff—Defendant's possession not adverse to plaintiff till defendant purchases also the superior interest)

- 2 (1938) A I R 1938 Rang 65 (66), *Ma E Khin v P S Mohamed Ali* (Distinguishing 20 Bom 557)

- 3 (1930) A I R 1930 Cal 15 (16) 56 Cal 1130 121 Ind Cas 407 *Harant Golder v Jaladhar Biswas* (The fact that the mortgage has been paid off does not make the mortgagee's possession adverse to the mortgagor)

Note 6

- 1 (1918) A I R 1918 Cal 659 (659) 40 Ind Cas 662, *Abdul Majid Mian v Baksha Ali*

(1888) 1888 All W N 156 (156), *Abid Hussain v Ballu Ram* (First auction sale and actual delivery in favour of *A*—Same property sold again in execution of another decree against same judgment debtor and purchased by *B*—Suit for possession by *B* against *A*—Time runs from date of delivery of possession to *A*)

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the auction purchaser will run from the date of the redemption of the mortgage²

- 2 *A* has a life interest in certain property and *B* is entitled to the remainder *B*'s interest in the property is sold in execution of a decree against him and is purchased by *C*. Limitation for a suit for possession of the property by *C* runs from the date of the death of *A*, that being the date when *B* is first entitled to possession of the property.³
- 3 *A* sells to *B* a certain property but remains in possession after the sale. The property is sold in execution of a decree against *B* and is purchased by *C*. Limitation for a suit for possession by *C* runs from the date of the sale by *A*.⁴

7. Effect of symbolic delivery of possession. — As seen in Note 2, this Article applies only to cases where the auction purchaser has not obtained delivery of possession under his purchase. Hence, where symbolic delivery of possession has been made to the auction purchaser under circumstances which render such symbolic delivery effective as against the third party in possession of the property this Article will not apply to a suit for actual possession brought by the auction purchaser.¹ Thus, pending a suit for sale on a mortgage, the mortgagor transfers the property to *X*, a third party. *X* enters into possession of the property under colour of such transfer. The property is subsequently sold in execution of the decree which is passed in the mortgage suit and the auction purchaser obtains symbolic possession of the property. Such symbolic possession is effective against *X*, the third party in possession. The reason is that the transfer to *X* being affected by the doctrine of lis pendens, he is bound by the decree passed against his transferor. Hence, this Article (assuming that it will otherwise apply) will not apply to a suit for possession by the auction purchaser against *X*.² In such cases there will be a fresh start of limitation from the date of the symbolic delivery.

2 (1896) 20 Bom 557 (561) *Ganesh v Ramchandra*

(1888) 1888 Bom P J 157, *Vajeram v Dhanshankar*

3 (1923) A I R 1923 Bom 415 (415) 76 Ind Cas 217, *Paghu Nath Ishai v Madhav Raval Karnat*

4 (1885) 11 Cal 229 (231), *Anand Coomari v Ali Jamun*

Note 7

1 (1918) A I R 1918 Lah 62 (63) 1918 Pun Re No 76 47 Ind Cas 411
Kaman v Umar

(1916) A I R 1916 Pat 324 (324) 35 Ind Cas 87, *Diswambhar Lal v Jhulal Ram Tewari*

[See (1900) 25 Bom 275 (280) 2 Bom L R 1021, *Gopal v Arushan Rao* (Articles 136 to 138 obviously refer to cases where no possession, formal or actual, had been obtained through Court)]

2 (1930) A I R 1930 Cal 15 (16) 56 Cal 1130 121 Ind Cas 407, *Harant Chatter v Jafadhar Biswas*

(1937) A I R 1937 Pat 13 (14) 15 Pat 372 166 Ind Cas 512, *Narayan Prasad v Adharmanidas*

[But see (1899) 21 All 269 (271) 1899 All W N 56, *Narain Das v. Lalita Prasad*]

But, where the third party in possession is in no way bound by the decree or the proceedings in which symbolic possession is delivered, the symbolic possession will be ineffective against him and will not furnish a fresh starting point of limitation for a suit for possession against him³

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8. Burden of proof.—This Article applies where the judgment debtor is out of possession at the date of the execution sale. Article 138 applies where the judgment debtor is in possession at the date of the sale. Under the former Article, limitation begins to run from the time when the judgment debtor is first entitled to possession. This may, in many cases be *before* the date of the sale. But under Article 138, limitation begins to run only from the date when the sale becomes absolute. The burden of proving that at the date of the execution sale the judgment debtor was in possession so as to make Article 138 applicable to the case, is on the auction purchaser suing for possession¹

Where in a suit for possession by the purchaser in execution of a decree the defendant pleads the bar of limitation and claims to have been in adverse possession against the judgment debtor at the date of the sale, the burden of proof is on the defendant to prove actual possession on his part for twelve years. If he proves this the burden is shifted to the plaintiff to prove that the possession was not adverse. But where the plaintiff shows that the judgment debtor was in possession within twelve years of the suit, the burden is on the defendant to show that such possession was really on his own behalf²

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- 3 (1916) A I R 1916 Cal 745 (746) 29 Ind Cas 841 *Ram Sumnun Prasad v Genda Lal Rai*
 (1916) A I R 1916 Cal 406 (409) 32 Ind Cas 703 *Sadulla Miridha v Joynab unnessa Bibi*
 (1904) 27 Mad 262 (270) *Venkatakrishna Rao v Venkappa*
 (1913) 21 Ind Cas 765 (767) (Mad) *Romp Cherla v Shank Ismail Sahab*
 (1911) 9 Ind Cas 271 (272) (Mad) *In re Rama Moothan*
 (1899) 21 All 269 (271) 1899 All W N 56 *Narain Das v Lalla Prasad*
 (1899) 16 Cal 530 (533) (F B) *Jogobundhu Mitter v Purnanund Gossami*
 (1884) 10 Cal 993 (995) *Runjit Singh v Dunwars Lal Sahu*
 (1930) A I R 1930 Cal 15 (16) 56 Cal 1130 121 Ind Cas 407, *Harant Golder v Jaladhar Biswas*
 (1922) A I R 1922 Bom 2 (3) 46 Bom 932 63 Ind Cas 91 *Ragunath Vaman v Kondiba Dabaji*
 (1883) 1883 All W N 122 (192) *Uttam Chand v Shank Ghasiuddin*
 (1914) A I R 1914 Cal 527 (529) 23 Ind Cas 811 *Nanruddin v Sayadur Rahman*

Note 8

- 1 (1914) A I R 1914 Cal 527 (529) 23 Ind Cas 811, *Nanruddin v Sayadur Rahman*
 (1918) A I R 1918 Cal 983 (984) 42 Ind Cas 709, *Dokari Joddar v Numanji Kundu*
 2 (1879) 4 Bom 89 (94) *Sambhubhai Karsandas v Shivlaladas Sadashivadas Desai*

Article 138

138. Like suit by a purchaser at a sale in execution of a decree, when the judgment-debtor was in possession at the date of the sale.	Twelve years.	The date when the sale becomes absolute
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Synopsis

1. Legislative changes.
2. Scope of the Article.
3. "Like suit."
4. Suit must be for possession.
5. "Purchaser."
6. Judgment-debtor must be in possession at date of sale.
7. Article only applies where the auction-purchaser has never obtained possession under the sale.
8. Effect of symbolic delivery of possession.
9. Article only applies to suits against judgment-debtor and persons deriving title from him.
10. Starting point of limitation.
11. Burden of proof.

Other Topics

Actual possession with judgment debtor —	Symbolical possession delivered —
Starting point	See Note 6 Pts 2 to 4
Article 137 and this Article — Difference	See Notes 2, 11
Purchaser includes assignee of purchaser	See Note 5 Pt 1
Share in joint property sold — Auction purchaser's suit against judgment-debtor & co sharers	See Note 9 Pt 3

1. Legislative changes.

- 1 The corresponding Articles in the Acts of 1871 and 1877 applied only to suits by purchasers of land. The present Article is not restricted to suits for land only.

* Act of 1877, Article 138

138 — By a purchaser of land at a sale in execution of a decree, for possession of the purchased land when the judgment debtor was in possession at the date of the sale	Twelve years
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The date of the sale

Act of 1871, Article 138

Twelve years

The date of the sale

Act of 1859

No corresponding provision

- 2 The words "when the judgment debtor was in possession at the date of sale" were substituted in 1877 for the words "when he never has had possession" which occurred in Article 138 of the Act of 1871
- 3 The starting point under the corresponding Articles of the Acts of 1871 and 1877 was the *date of the sale*. The words "when the sale becomes absolute" were substituted in the third column in the Act of 1908

2. **Scope of the Article.** — This Article also, like the previous Article, applies to a suit by the purchaser at a sale in execution of a decree for possession of the immovable property purchased, but with this difference, namely, that this Article applies to cases where the *judgment debtor was in possession* at the date of the sale, while Article 137 applies to cases where the *judgment debtor was out of possession* at the date of the sale

The question as to *under what circumstances* a suit for possession of the property sold in execution can be brought by the purchaser depends on the provisions of the Civil Procedure Code¹ This Article and Article 137 only prescribe the *period of limitation* for such suits

Article 180 *infra* prescribes the period of limitation for *applications* for delivery of possession. The fact that an *application* for delivery of possession would have been time barred is no bar to a *suit* for possession²

Under Section 16 *ante*, in computing the period of limitation under this Article, the time during which a proceeding for setting aside the sale has been prosecuted must be excluded³

3 "Like suit." — The corresponding Articles of the Acts of 1871 and 1877 applied only to suits for the *land* purchased in execution of a decree. The word "land" has been omitted in the present Article and the words "like suit" which have reference to Article 136 have been introduced, thereby making it clear that the suit contemplated is one for the possession of *immovable property*, which would include not only *land* but also other immovable property

Article 138 — Note 2

1 See Authors Civil Procedure Code 2nd Edition, Section 47 Note 19, Order 21 Rule 95 Notes 5 and 8 and Rule 97 Note 5

2 (1907) 29 All 463 (466) 4 All L Jour 434 1907 All W N 131, *Sheo Narain v Nur Muhammad* (9 Cal 602 and 14 Cal 644 Foll)
(1926) A I R 1926 All 120 (121) 89 Ind Cas 134 *Harakh Sonar v Gopi Kishun*

recovery of possession of the properties after confirmation of the sale is governed by Article 133 and not by Article 150)]

3 (1917) A I R 1917 Cal 602 (603) 83 Ind C
Lal Nath v Eshwara

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3—5

In the undermentioned case¹ the equity of redemption under a mortgage was sold in execution of a decree. It was contended that as the auction purchaser did not obtain symbolic possession of the property within twelve years of the confirmation of the sale his right to the equity became extinguished by virtue of Section 28. The contention was overruled.

4. Suit must be for possession — This Article only applies where the suit is for possession of the property sold. A suit for possession alleging that the transfer from the judgment debtor under which the defendant claims to be in possession is fraudulent and collusive is not a suit for setting aside the transfer but is one for possession for the purposes of this Article.¹

In the undermentioned case² it was held that this Article does not apply unless the person in possession resisted the attempt of the auction purchaser to take possession. In other words the mere fact that the auction purchaser did not take possession will not bar his right after the period mentioned in this Article where there has been no resistance to his taking possession. It is submitted that this view is not correct.³

5 "Purchaser" — An assignee of the auction purchaser will be included in the term purchaser in this Article and a suit by such assignee will be governed by this Article.¹

This Article applies to a suit by a decree holder purchaser (where such suit is maintainable) as well as one by a stranger purchaser.²

Note 3

- 1 (1915) A I R 1915 Mad 1150 (1151) 26 Ind Cas 528 *Lakshminarayana Aiyer v Ulagammal*

Note 4

- 1 (1883) 6 All 75 (77) 1883 All W N 212 *Uma Shankar v Kalla Prasad*
(1884) 1884 A

[See a

for
the
entire
note
text

- 2 (1887) 1887 All W N 92 (92) *Pir Bakhsh v Makhan Lal*

- 3 See (1926) 96 Ind Cas 178 (174) (All) *Bhagwat v Sita Ram* (No question of the possession of the defendant being adverse to the plaintiff would arise)

Note 5

- 1 (1899) 23 Bom 246 (247) *Govind v Garaga*
(1904) 31 Cal 681 (684) 8 Cal W N 476 (F B) *Sati Prasad Sen v Jogesh Chandra Sen* (Overruling 23 Cal 49)

(1895) 18 Mad 144 (144) *Pullayya v Ramayya*

(1892) 15 Mad 331 (339) *Aramuga v Chockalingam*

[See (1930) A I R 1930 Cal 586 (587) 128 Ind Cas 244 *Jadav Chandra v Akkur Chandra*

- 2 (1924) A I R 1924 Bom 429 (431) 48 Bom 550 83 Ind Cas 932 (F B) *Hargovind v Bhudar Rao*

8. Judgment-debtor must be in possession at date of sale.— The Article only applies where the judgment debtor was in possession at the date of execution sale¹ Where the property is in the possession of a third party under a fraudulent and collusive transfer by the judgment debtor, the property must be deemed to be in the possession of the judgment debtor himself and a suit for possession of the property will be governed by this Article²

7. Article only applies where the auction-purchaser has never obtained possession under the sale.— The Article only applies to cases where the auction purchaser has never obtained possession of the property under sale Where he has once obtained such possession but subsequently loses it and sues for recovery of possession again this Article does not apply to such suit¹

Where, after the sale in execution the parties enter into an amicable settlement under which the judgment debtor continues in possession of the property as the auction purchaser's licensee, the auction purchaser must be deemed to have entered into possession of the property and this Article will not apply to a suit for possession which the auction purchaser may subsequently bring²

Where, after the execution sale, the judgment debtor vacates the land and re enters on it after some time the possession of the vacant land must be deemed to have vested in the rightful owner, viz the auction purchaser during the interval and hence, a suit for possession by the auction purchaser will not be within this Article³

8. Effect of symbolic delivery of possession.— As seen in Note 3 *ante*, this Article only applies where the auction purchaser has not obtained possession under the sale Hence, where at the time of the execution sale the property is not capable of actual delivery to the auction purchaser and symbolic possession is delivered to him, a suit for actual possession by the auction purchaser will not be within this Article Thus, where the property is in the occupation of tenants or the property sold is a share in joint property, the Civil Procedure Code only contemplates symbolic possession being given to

Note 6

- 1 (1915) A I R 1915 Cal 659 (659) 40 I C 662, *Abdul Majid v Baksha Ali*
- 2 (1883) 6 All 75 (77) 1883 All W N 212 *Uma Shankar v Kalka Prasad*
(1894) 1894 All W N 83 (89) *Banwari Lal v Bhagwan Din*

Note 7

- 1 (1924) A I R 1924 All 844 (845) 79 Ind Cas 1047 *Harpal Kurni v Mohan*,
(1900) 25 Bom 275 (280) 2 Bom L R 1021 *Gopal v Krishna Rao*
(1888) 12 Bom 678 (683) *Agarchand Gumanchand v Rakhma Hanmant*
(1918) A I R 1918 Lah 62 (63) 1918 Pun Re No 76 47 Ind Cas 411,
Kaman v Umra
(1932) A I R 1932 Pat 145 (147) 11 Pat 163 142 Ind Cas 246, *Ram Prasad*
Ojha v Bindeshwari Prasad
(1916) A I R 1916 Pat 824 (324) 85 Ind Cas 87, *Dasrambhar Lal v Jhulan*
- 2 (1930) A I R 1930 Cal 586 (587) 123 Ind Cas 244, *Jadav Chandra v Akhrur*
- 3 (1917) A I R 1917 Cal 802 (804) 38 Ind Cas 547, *Premtha Nath Roy v*
Kishore Lal Saha (Per Mookerjee, J)

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Note 8

the auction purchaser. Hence, where such possession is given to the auction purchaser, this Article will cease to apply to the case. In such cases, the delivery of symbolic possession will give a fresh starting point of limitation to the auction purchaser to sue for possession.¹

Where, at the time of the sale, the property is in the actual possession of the judgment debtor, the Code requires that delivery of possession must be made by actual delivery and not by symbolic delivery. But suppose, in such a case, symbolic possession and not actual possession is delivered to the auction purchaser will such symbolic possession give a fresh starting point of limitation for the auction purchaser a suit for possession against the judgment debtor? There is a conflict of decisions on this question. The generally adopted view is that symbolic possession will interrupt the running of time and give a fresh start of limitation even in such cases.² This view proceeds on the ground that delivery of possession obtained through Court will give a fresh starting point of limitation as against the judgment debtor and his representatives, although the delivery obtained is only symbolic and the circumstances are such that actual

Note 8

- 1 (1917) A I R 1917 P O 197 (201) 43 Ind Cas 265 (P C) *Sri Radha Krishna v Ram Bahadur* (Property in occupation of tenants)
- (1922) A I R 1922 All 463 (465) 73 Ind Cas 920 *Ram Lal Singh v Harakh Narain Rai* (Do)
- (1889) 16 Cal 530 (534) (F B) *Juggobundhu Miller v Purnanund Gossani* (Do—Overruling 10 Cal 402)
- (1924) A I R 1924 P O 144 (147) 51 Cal 631 51 Ind App 293 80 Ind Cas 827 (P C) *Midnapore Zamindari Co Ltd v Kumar Naresh Narayan Roy* (Decree for joint possession—Decree holder getting symbolic possession—Fresh starting point of limitation is given)
- (1931) A I R 1931 All 234 (234) 124 Ind Cas 767, *Nirvanjan Lal v Jhamman Lal* (Do)
- (1906) 8 All L Jour 659 (660) 1906 All W N 278 *Hanuman Das v Ambika Parshad* (Sale of share of property—Formal possession obtained—Fresh start of limitation is given)
- (1917) A I R 1917 All 312 (312) 39 All 460 39 Ind Cas 745 *Rajendra Kashore v Bhagwan Singh* (Do)
- (1897) 19 All 499 (502) 1897 All W N 127, *Mangli Prasad v Debi Das* (Do)
- (1926) A I R 1926 All 691 (692) 96 Ind Cas 591, *Bairnath v Sri Bhagwan* (Do)

- (1918) A I R 1918 Lah 62 (63) 1918 Pun Re No 76 47 I O 214 (Do) *an v Umra* (Bare site—Symbolic possession is actual possession)
- 2 (1923) A I R 1923 Cal Cal 138 (140) 77 I O 1035 *Bhulu Beg v Jatindra*
- (1922) A I R 1922 Cal 176 (178) 70 I O 602 *Janaki Nath v Baskunthi*
- (1921) A I R 1921 Cal 385 (387) 70 Ind Cas 420 *Brojendra v Ashutosh*

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possession must be given But the High Courts of Allahabad³ and Bombay⁴ have taken a contrary view and held that unless the circumstances of the case are such as to justify the giving of symbolic possession instead of actual possession, the symbolic possession will not be a delivery of possession at all in the eye of the law so as to interrupt the running of time.

9. Article only applies to suits against judgment-debtor and persons deriving title from him. — The Article only contemplates cases where the auction-purchaser sues the judgment-debtor or those claiming under him¹ Thus, where the judgment-debtor is in possession at the date of the sale but is subsequently dispossessed by a trespasser or person claiming under an independent title, a suit by the auction-purchaser for possession against such person will not be within this Article² Similarly, where the property sold is a share in joint property, the auction-purchaser's suit against the judgment-debtor's co sharers will not be one within this Article³

Suppose, pending the attachment of certain property, the judgment-debtor mortgages it with possession to a third party The property is subsequently sold in execution of the decree It has been

(1882) 1882 Pun Re No 75 p 216, *Mt Karim Nissam v Basho*

(1927) A I R 1927 Mad 843 (850) 105 Ind Cas 243, *Kamayya v Mahalakshmi*

(1923) A I R 1923 Pat 76 (82) 71 Ind Cas 999 24 Cri L Jour 279, *Maharaja Pratap Uday Nath Sahi Deo v Sunderbans Koer*

[But see (1924) A I R 1924 Lah 301 (302) 71 Ind Cas 885, *Sardar Khan v Abdulla Khan*]

8 (1921) A I R 1921 All 9 (10, 11) 43 All 520 63 Ind Cas 212 (F B), *Jang Bahadur Singh v Hanmant Singh*

4 (1912) 14 Ind Cas 447 (449) 36 Bom 873 (F B), *Mahdeo v Janunamji* (Overruling 25 Bom 275 and 25 Bom 358)

[See (1922) A I R 1922 Bom 2 (3) 46 Bom 932 68 Ind Cas 91, *Raghunath Vaman v Kondiba Babaji*]

[But see (1922) A I R 1922 Bom 27 (28) 46 Bom 710 66 Ind Cas 320, *Mahadevappa Dundappa v Bhima Doddappa Valed* (36 Bom 373 (F B) held doubtful in view of A I R 1917 P C 197)]

Note 9

1 (1910) 6 Ind Cas 467 (471) (Cal), *Khiroda Kanta Roy v Krishna Das*

(1918) 18 Ind Cas 465 (465) 35 All 432 *Bhagwant Singh v Bhola Singh*

(1922) A I R 1922 Cal 176 (177) 70 Ind Cas 602 *Janakimath v Baskuntha*

(1908) 7 Cal L Jour 560 (562) 12 Cal W N 617, *Raghu Nath Bhagat v Syed Samad Shah*

(1916) A I R 1916 Pat 324 (324) 35 Ind Cas 57 *Biswambar Lal v Jhulan*

(1919) A I R 1919 Pat 207 (210) 51 Ind Cas 801 4 Pat L Jour 463, *Bhikad Bhunjan Narain Tewari v Upendra Nath Roy*

2 (1908) 7 Cal L Jour 560 (562) 12 Cal W N 617, *Raghu Nath Bhagat v Syed Samad Shah*

3 (1910) 6 Ind Cas 467 (471) (Cal), *Khiroda Kanta Roy v Krishna Das*

4 (1912) 14 Ind Cas 447 (449) 36 Bom 873 (F B), *Mahdeo v Janunamji*

5 (1918) 18 Ind Cas 465 (465) 35 All 432 *Bhagwant Singh v Bhola Singh*

6 (1922) A I R 1922 Cal 176 (177) 70 Ind Cas 602 *Janakimath v Baskuntha*

7 (1908) 7 Cal L Jour 560 (562) 12 Cal W N 617, *Raghu Nath Bhagat v Syed Samad Shah*

8 (1921) A I R 1921 All 9 (10, 11) 43 All 520 63 Ind Cas 212 (F B), *Jang Bahadur Singh v Hanmant Singh*

9 (1923) A I R 1923 Pat 76 (82) 71 Ind Cas 999 24 Cri L Jour 279, *Maharaja Pratap Uday Nath Sahi Deo v Sunderbans Koer*

10 (1924) A I R 1924 Lah 301 (302) 71 Ind Cas 885, *Sardar Khan v Abdulla Khan*

11 (1927) A I R 1927 Mad 843 (850) 105 Ind Cas 243, *Kamayya v Mahalakshmi*

12 (1929) A I R 1929 Cal 230 (230) 56 Cal 616 117 Ind Cas 593 *Biswanath Chakravarti v Labiya Khatun* (Per Mitter, J — Suit by purchaser against co tenants of judgment debtor is governed by Art 144 and not by Art 135)

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9-11

held that a suit for possession by the auction-purchaser against the mortgagee will be governed by this Article. The reason apparently is that the mortgagee in such circumstances must be deemed to be a person deriving his title from the judgment debtor.⁴

10. Starting point of limitation.—Limitation under this Article begins to run from the date when the sale becomes absolute. Under the Civil Procedure Code, Order 21 Rule 92, an execution sale becomes absolute on its being confirmed by the Court. Hence the date of confirmation of the sale is the date from which limitation begins to run under this Article.¹

Under the Acts of 1877 and 1871, the starting point of limitation was the date of the sale and not that of the confirmation of the sale.²

Where a sale has taken place while the Act of 1877 was in force but the suit for possession is brought after the coming into force of the Act of 1908, the period of limitation for the suit must be calculated from the date of the confirmation of the sale and not from the date of the sale. The reason is that the law of limitation applicable to a suit is the law which is in force at the date of the institution of the suit.³

11. Burden of proof.—This Article applies where the judgment debtor was in possession at the date of the sale, while Article 137 applies where the judgment debtor was out of possession at the date of the sale. The burden of proving whether the judgment debtor was or was not in possession at the date of the sale is on the plaintiff.¹

- 4 (1926) A I R 1926 Mad 966 (967) 97 Ind Cas 718, *Srinivasa Iyengar v Pellayan Ambalam*
(1925) A I R 1925 Mad 338 (339) 85 Ind Cas 849 *Srinivasa Iyengar v Pellayan Ambalam*
(See also (1938) A I R 1938 Pat 189 (190) *Ramasray Prasad v C G Atkins* (Lessee from judgment debtor under unauthorised lease—Suit for possession against lessee must be brought within twelve years of sale))

Note 10

- 1 (1916) A I R 1916 Pat 396 (397) 34 Ind Cas 897, *Bankey Behary Lal v Bhagwan Das Marwari*
(1916) A I R 1916 Pat 100 (101) 37 Ind Cas 955 *Mohammad Latif Khan v Bazo Kori*
2 (1896) 14 Cal 644 (647) *Kishori Mohun Roy Chowdhry v Chunder Nath Pal*
(1895) 17 Mad 69 (91) 3 Mad L Jour 267, *Venkatalingam v Iyerasami*
(1898) 1898 Bom P J 400 (401), *Antary Yeswant v Lakshminarayana*
(See a. v Hur sale))
3. (1918) A I R
Hakim
(1916) A I R 1916 Cal 754 (755) 29 Ind Cas 833, *Discessor Sen v Imam uddin Chowdhury*

Note 11

- 1 (1914) A I R 1914 Cal 527 (529) 23 Ind Cas 811 *Nasiruddin v Sayadur Rahman*
(1918) A I R 1918 Cal 983 (984) 42 Ind Cas 709 *Dohariyoddar v Ailmani Aundru*

139.* By a land- lord to recover posses- sion from a tenant.	Twelve years.	When the tenancy is determined.	Article 139
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Synopsis

1. Legislative changes.
2. Scope of the Article.
3. This Article and Article 143.
4. Relationship of landlord and tenant must have existed between the parties.
- 4a. "Landlord."
- 4b. "Tenant."
5. The plaintiff must be a landlord.
- 5a. "When the tenancy is determined."
6. Determination by efflux of time.
7. Determination by notice to quit.
8. Determination by surrender.
9. Determination by forfeiture.
10. Determination by abandonment.
11. Effect of bar under Article.
12. Nature of tenant's possession during tenancy.
13. Nature of tenant's possession after determination of tenancy.
14. Tenancy right can be acquired by adverse possession.
15. Special or local Act.
16. Tenancy at will.
17. Permanent tenancy.
18. Possession under void lease.
19. Encroachment by tenant.
20. Onus of proof.
21. Pleading.
22. Suit against third party getting into possession during tenancy — Limitation.

* Act of 1877
Same as above.

Act of 1871

Same as above except that the number of the Article was 140

Act of 1859

Corresponding provision in clause 12 of Section 1 "Suits for the recovery of immovable property or any interest in immovable property to which no other provision of this Act applies—the period of twelve years from the time the cause of action arose"

Other Topics

Article 144 and this Article	See Note 2	Note 14
Leases not governed by T P Act—Disclaimer of title or breach of condition	See Note 9	
—Overt act if necessary	See Note 9	
Non payment of rent	See Note 13 F N (2b)	
Non performance of service	See Note 12 F N (1b)	
Notice to quit a portion only of demised land	See Note 7 Pt 8	
Permanent tenancy—Article not applicable	See Note 5a Pt 1a	
Permanent tenancy cannot be acquired by prescription	See Note 12 F N (4)	
Possession of tenant holding over	See Note 2 Pt 1	Note 13
Tenancy by sufferance	See Note 16	

1. Legislative changes—The Article was first enacted in the Act of 1871. In the Act of 1859 there was no specific provision corresponding to this Article and suits of the kind mentioned in this Article were held to fall under Section 1 clause 12 of the Act¹

2 Scope of the Article—This Article applies to a suit by a landlord to recover possession from a tenant and the *terminus a quo* is the date of the determination of the tenancy^{1a}. It follows that two conditions must be satisfied before the Article can apply

- 1 The suit must be one for possession of immovable property
- 2 The suit must be by a landlord against a person who was his tenant but whose tenancy has expired or determined (See Note 4)

A suit falling under this Article is not covered by Article 144. The reason is that the possession of a tenant holding over after the determination of the tenancy is not *adverse* to the landlord though it is a wrongful possession in which he is not entitled to continue¹. But time will under this Article run against the landlord from the date of the determination of the tenancy and will bar a suit after twelve years. Article 144 applies only to cases where the defendant's possession is *adverse* to the plaintiff. It has however been held in some cases² that Article 144 is a general Article and this a special one and that on that ground this Article should be applied in preference to Article 144 in accordance with the general principle of interpretation of statutes that a special provision will prevail over the general. It is submitted that in view of what has been said above Article 144 will not apply to cases falling under this Article because the possession of the tenant is not adverse to the landlord and not because it is a general Article which would have to give way to the special Article.

Article 139 — Note 1

1 (1866) 8 South W R 55 (57) *C T Davis v Kasse Abdool Hassan*

Note 2

1a (1924) A I R 1924 Pat 500 (562) 83 Ind Cas 741 3 Pat 403 *Harnarayan Singh v Darshan Deo* (Suit for declaration—Article does not apply)

1 See Note 13 *infra*

2 (1935) A I R 1935 Bom 382 (384) 159 Ind Cas 378 *Lakshmgowda v Jambhu*

3. This Article and Article 143.—Article 143, *infra*, provides for suits for possession of immovable property when the plaintiff has become entitled to such possession by reason of any forfeiture or breach of condition. It is a general Article which applies to all suits for possession based upon a forfeiture or breach of condition as the cause of action. Where, however, such a suit is between a landlord and tenant, this Article will apply, inasmuch as it *specially* provides for suits for possession by a landlord against his tenant. A suit by a landlord against an alienee from the tenant for possession on the ground of forfeiture incurred by reason of the alienation is not a suit falling within this Article and would therefore be governed by Article 143¹.

In *Guh: Sheskh v Mathewson*,² it was held by the High Court of Calcutta that where a suit is based on forfeiture, Article 143 would apply even though the suit is one by a landlord against a tenant. In *Bhairab Chandra v Kadam Bewa*,³ it was observed by the same High Court that Article 143 did not apply because the relationship of landlord and tenant did not exist between the plaintiff and the defendant. In *Annamalai v Vythilinga*,⁴ it was held by a single Judge of the High Court of Madras that both Articles 139 and 143 would apply to the case of landlord and tenant though their operation was different. The learned Judge observed as follows: "If it is necessary that forfeiture should be followed by an overt act determining the lease before the landlord can sue for possession, the forfeiture and the overt act determine the lease and Article 139, Limitation Act, would apply and the landlord would have twelve years to recover possession from the time when the lease is determined by the overt act. But, where forfeiture itself gives rise to an action for possession at once, Article 143 would apply. If a period of twelve years is allowed to elapse from the time the right to sue for possession has accrued, the tenant acquires title to hold the land absolutely by the operation of Section 28 of the Limitation Act. But, if the landlord waives the forfeiture, he can wait until the termination of the lease

(1901) 25 Mad 507 (510) 12 Mad L Jour 119 *Seshamma Shettlati v Chikaya Hegade*

[See also (1883) 9 Cal 367 (370) 12 Cal L R 19 *Krishna Gobind Dhur v Hars Churn Dhur*]

Note 3

1 (1930) A I R 1930 Mad 430 (432) 124 Ind Cas 273 *Ayyasamy Pathar v Manatikrama Zamorin* (Reversing A I R 1926 Mad 819 (830))

(1922) A I R 1922 Mad 290 (295) 55 Ind Cas 350, *Zamorin of Calicut v Samu Nair*

(1920) A I R 1920 Cal 866 (867) 60 Ind Cas 312 (313) *Moti Lal Pal v Chandra Kumar Sen*

(1901) 15 Mad 123 (124) 2 Mad L Jour 81, *Madharan v Athi Nangiyar*

2 (1905) 11 Cal W N 661 (662) (Following 7 Sath W R 209)

[See also (1883) 1883 Pun Re No 180 p 551 (555), *Dhian Singh v Mehan Singh*]

3 (1913) 22 Ind Cas 28 (29) (Cal)

4 (1937) A I R 1937 Mad 295 (297) 172 Ind Cas 630

[See also (1926) A I R 1926 Cal 193 (203) 85 Ind Cas 678, *Gopika Raman v Atal Singh*]

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Notes
3-4a

in cases where the lease is terminable otherwise and take advantage of Article 139." It is submitted that none of the three views mentioned above can be accepted as correct. As regards the case expressing the *first* view, no reasons have been given as to why Article 143 should be applied in preference to Article 139. The case expressing the *second* view did not deal with the applicability or otherwise of Article 139 but with the question whether Article 144 or Article 143 was applicable. According to the case expressing the *third* view, time will, in cases of forfeiture, run under Article 143 but that if the landlord subsequently waives forfeiture, the running of time will be stopped and the landlord can wait until forfeiture is again incurred or the lease is determined otherwise. In other words, according to this view, the landlord can sue for possession notwithstanding that the lease has not determined. Such a view is clearly untenable.

4. Relationship of landlord and tenant must have existed between the parties.— In order that this Article may apply, there must have been the relationship of landlord and tenant between the parties.¹ As was observed in *Vadepalli Narasimham v. Dronama Raju*,² this Article "deals with suits to recover possession from a tenant, that is to say, a person who was a tenant until his tenancy determined."

The relationship between a *khot* and his tenant is not that of a landlord and tenant, a *khot* is not a landlord, but, in theory, is only a farmer of land revenue.³

A lease in favour of an agent is, in law, one in favour of the principal and therefore, a suit for possession by the principal on the termination of such lease will be governed by this Article.⁴

4a. "Landlord."— The word "landlord" in this Article would on general principles, include his representatives also.¹ Thus, a suit by a transferee of the landlord against the tenant for possession

Note 4

- 1 (1900) 24 Bom 504 (507) 2 Bom L R 491, *Chandri v. Daji Bhau*
 (1912) 15 Ind Cas 146 (151) (Mad) *Ambalavana Chetty v. Singaratelu Udayar* (Trespass during tenancy—Suit against trespasser is not governed by Article 139)
 (1929) A I R 1929 P C 99 (100 102) 114 Ind Cas 561 56 Ind App 119 56 Cal 1003 (P C) *Gopika Raman v. Atal Singh* (A I R 1926 Cal 193 Affirmed)

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- 3 (1935) A I R 1935 Bom 98 (100) 156 Ind Cas 339 *Daluchand v. Slants*
 4 (1935) A I R 1935 P C 59 (61) 154 Ind Cas 945 (P C), *Chandrika Prasad v. Bombay Baroda & Central India Railway Co*
 (1914) A I R 1914 Bom 296 (297) 38 Bom 53 21 Ind Cas 763 *Kris'na Dixit v. Bai Dixit*

Note 4a

1 See Note 11 to Article 89 ante

would also be governed by this Article² Where there are several landlords, one of them can sue, after the termination of the lease, for possession of the property³ But, the tenancy must have been determined by *all* the landlords (where it has been determinable by the action of the landlords)⁴

A person competent to transfer property only for the period of his lifetime grants a lease for a term extending beyond his life The person dies On his death, the lease automatically terminates and his successor becomes entitled to sue the quondam tenant for possession The suit by the successor is not governed by this Article⁵ The reason is that he has not succeeded to the interest of a landlord or a quondam landlord and only sues as the *proprietor* of the property It has been held in the undermentioned case⁶ that even by paying rent to the successor of the deceased person, a tenancy cannot be created between the parties and that the principle of Section 116 of the Transfer of Property Act does not apply to such cases

4b. "Tenant." — A lease is a transferable interest It is also *heritable*¹ except where the lease is one for life as in the case of *istimrari mokarrari* leases² The word 'tenant' would therefore, except in the last mentioned case, include his representatives^{2a}

In such cases (i.e. in the case of life tenants) on the death of the life tenant, the tenancy becomes extinct and therefore, the word

2 (1922) A I R 1922 All 423 (424) 68 Ind Cas 750 *Deb, Prasad v Mt Gujar*

3 (1927) A I R 1927 Bom 192 (194) 51 Bom 149 101 Ind Cas 35, *Maganlal Dulabhdas v Dhudar Purshottam*

4 (1929) A I R 1929 Pat 433 (435) 9 Pat 425 123 Ind Cas 630 *Nirmal Kumar v Surjan Dasadh*

5 (1882) 9 Cal 411 (417) 11 Cal L R 503 *Modho Kooery v Tekait Ram chunder Singh*

(1891) 18 Cal 520 (525) *Gossain Dalmar Puri v Bepin Dehari Mitter*

(1936) A I R 1936 P O 183 (183) 162 Ind Cas 465 63 Ind App 261 59 Mad 809, *Ponnambala Deshar v Periyannan Chetti*

(1906) 1906 Pun Re No 90 page 324 (325) 1907 Pun L R 91 1906 Pun W R 137 *Ghudu Singh v Khushall Singh*

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Note 4b

1 (1929) 112 Ind Cas 651 (653) (Lah) *Mahammad Budha v Gulam Qadir* (Death does not determine lease)

(1932) A I R 1932 Lah 586 (588) 140 Ind Cas 474 13 Lah 432 *Sohawa Singh v Kesar Singh* (Tenant dying during tenancy—LOSS OF SON DOES NOT CHANGE TO THAT OF A TRESPASER)

2 (1925) A I R 1925 P C 146 (146) 55 Ind App 212 109 Ind Cas 663 7 Pat 649 (P C) *Kamakhyia Narayan Singh v Ram Raksha Singh*

2a (1866) 8 Suth W R 53 (59) C T Davis v Abdul Hamed (Transfer from tenant)

(1919) A I R 1919 Cal 586 (587) 41 Ind Cas 378 *Ishan Chandra v Nishi Chandra* (Do)

(1866) 8 Suth W R 512 (513) *Hidayatunnissa Begum v Siraj Dayal Singh*

There is a conflict of decisions whether the representative of a tenant holding over without the assent of the landlord after the termination of his tenancy is a "tenant" within the meaning of this Article. In *Narasimham v. Seetharama Murthy*,⁵ it was observed that the representative of a tenant holding over who enters after his death is not a "tenant" within the meaning of this Article, and that a suit against such a person will be governed by Article 144. This view has been dissented from in later cases of the same High Court.⁶ It is submitted that the view held in the later cases is correct.

5. The plaintiff must be a landlord.—Where a lessee continues in possession after the determination of the lease for a period of

- 3 (1925) A I R 1925 Pat 216 (224) 84 Ind Cas 586 4 Pat 139
3a See also (1893) 18 Bom 256 (259), *Krishnay Ramchandra v Antaji Pandurang* (But it was held that such possession was permissible This view is not correct and has been dealt in Note 13 *infra*)
(1926) A I R 1926 Pat 241 (243) 93 Ind Cas 800, *Kuldip Singh v Kamakhya Narain Singh*
(1927) A I R 1927 Pat 305 (306) 102 Ind Cas 821, *Kamakhya Narain Singh v Khalik Ahmad*
(1925) A I R 1925 Pat 216 (222) 84 Ind Cas 586 4 Pat 139, *Ram Rakhya Singh v Kamakhya Narain Singh*
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6 (1909) 4 Ind Cas 1080 (1081) 33 Mad 260, *Subraveli Iamish v Gundala Ramanna*, (7 Cal L Jour 615, Followed)
(1925) A I R 1925 Mad 446 (447) 86 Ind Cas 933, *Sudala Muthu Therasa v Sappan Therasa*

twelve years, he acquires under Section 28 *ante*, a title to the property. If he is subsequently dispossessed by the landlord and he sues the landlord for possession, the suit will not be governed by this Article, the reason being that the suit is not one by a landlord.¹

Where a mortgagee with possession leases back the mortgaged property to the mortgagor for a term of years and after the expiry of such term sues the mortgagor for possession, the suit will be governed by this Article.² A contrary view, viz that such a suit must be regarded as not one by a landlord but on the basis of the plaintiff's right as a mortgagee with possession, has been held in the undermentioned case.³ It is submitted that this view is not correct.

A purchased a common half of property belonging to B and leased it back to B for one year. After the expiry of the lease, B sold the said half to C purporting to act as full owner thereof. More than twelve years after the expiry of the lease A sued C and the co owner of the other half of the property for joint possession. It was held by the High Court of Bombay⁴ that the plaintiff claimed the property as owner and not as landlord even though he alleged in the plaint that the defendant was a lessee whose lease had expired, and that therefore this Article did not apply. The decision itself may be supported on the ground that Article 139 cannot apply to the case, inasmuch as there was no relationship of landlord and tenant between the parties to the suit. But that the applicability of the Article could be avoided by treating the plaintiff as owner and not landlord does not seem to be correct.

5a. "When the tenancy is determined" — A landlord's right to sue his tenant for possession arises only on the determination of the tenancy.¹ Hence, the starting point of limitation under this Article has been fixed as the date when the tenancy is determined.

Note 5

- 1 (1926) 98 Ind Cas 911 (912) (Bom) *Shriram Shahansing v Fallu*
- 2 (1918) 18 Ind Cas 899 (899) (All) *Tulsiram v Sunderlal*
- (1909) 1 Ind Cas 208 (208) 31 All 318 6 All L Jour 299 *Khunnilal v Madan Mohan*
- (1920) A I R 1920 Lah 217 (217) 57 Ind Cas 269 *Des Raj v Jaimal Singh*
- 3 (1935) A I R 1935 Lah 411 (413) *Amru v Santa*
- 4 (1921) A I R 1921 Bom 462 (462) 60 Ind Cas 559 *Ichalal Jagmohandas v Nago Sina*

Note 5a

- 1 (1935) A I R 1935 P C 59 (60) 154 Ind Cas 945 (P C) *Chandrika Prasada v Bombay Baroda & Central India Ry Co* (Limitation does not run until tenancy is determined)

(1902) 20 M.L.J. 400 (1902) P.C. —

nation before suit)

- (1915) A I R 1915 All 312 (312) 29 Ind Cas 264 *Padarath Tewari v Bannugh*

(1906) 18 All 440 (445) 1906 All W N 162 (F B) *Sita Devi v Ram Lal*

(1908) 6 Bom H C R A C 31 (33) *Sanabhas Pusamji v Pusamji Jankar ji*

(1935) 19 Bom 135 (139) *Vinayak Janardan v Mainda*

Article 139
Note 5a

Therefore, where the lease is not a terminable one, for example, a permanent tenancy, this Article does not apply.^{1a}

A tenancy can be determined in various modes. Section 111 of the Transfer of Property Act enumerates several ways in which a tenancy can be determined. The Section embodies principles of general applicability which will also govern tenancies to which the Transfer of Property Act does not apply.² The modes enumerated in Section 111 of the Transfer of Property Act are not exhaustive.

Illustrative cases

- 1 A lease granted by a mortgagee with possession in the course of his management does not terminate on the redemption of the mortgage ³
- 2 Under the Malabar Compensation for Tenant's Improvements Act, a *kuzhikanom* lease does not terminate with the expiry of the twelve years of the *lanom* but will terminate only on the payment of compensation to the tenant for the improvements made by him ⁴
- 3 The mere fact that the tenant refuses to pay to his landlord the rent due under the lease and attorns to another person does not put an end to the tenancy ⁵
- 4 The lease granted by a Hindu widow in possession of her widow's estate does not *ipso facto* come to an end at her death but is only voidable by the next inheritor of the estate ⁶

(1894) 18 Bom 110 (114) *Dodhu v Madhavrao Narayan Gadre*

• Ram v Har Dayal
Kasim Abbas v Hans

(1905) 27 All 81 (82) 1 All L Jour 479 1904 All W N 168 *Nazir Hossain*
v. *Shibba*

[See also (1924) A I R 1924 Pat 560 (562) 63 Ind Cas 741 8 Pat
403 *Harnarayan Singh v Darshan Deo* 1924 Pat 560 (562) 63 Ind Cas 741 8 Pat

(1906) 3 All L Jour 619 (690) 1906 All W N 243 *Dubri Lal v Dhotu Rai*]

1a (1903) 27 Bom 515 (544) 5 Bom L R 274, Fatehsingji v Bemanji
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9 (1916) A I R 1916 Mad 911 (912) 31 Ind Cas 630 *Chinnappa Tharan v Pazhanappa Pillai*; (25 Mad 507 and 11 Ind Cas 817 (All) Followed) (1910) A I R 1916 Mad 937 (938) 39 Ind Cas 651. *Erama Menon v San*

(1918) A I R 1918 Mad 887 (888) 38 Ind Cas 651, *Eroma Menon v San*
kunni Menon

4 (1915) A I R 1918 Mad 887 (633) 38 Ind Cas 651, *Eroma Menon v Sankunni Menon*

(1918) 19 Ind Cas 563 (563, 564) (Mad) *Kummatha Vittil Kunhi Kuthalais Haji v Antoni Gozeas*

5 (1888) 15 Cal 527 (532) *Sarbananda Basu v Pran Sanhar Roy*
See also the cases cited in Foot Note (1b) of Note 12

See also the cases cited in Foot Note (1b) of Note 12

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W N 424 S4 Ind App 87
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5 Where an *istimrari mokarrari* lease is granted to two persons jointly, the death of one of them does not put an end to the lease as regards half the share in the land leased. The lease does not terminate till the death of the survivor.⁷

6 The denial by the lessee of the landlord's title does not by itself put an end to the tenancy.⁸

Article 139
Notes
5a—6

6. **Determination by efflux of time.**—A tenancy for a term of years will determine on the expiry of the term and no notice to quit or other formality is necessary for the determination of the tenancy in such cases.¹ But the tenancy may be renewed under the circumstances mentioned in Section 116 of the Transfer of Property Act.² Where no such circumstances are established, a suit by the landlord against the tenant would be barred after twelve years from the expiry of the term of the tenancy.³ But, where a tenancy is renewed, a landlord is entitled to sue for possession only on the termination of such renewed lease in the manner provided by law⁴ and hence, a suit for possession by the landlord can be brought in such cases at any time within twelve years of the determination of the renewed lease.⁵

Where it is established that a settlement is made annually by the landlord with the tenant, the tenancy terminates at the end of each year.⁶

7 (1917) A I R 1917 Cal 746 (786) 36 Ind Cas 321 43 Cal 832 *Ram Narain Singh v Chota Nagpur Banking Association*

(1925) A I R 1925 Pat 228 (236) 82 Ind Cas 204, *Gopal Ojha v Ramadhar Singh*

8 See Foot Note (2a) to Note 12 *infra*

Note 6

1 (1881) 7 Cal 710 (712) 9 Cal L R 240 4 Shome L R 186, *Chatur Singh v Vakund Lall*

(1908) 7 Cal L Jour 615 (626) *Madan Mohan Gossain v Kumar Rameshwar Malia*

(1934) A I R 1934 Nag 67 (67) 30 Nag L R 155 148 Ind Cas 561, *Gopinath Maharaj v Mothi Chitwa*

2 (1921) A I R 1921 Cal 741 (747) 48 Cal 359 61 Ind Cas 503, *Mahomed Ayejuddin Mea v Prodyot Kumar Tagore*

3 (1904) 1 All L Jour 201 (205 206) *Lachman v Gulrari Lal*

(1898) 22 Bom 893 (898) *Kanthappa v Seshappa*

(1926) A I R 1926 All 594 (585) 95 Ind Cas 103, *Kanhariya Lal v Nanag Ram*

(1922) A I R 1922 All 318 (319) 44 All 593 75 Ind Cas 454 *Bisheshwar Nath v Kundan*

(1909) 1 Ind Cas 208 (209) 31 All 318, *Khunna Lal v Madan Mohan Lal*

(1927) A I R 1927 Bom 650 (650) 105 Ind Cas 859 *Purshotam Lashwant v Fushnu Gorathe*

4 (1935) A I R 1935 P C 59 (62) 154 Ind Cas 945 (P C) *Chandrika Prasad v B B & C I Py Co*

(1911) 9 Ind Cas 141 (146) (Mad) *Linga Reddi v Venkata Krishna Rao*

5 (1917) A I R 1917 Cal 603 (605) 82 Ind Cas 827, *Lalji Sahu v Sham Lal*

6 (1929) A I R 1929 Pat 444 (446) 115 Ind Cas 305 *Pratap Uday Nath Saha Deo v Jagannath Mahito*

Article 139
Note 7

7. Determination by notice to quit. — In the absence of a contract to the contrary, a notice to quit or of an intention to quit is one of the recognized modes of determining a lease. Where the lease is for a term of years it cannot be determined by a notice to quit before the expiry of the term. The reason is that in such cases, there is a contract preventing the determination of the lease before the end of the period fixed. Similarly, a permanent lease cannot be determined by a notice to quit. As seen in Note 6 above, a lease for a term of years determines automatically on the expiry of the term and a notice to quit is not necessary to determine the lease in such cases.

Section 106 of the Transfer of Property Act provides that in the absence of a contract or local law or usage to the contrary, a lease of immovable property for agricultural or manufacturing purposes shall be deemed to be lease from year to year, terminable on the part of either lessor or lessee, by six months' notice expiring with the end of a year of the tenancy,¹ and that a lease of immovable property for any other purpose shall be deemed to be a lease from month to month terminable, on the part of either lessor or lessee by fifteen days' notice expiring with the end of a month of the tenancy.² The second paragraph of the Section prescribes the form in which such notice is to be given. In cases not governed by the Transfer of Property Act, the period of the notice must be determined according to the rule of justice, equity and good conscience, having regard to all the circumstances of the case.³

A notice to quit or of an intention to quit is a formal expression of the will of the party giving the notice that the tenancy shall terminate.⁴ Whether a notice contains such formal expression depends on the construction of the particular notice in question. In *Harikar Bannerji v Ramshashi Roy*,⁵ their Lordships of the Privy Council observed as follows: 'If this were a case arising in England the English authorities would therefore be applicable. It has not been suggested, and could not, their Lordships think, be successfully contended that the principles they lay down are not applicable to cases

Note 7

1 (1921) A I R 1921 Cal 741 (747) 48 Cal 359 61 Ind Cas 503 *Mahomed*

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from month to month terminable by fifteen days' notice)

3 (1919) A I R 1919 Cal 509 (531) 51 Ind Cas 415 *Shamsonees Dibi v Sifya*
Sebak Ghosal

222 49 Ind Cas

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229 49 Ind Cas

arising in India. They establish that notices to quit, though not strictly accurate or consistent in the statements embodied in them, may still be good and effective in law, that the test of their sufficiency is not what they would mean to a stranger ignorant of all the facts and circumstances touching the holding to which they purport to refer, but what they would mean to tenants presumably conversant with all those facts and circumstances, and, further, that they are to be construed not with a desire to find faults in them which would render them defective but to be construed *ut res magis valeat quam periat*.⁶

A notice to quit which is not according to the law will not put an end to the tenancy.⁷ Thus, a notice to quit calling upon the tenant to quit a *portion* only of the demised land is not valid and will not have the effect of determining the tenancy.⁸

A notice to quit must also be properly served on the tenant. As to what will constitute sufficient service, see the undermentioned cases.⁹

8. Determination by surrender.—A tenancy can be determined by express or implied surrender, that is to say, by the lessee yielding up his interest under the lease to the lessor, and the lessor consenting to such yielding up.

The surrender of a lease before the expiry of the term of the lease cannot determine *underleases*.¹

9. Determination by forfeiture.—Section 111 (g) of the Transfer of Property Act deals with the determination of tenancy by forfeiture. Before the amendment of that clause by Act 20 of 1929, a tenancy could be determined by forfeiture only where in addition to the disclaimer of title or a breach of a condition, the lessor or his transferee did some act showing his intention to determine the lease.^{1a} Under the clause as amended, the lessor or his transferee should give notice in writing to the lessee of his intention to determine the lease. There is a difference of opinion on

6 That an act may avail rather than perish

7 (1891) 15 Bom 407 (411) *Vithu v Dhond*

8 (1918) A I R 1918 P O 102 (105, 110) 46 Cal 459 45 Ind App 222 48 Ind Cas 277 (P C) *Harishar Banerji v Ramshashi Roy*

(1921) 64 Ind Cas 550 (550) (Cal) *Ramakant v Gunesh Chunder*

9 (1918) A I R 1918 P C 102 (111, 112) 46 Cal 458 45 Ind App 222 48 Ind Cas 277 (P C) *Harishar Banerji v Ramshashi Roy*

(1888) 7 Bom 474 (477) *Chandmal v Bachraj* (If a notice is not properly served or otherwise not sufficient the tenancy must be considered to continue)

Note 8

1 (1868) 10 Suth W R 334 (335) *Heeramones v Gunganarain*

[But see (1892) 6 C P L R 74 (74) *Bhopal Singh v Thalur Dore Lal* (Case under local Tenancy Act)]

Note 9

1a (1925) A I R 1925 All 346 (347) 47 All 348 56 Ind Cas 174, *Shib Charan Das v Aharkia*

(1902) 12 Mad L Jour 194 (196) *Mathusami Pillai v Sreenivasan*.

Article 139
Note 9

the question whether in cases not governed by the Transfer of Property Act, a disclaimer of title by the tenant or a breach of condition by him would, by itself, determine the tenancy without any act on the part of the landlord showing his intention to determine the lease. In the undermentioned cases¹ it has been held that such act is necessary before the tenancy is determined. A contrary view, viz that no such act is necessary, has been held in the cases² cited below. In *Maharaja of Jeypore v Rukmani Pattamahadevi*,³ which was a case to which the Transfer of Property Act did not apply, their Lordships of the Privy Council held that

- (1917) A I R 1917 Bom 6 (7) 42 Bom 195 43 Ind Cas 851 *Isabali Tayabali v Mahadu Eloba* (Filing of suit itself is an act showing such intention)
- (1912) 14 Ind Cas 747 (749) (All) *Kadir Baksh v Prag Narain* (Filing of suit itself is not an act showing intention)
- (1916) A I R 1916 Cal 969 (971) 45 Cal 469 41 Ind Cas 952 *Nourang v Janardan Kishore Lal*
- 1 (1900) 24 Mad 246 (251) 10 Mad L Jour 415 *Srinivasa Ayyar v Muthusami Pillai* (Tenancy subsists unless lessor does some act showing intention to put an end to the lease)
- (1926) A I R 1926 Cal 193 (203) 85 Ind Cas 678, *Gopika Raman Boy v Alal Singh*
- (1867) 8 Suth W R 55 (58) *C T Davis v Kasce Abdool Hamed*
- (1897) 21 Mad 153 (160, 163) 8 Mad L Jour 92 *Illoppan v Manavikrama*
- (1914) A I R 1914 Mad 564 (568) 37 Mad 1 7 Ind Cas 902 *Raja of*
id Cas 690 *Annamalai Pathar v*
ergal (Forfeiture does not deter
mine lease though it will give a cause of action for a suit)
- (1868) 1688 Pun Re No 18 page 47 (48) *Tota v Sakotia* (There must be circumstances to show acquiescence of landlord in tenant's act of repudiation)
- (1888) 1888 Pun Re No 166 page 482 (483), *Tulsi Ram v Jlandu* (Do)
- (1924) A I R 1924 Lah 389 (392) 71 Ind Cas 605 *Muhammad Hussain v Sahara* (Do)
- [See also (1912) 18 Ind Cas 32 (83) (Lah) *Muhammad Badar Khan v Chiragshah*
- (1911) 11 Ind Cas 639 (639) (Lah) *Ghasan v Bahadur* (Repudiation should be acquiesced in by landlord)]
- 2 (1937) A I R 1937 Mad 295 (298) 172 Ind Cas 690 *Annamalai Pathar v Vythilinga Pandara Sannadhi Atergal*
- (1915) A I R 1915 Mad 818 (815) 20 Ind Cas 980 38 Mad 445 *Koropal v Narayana* (34 Mad 161 and 17 Ind Cas 947, Followed)
- (1919) A I R 1919 Mad 897 (902) 46 Ind Cas 62 *Rama Ijengar v Gurusami Chetty* (See 6 Ind Cas 447 and 20 Ind Cas 730 to the same effect—31 Mad 403 Dissented from)
- 3 (1919) A I R 1919 P C 1 (4) 42 Mad 589 46 Ind App 109 50 Ind Cas 631 (P C)
- [See also (1932) A I R 1932 Mad 928 (932) 137 Ind Cas 497 *Persyanan Chetty v Govinda Rao*]

the English law as to forfeiture of tenancy should be held to be applicable to the case as being consonant with justice, equity and good conscience and their Lordships observed as follows "Now, the rule of English law is that a tenant will forfeit his holding if he denies his landlord's title in clear, unmistakable terms, whether by matter of record or by certain matters in *pais*. The qualification that the denial must be in clear, unmistakable terms has not unfrequently been applied by the Courts in India, which have held that where a tenant admits that he does hold as tenant of the person who claims to be his landlord but disputes the terms of the tenancy and sets up terms more favourable to himself, he does not, though he fails in establishing a more favourable tenancy, so far deny the landlord's title as to work a forfeiture." The decision of their Lordships would seem to support the second of the two conflicting views above referred to.

It has been held by the Bombay High Court⁴ that there can be no forfeiture by disclaimer in cases not governed by the Transfer of Property Act, unless the disclaimer is in matter of record and unless the elements of estoppel are present.

A mere breach of a condition in a lease will not cause a forfeiture or determination of the lease, unless the lease deed provides that the landlord should have the right of re entry on such breach and he does some act showing his intention to determine the lease.⁵

10. Determination by abandonment. — Abandonment of tenancy by the tenant is a mode of determining the tenancy recognised under certain local Tenancy Acts.¹ But, under the Transfer of Property Act and the general law, abandonment by itself will not put an end to a tenancy unless it amounts to a surrender, express or implied which necessarily involves the consent of the landlord.² In the undermentioned case,³ however, a contrary

4 (1935) A I R 1935 Bom 41 (44) 59 Bom 191 155 Ind Cas 516, *Racholappa v Konher Annarao*

5 (1929) A I R 1929 Oudh 529 (532, 533) 118 Ind Cas 841 4 Luck 649, *Ambika Prasad v Beni Madho*

Note 10

1 See (1928) A I R 1928 Oudh 95 (97) 107 Ind Cas 326 3 Luck 278 *Sahab Din v Mahabir Singh*

(1926) 97 Ind Cas 802 (803) (Pat) *Firangi Das v Chheddi Pandey* (B T Act Section 87)

(1928) A I R 1928 Cal 669 (669) 114 Ind Cas 791, *Abdul Hakim v Annada Prasad*

(1928) A I R 1928 Cal 193 (195) 107 Ind Cas 735, *Ataharuddin v Murari Mohun Dutt*

(1922) A I R 1922 Nag 241 (242) 58 Ind Cas 112 18 Nag L R 109 *Jodhray v Daulat*

(1916) A I R 1916 Cal 454 (455) 33 Ind Cas 98 (102) *Sakayet Mollah v Alam Mollah*

2 (1916) A I R 1916 Cal 454 (455) 33 Ind Cas 98 (102), *Sakayet Mollah v Alam Mollah*

[See also (1883) 9 Cal G*1 (675 679) 12 Cal L R 343, *Judoonath Ghose v Schoene Kalburn & Co*]

3 (1912) 15 Ind Cas 146 (150) (Mad), *Ambararana Chetty v Singaravelu Odayer*

Article 189
Notes
10-12

view has been expressed by Abdur Rahim, J. It is submitted that the view is not correct.

11. Effect of bar under Article.—Where a suit is barred under this Article, the landlord's right to the property is extinguished under Section 23, *ante*.¹ Hence, in such cases, the landlord is not entitled to recover any rent in respect of the property for any period after the expiry of the time limited under this Article.²

As seen in Note 6 to Section 23 *ante*, the person in possession cannot acquire by prescription under that Section any higher right than what he has been claiming. Hence, where after the determination of the tenancy, the tenant remains in possession claiming to be a permanent tenant, the lapse of twelve years under this Article will confer on him only the right of a permanent tenant³ and not that of a full owner.

12. Nature of tenant's possession during tenancy.—The possession of a tenant during the period of his tenancy is only a permissive one⁴ and is not adverse to the landlord.^{5a} The mere

Note 11

- 1 (1922) A I R 1922 P C 184 (185) 74 Ind Cas 561 (P C), Mohunt Bhagwan v Ramakrishna Bore
- (1912) A I R 1912 Lah 70 (70, 71) 64 Ind Cas 852 Faral v Mohan Khan (Tenancy at-will determined by repudiation by tenant)
- 2 (1935) A I R 1935 Mad 377 (378) 257 Ind Cas 569, Ambalam v Peria Karuppan Chetty
- 3 (1904) 9 Cal W N 292 (299), Bagdu Majhi v Paja Sri Sri Durga Prasad Singha
- (1910) 5 Ind Cas 965 (967) 34 Bom 329, Trimbak Ramchandra v Gulam Zilani

Note 12

- 1 (1890) 6 Cal 311 (316) 7 Cal L R 181, Gobind Lal Seal v Debendranath Mullick
- 1a (1900) A I R 1920 Cal 551 (562) 57 Ind Cas 793 Jogendra Chandra Kar v Syam Sundar Das
- (1921) A I R 1921 Cal 754 (755) 61 Ind Cas 469 Manrotha Nath Mitter v Anath Bundhu
- (1914) A I R 1914 Cal 630 (631) 23 Ind Cas 299 Deo Nandan Prasad v Udit Narayan
- (1914) A I R 1914 Cal 506 (508) 22 Ind Cas 563, H. Manners v Hanbur Dutt Koer
- (1903) 7 Cal W N 294 (296) Keamuddin v Hara Mohan Mondul
- (1865) 3 South W R 73 (82) Beng L R Supp Vol 180 Watson v Government
- (1915) A I R 1915 Cal 132 (139) 27 Ind Cas 31 Allabuddin v Durrada Kishore Manjya

(1901) 28 C. 1111 - - - - - Raja Kant Lohree
v Sham Dehara Sin
ulodhur Chander Chas-
Singh
nee Dasse
Khaiah Akbar

Gunnee
(1864) 1 South W R 341 (341), Bunsedhur Dass v Sheikh Mohamed
(1875) 25 South W R 56 (56), Narayn Mundul v Boodo Mahad

failure of the tenant to pay rent cannot make his possession adverse to the landlord^{1b} It is also a fundamental principle of law that a

- (1902) 29 Cal 518 (534) 4 Bom L R 537 6 Cal W N 617 29 Ind App 104 8 Sar 269 (P C) *Secretary of State v Krishnamoni*
- (1870) 14 Suth W R 357 (358) 7 Beng L R App 17, *Maharam Sheik v Nakowri Das Mahaldar*
- (1869) 11 Suth W R 102 (103) *Shumboo Nath Saha v Bunwari Lal Roy*
- (1889) 16 Cal 806 (809) *Jonardhan Mundul Dakua v Sambhu Nath Mundul*
- (1926) A I R 1926 All 678 (678) 96 Ind Cas 187, *Tuls Singh v Sheosaran Ras*
- (1929) A I R 1929 All 853 (884) 122 Ind Cas 737, *Kasim Abbas v Hans Ram*
- (1923) A I R 1923 Lah 247 (248) 70 Ind Cas 966 *Chauhar v. Manshaw Singh* (Possession of licensee from tenant after suit)
- (1868) 2 Agra 25 (26) *Mahomed Inayat-ool-lah v Syed Albarali*
- (1934) A I R 1934 All 722 (722) 151 Ind Cas 256 *Lekhray v Chandra* (Tenant cannot hold adversely to the landlord by the mere fact of encroachment)
- 1b (1922) A I R 1922 P O 272 (278) 49 Ind App 399 2 Pat 38 71 Ind Cas 984 (P C) *Jagdev Narain Singh v Baldeo Singh*
- (1860) 2 All 617 (520) 4 Ind Jur 650 (F B) *Prem Sukh Das v Bhupia*
- (1917) A I R 1917 Mad 533 (534) 35 Ind Cas 671 *Narasanga Rao v Ranga sams Thevan*
- (1932) A I R 1932 Cal 427 (430) 59 Cal 454 137 Ind Cas 860 *Jagadwri pendranarayan v Bilash Ray*
- (1917) A I R 1917 All 102 (103) 31 Ind Cas 395, *Vijay Narain Singh v Parbhu Narain Singh*
- (1938) A I R 1938 All 331 (383) 162 Ind Cas 907, *Ram Setak v Mt Rani Subhaddra Euar*
- (1887) 7 Bom 34 (39) *Dadoba v Krishna*
- (1882) 7 Bom 40 (42) 7 Ind Jur 201 *Tatia v Sadashiv*
- (1885) 9 Bom 419 (421) *Ganga Bai v Ealapa Dars Mukrya*
- (1894) 18 Bom 250 (255 256) *Rambhat v Babablat*
- (1937) A I R 1937 Pat 96 (98) 167 Ind Cas 238 *Kameshwar Singh v Sakhawati Ali* (A I R 1922 P O 272 Followed)
- (1936) A I R 1936 Pat 287 (289) 162 Ind Cas 838 *Joti Prasad Singh v Rajendra Narayan Singh* (Do)
- (1933) A I R 1933 Pat 175 (178) 145 Ind Cas 527 *Mohan Lal Jha v Kameshwar Singh* (Do)
- (1933) A I R 1933 Pat 656 (657) 13 Pat 45 149 Ind Cas 1177 *Keshav Prasad v Brahmdeo Ras* (Non payment will not create rent free title A I R 1922 P O 272 Followed)
- (1923) A I R 1923 Pat 201 (203) 71 Ind Cas 570 *Ram Lochan Baid v Kamakhya Narain Singh*
- (1891) 3 Mad 118 (120) *Perumal Naden v Sangutien* (4 Cal 314 Approved)
- (1896) 20 Mad 6 (8) *Srinivasaraghava Iyengar v Muthuswami Padayachi*
- (1922) 65 Ind Cas 749 (751) (Oudh) *Durga v Ram Padarath*
- (1902) A I R 1922 Pat 541 (542) 1 Pat 290 69 Ind Cas 703 *Nand Lal Sahu v Tilhat Shrinivas* (Non performance of service—Such non performance was regarded as equivalent to non payment of rent)
- (1933) A I R 1933 Mad 668 (669) 147 Ind Cas 501 *Rajagopala Goundar v Maruthamuthu Asary*
- (1937) A I R 1937 Mad 295 (297) 172 Ind Cas 690 *Annamalai Pathar v Vithalinga Pandara Sannadhi Atergal* (Non performance of service will not determine tenancy)
- (1907) 7 Cal L Jour 615 (603) *Madan Mohan Gossain v Kumar Kameshwar Malia*
- (1905) 2 Cal L Jour 569 (572) 32 Cal 1141 *Jogendra Narain v M M Crawford*
- (1879) 4 Cal 661 (663) 3 Ind Jur 565 *Poresh Narain Roy v Kasi Chunder Talukdar*

Article 139
Note 12

tenant who has been let into possession by his landlord cannot deny his landlord's title, however defective it may be, so long as he has not openly restored possession by surrender to the landlord.² Hence, a mere denial by the tenant of the landlord's right cannot make the

- (1867) 7 Buth W R 400 (400), *Troyluckho Tarnees Dossia v Mohima Chunder Muttuck*
 (1924) A I R 1924 Cal 168 (170, 171) 75 Ind Cas 325, *Giris Chandra v Sri Krishna De*
 (1917) A I R 1917 Cal 583 (584) 35 Ind Cas 28, *Reajuddin Behari v Chand Baksha Haji*
 (1866) 6 Buth W R 218 (218), *Huronath Roy v Jogender Chunder Roy*
 (1875) 28 Buth W R 253 (253) 2 Ind App 145 14 Beng L R 450 3 Sar 449 3 Suther 102 (P O), *Prosunno Kumari v Golab Chand*
 (1879) 4 Cal 314 (318) 3 Cal L R 119 3 Ind Jur 461, *Rungo Lall Mundul v Abdul Guffor*
 (1911) 9 Ind Cas 119 (120) (Cal), *Ram Nevas v Sashi Bushan*
 (1911) 11 Ind Cas 395 (397) (Cal), *Srinath Roy v Satya Ankar Sen*
 (1912) 14 Ind Cas 324 (325) (All) *Sheodayalsingh v Ganga*
 (1912) 16 Ind Cas 365 (366, 367) 40 Cal 173, *Prosonna Kumar Mukerjee v Srikantha*
 (1912) 17 Ind Cas 523 (524) (All) *Deeknandan Pershad v Bindeshwari Pershad*
 (1912) 17 Ind Cas 948 (944) 37 Bom 284, *Vinayak Balkrishna v Sitaram*
 (1913) 19 Ind Cas 119 (120) (All), *Abdul Karim v Chunni Bibi*
 (1926) A I R 1928 Sind 71 (73, 74) 90 Ind Cas 1007 21 Sind L R 185
Siddick Hayee Yakub v Muhammad Faruq
 (1925) A I R 1925 Sind 36 (38) 79 Ind Cas 59, *Mahomed Faruq v Siddik*
 (1929) A I R 1929 Oudh 370 (371) 115 Ind Cas 802 *Lalla Pershad v Har nam Singh*
 (1931) A I R 1931 Oudh 401 (402) 132 Ind Cas 710, *Krishnapal Singh v Rameshwar Daksh Singh*
 (1932) A I R 1932 Lah 586 (587, 590) 13 Lah 432 140 Ind Cas 474 *Sohawa Singh v Kesar Singh*
 (1920) A I R 1920 Lah 217 (218) 57 Ind Cas 269 *Desraj v Jasmai Singh*
 (1888) 1888 Pun Re No 18 page 47 (48) *Tota v Saholia*
 (1914) A I R 1914 Lah 530 (530) 1915 Pun Re No 25 29 Ind Cas 213
Dalip Singh v Ranma
 (1930) A I R 1930 Lah 437 (437) 129 Ind Cas 889, *Alla Ditta v Budha*
 (1933) A I R 1933 Lah 776 (777) 144 Ind Cas 726, *Mahomed v Malku*
 (1935) A I R 1935 Lah 441 (443) *Amru v Santa*
 (1927) A I R 1927 Lah 759 (759) 100 Ind Cas 73 *Lal Singh v Wadlawa*
 (1910) 7 Ind Cas 252 (253) (Mad) *Narayanasingh v Vathwar Rama Arjer*
 (Non performance of service)
 (1931) A I R 1931 Nag 105 (105) 122 Ind Cas 271 *Hasder v Jankiram*
 (1888) 1 O P L R 69 (69) *Shrikhari v Ram Patil*
 (1936) A I R 1936 Lah 461 (462) 163 Ind Cas 592 *Girdhari Pam v Qasim*
 (1899) 28 Bom 602 (604) 1 Bom L R 61, *Komar Gowda v Bhamaaji Keshav*
 (Performance of service stands on the same footing as payment of rent)
 (1936) A I R 1936 Lah 741 (742) 166 Ind Cas 607, *Mt Blani v Ujagar Singh*
 [See also (1928) A I R 1928 Lah 937 (938) 113 Ind Cas 543 *Rilia v Dodi Ray*]
 (1929) A I R 1929 Oudh 370 (371) 115 Ind Cas 302 *Lalla Prasad v Harnam Singh*
 2 (1915) A I R 1915 P C 96 (98) 37 All 557 42 Ind App 202 30 Ind Cas 293
 (P C), *Mt Bilas Kunwar v Desraj Ranjit Singh*

Article 139
Note 12

a life tenant to the landlord that he is entitled to a permanent and heritable tenure in the land will not enable him to prescribe for such

- (1922) A I R 1922 Mad 82 (82), *Tanku Mahalakshmi v Chamariy Narasimha Murthy*
- (1923) A I R 1923 Mad 661 (662) 72 Ind Cas 690, *Sundararajachariar v Ali Mahamad Etkibar* (Tenant cannot prescribe for a tenancy on more favourable terms)
- (1927) A I R 1927 Cal 918 (914) 104 Ind Cas 812, *Rajni Kanla v Raj Kumari Das* (A I R 1923 P C 118, A I R 1923 P C 205 and A I R 1924 P C 65 Followed)
- (1935) A I R 1935 Bom 247 (250) 156 Ind Cas 1020, *Vaman v Ehande Rao* (Permanent tenancy cannot be acquired by tenant by prescription)
- (1934) A I R 1934 Bom 194 (197) 150 Ind Cas 555 58 Bom 419, *Datto Shivram v Baba Sahib* (Do)
- (1929) A I R 1929 Bom 197 (197) 122 Ind Cas 419 *Shahid Ali, v Khot Sahib* (Cannot prescribe for permanent tenancy 21 Bom 509 held considerably shaken by A I R 1923 P C 118)
- (1932) A I R 1932 Bom 3 (8) 136 Ind Cas 801, *Shankar Yesu v Khemsawant* (Cannot acquire permanent tenancy A I R 1923 P C 118 Followed)
- (1927) A I R 1927 Bom 667 (668) 52 Bom 55 107 Ind Cas 52 *Shahid Nathabhai v Kalansang Gulabsang* (Permanent tenancy cannot be acquired by tenant)
- (1926) 98 Ind Cas 753 (754) (Oudh) *Gajadhar v Court of Wards Barua Mahanun Estate* (Under proprietary right A I R 1923 P C 118, Followed)
- (1926) A I R 1926 Bom 316 (319) 50 Bom 195 94 Ind Cas 737, *Madhavarao v Immam Bapu*
- (1924) A I R 1924 P C 65 (79) 51 Ind App 83 47 Mad 337 82 Ind Cas 226 (P O), *Naina Pillai v Ramanathan Chetty* (A I R 1923 P C 205 Followed)
- (1925) A I R 1925 Bom 330 (335) 91 Ind Cas 272 *Jujan Singh v Dolo Chhala* (21 Bom 509 and 27 Bom 515 may have to be re considered in view of A I R 1923 P C 118 and A I R 1923 P C 205)
- (1925) A I R 1925 Bom 375 (376) 87 Ind Cas 779 49 Bom 526 *Vishnu Ram Chandra v Tukaram Ganu* (A person who is in possession of the watan lands as a tenant of the watanbar cannot acquire a right by adverse possession to a permanent tenancy)
- (1918) A I R 1918 Mad 932 (942) 41 Ind Cas 769, *Naina Pillai v Ramanathan Chetty*
- (1885) 11 Cal 818 (337) 12 Ind App 52 4 Sar 590 9 Ind Jur 236 R & J 88 (P O) *Rohan Singh v Surat Singh*
- (1923) A I R 1923 Cal 682 (683) 75 Ind Cas 105, *Aedar Nath Sadhulhan v Madhu Sudan Das*
- (1921) A I R 1921 Cal 453 (455) 63 Ind Cas 109, *Jyoti Prosad v Dasarat Ghosh*
- (1915) A I R 1915 Oudh 5 (7) 30 Ind Cas 218 *Ram Asre v Md Abul Hasan Khan*
- (1932) A I R 1932 Lah 588 (589 590) 13 Lah 432 140 Ind Cas 474 *Sohawa Singh v Kesar Singh*
- (1888) 1888 Pun Re No 18 page 47 (48) *Tola v Sakota*
- (1901) 1901 Pun Re No 65 page 210 (211) 1901 Pun L R No 105, *Honda Ram v Bhakhu*
- (1908)

[See also (1903) 26 Mad 488 (489) *Ramaswami Nish v Arayammai* (24 Mad 246, Followed)]

permanent tenancy from the date of the notice^{4a} In *Mumtaz Ali v Moan Singh*,⁵ their Lordships of the Privy Council observed as follows "They (their Lordships) are unable to affirm as a general proposition of law that a person who is in fact, in possession of land under a tenancy or occupancy title can, by a mere assertion in a judicial proceeding and the lapse of six or twelve years without that assertion having been successfully challenged, obtain a title as an under proprietor to the land"

Several decisions have however, proceeded on the view that a tenant in possession can, by an open assertion of an adverse title against the landlord, make his possession adverse so as to make limitation run against the landlord from the date of such open assertion⁶ It is submitted that this view is not correct and is opposed to the general trend of decisions

4a (1918) A I R 1918 Cal 263 (265) 43 Ind Cas 59, *Birendra Kishore v Muhammad Daulat Khan*

(1918) A I R 1918 Cal 784 (785) 38 Ind Cas 469, *Birendra Kishore v Fuljan Bibi*

(1900) 27 Cal 156 (166) 26 Ind App 216 4 Cal W N 274 7 Sar 580 (P C) *Beni Pershad Koeri v Dudhnath Roy*

(1935) A I R 1935 Cal 493 (500) 157 Ind Cas 601 *Devin Chandra v Tara Prasanna*

(1926) A I R 1926 Cal 193 (202) 85 Ind Cas 678, *Gopika Raman Roy v Atal Singh*

(1900) 10 Mad L Jour 152 (Jour)

5 (1923) A I R 1923 P O 118 (121) 50 Ind App 202 26 Oudh Cas 231 45 All 419 74 Ind Cas 476 (P C)

6 (1894) 18 Mad 171 (172) *Govinda Pillai v Ramanuja Pillai*

and A I R 1924 P C 65)

(1917) A I R 1917 Cal 562 (562) 36 Ind Cas 829 *Gour Chandra v L Kishore* (Denial of landlord's title more than twelve years)
suit—Suit barred after twelve years)

(1921) A I R 1921 Bom 227 (227) 45 Bom 509 59 Ind Cas 114
Ramchandra v Pandu (21 Bom 509 Followed)

(1921) A I R 1921 Bom 235 (236) 45 Bom 661 60 Ind Cas 3
Bhan v Arishna Malhari (27 Bom 515 Followed)

(1924) A I R 1924 Cal 168 (171) 75 Ind Cas 325 *Giri v padhyaya v Sri Arishna De*

(1917) A I R 1917 Cal 583 (584) 35 Ind Cas 23 *Rejuzul Baksha Haji*

(1916) A I R 1916 Cal 680 (680) 37 Ind Cas 856 *Ere Kumar Chakkravarthy*

(1866) 6 Suth W R 218 (218) *Huronath Roy v Joger*

(1901) 9 Cal W N 292 (292) *Baydu Majhi v R. J. Singh*

(1870) 13 Suth W R 129 (130) 12 Beng L R 2-1
Coomaree v Bengal Coal Co

(1871) 15 Suth W R 191 (191) 6 Beng L R App 1
v Gopee Singh

(1871) 15 Suth W R 232 (233) 6 Beng L R App
Hossain v Lloyd

(1869) 12 Suth W R 361 (365) 12 Beng L R
Dabee v Amalilani Mookerjee

(1925) A I R 1925 Cal 631 (634) 52 Cal 576
Debi v Monohar Mukhopadhyay

Article 139
Note 13

13. Nature of tenant's possession after determination of tenancy. — Where a tenant holds over after the determination of the tenancy and the landlord has not assented to such holding over by receipt of rent or otherwise, no relationship of landlord and tenant comes into existence between the parties. The possession of the tenant under such circumstances is *wrongful*¹. As was observed by Sir Lawrence Jenkins, G J, in *Chandri v Daji Bhau*,² "a tenant by sufferance is only in by the laches of the owner so that there is no privity between them"^{3a}. But, notwithstanding that the possession of the tenant holding over is wrongful, such possession is not *adverse to the owner*^{2b}. In *Musammatt Allah Rakh v Shah Moha*

17913 AIR 1905

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Note 13

- 1 (1926) 98 Ind Cas 912 (912) (Bom) *Shravan Shahsingh v Fattu* (24 Bom 504 Followed)
(1925) A I R 1925 Pat 17 (19) 81 Ind Cas 535 25 Cri L Jour 919 Gita

(1927) A I R 1927 All 821 (822) 102 Ind Cas 231, *Istiaqad Ali v Mahomed Bakhsh*

(1924) A I R 1924 Cal 445 (446) 69 Ind Cas 501 *Reazuddin Patwari v Abdul Jobbar*

(1917) A I R 1917 Cal 445 (446) 69 Ind Cas 501 *Reazuddin Patwari v. Keda*
[See (1

- 2 (1900) 24 Bom 504 (506) 2 Bom L R 491

2a See also the case in

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(1924) A I R 1924 Pat 463 (464) 80 Ind Cas 568, *Mathura Prasad v Naya Khan*

(1925) A I R 1925 Pat 216 (221) 4 Pat 139 84 Ind Cas 586 *Pam Dakhya Singh v Kamakhya Narain Singh*

- 2b (1925) A I R 1925 All 638 (639) 85 Ind Cas 550 *Dalmir Singh v Joti Prasad*

(1917) A I R 1917 Mad 735 (737) 84 Ind Cas 6 *Gorindasamy Pillai v Ramaswamy Aiyar*

(The possession of the landlord)
Tim 236 Vadapattai by

mad,³ where the defendant in a suit for possession pleaded that his possession had been adverse to the plaintiff for the statutory period and at the same time relied on Article 139 as barring the plaintiff's suit, their Lordships observed as follows: "It may be noted at once that the appellant's plea of adverse possession is obviously inconsistent with the application of Article 139 which relates to the case of a landlord suing to recover possession from a tenant. It has accordingly been held that where a tenant holds over, for a period of twelve years from the determination of the tenancy, without the landlord's assent, he acquires under Section 29 *ante*, a title to the land, not by reason of his possession having been adverse for a period of twelve years but by reason of the efflux of time limited under this Article.⁴ It has also been held that the tenant holding over has a position recognized by law and can, unlike a trespasser, sue under Section 9 of the Specific Relief Act, if he is dispossessed otherwise than in due course of law.⁵ The proposition that a tenant's possession after the determination of the tenancy is not adverse to the landlord would seem to be based on the ground that the principle set forth in *Bilas Kunwar's case*,⁶ viz that a tenant who has been let into possession cannot deny his landlord's title so long as he has not openly restored possession by surrender to his landlord, is applicable also to cases where the tenancy has determined.⁷

In some cases,⁸ it has been held that the tenant's possession after the determination of the tenancy is *not wrongful* and in some other

1899] 4 D. & W. 100 (1899) D. 313, 4 C. 1.

parties]]

- 3 (1934) A I R 1934 F C 77 (80) 61 Ind App 50 56 All 111 147 Ind Cas 837
- 4 (1915) A I R 1915 Mad 845 (848) 25 Ind Cas 109 *Ganapathi Mudali v Venkata Lakshminarasayya* (33 Mad 260 and 31 Mad 163, Dissented from)
- 5 (1919) A I R 1919 Bom 97 (98) 43 Bom 531 51 Ind Cas 193 20 Cri L Jour 417 *Gulam Mahomed Asam v Emperor*
- (1914) A I R 1914 Mad 296 (296) 57 Mad 291 22 Ind Cas 769 *Bhogavalli Venkayya v Kudappa Settya* (11 W R (Eng) 390 and 54 L J Q B 509 Relied on)
- 6 (1915) A I R 1915 F C 96 (98) 37 All 557 42 Ind App 202 30 Ind Cas 299 (P C) *Bilas Kunwar v Desraj Ranjit Singh*
- 7 (1915) A I R 1915 Mad 845 (848) 25 Ind Cas 109 *Ganapathi Mudali v Venkata Lakshminarasayya*
- (1938) A I R 1938 Mad 73 (74) *Sitharamiah v Ramaswamy*
- 8 (1930) A I R 1930 All 177 (179) 122 Ind Cas 865, *Onkar Prasad v Dhanu Ram*

Article 139
Notes
13—14

cases,⁹ it has been held that such possession is *adverse* to the landlord. It is submitted that both these views are wrong.

14. Tenancy right can be acquired by adverse possession —
A tenancy right can be acquired by adverse possession under Article 144. This Article does not apply to such cases¹. See Notes to Article 144, *infra*.

- 9 (1926) 99 Ind Cas 911 (912) (Bom) *Shraavan Shahsingh v Fattu*
(1902) 26 Mad 535 (537) *Parameswararam Mumbannoo v Krishnar Tengal*
(1897) 21 Mad 153 (163) 8 Mad L Jour 92, *Ilappa v Manavikrama*
(1929) A I R 1929 Pat 18 (21) 7 Pat 675 110 Ind Cas 491 *Rikki Nath Kuari v Rangoo Mohlo*
(1912) 16 Ind Cas 546 (547) (Mad) *Kandasami Mudali v Sengoda Mudali*
(1910) 4 Ind Cas 1090 (1081) 33 Mad 260, *Subroveti Ramiah v Gundala Ramanna*
(1910) 6 Ind Cas 339 (340) 37 Cal 674 *Hari Chandra Singh v Bhikambar Singh*
(1909) 3 Ind Cas 566 (567) 31 All 514, *Purn Mai v Makdum Baksh*
(1914) A I R 1914 Lah 530 (530) 1915 Pun Re No 25 29 Ind Cas 243 *Dalip Singh v Ramna* (Possession will not be adverse if a fresh tenancy can be inferred from the relationship of the parties)
(1914) A I R 1914 Mad 564 (569) 7 Ind Cas 202 (207, 208) 37 Mad 1 *Raja of Venkatagiri v Mukku Narayya*
(1916) A I R 1916 Lah 353 (355) 1915 Pun Re No 97 32 Ind Cas 85, *Umar Bhaksh v Baldeo Singh*

Note 14

- 1 (1914) A I R 1914 Cal 196 (197) 20 Ind Cas 664 (665) *Probbabati Das v Taibaturunnissa Chaudhurani*
(1890) 13 Mad 467 (471) *Sankaran v Persasami*
(1914) A I R 1914 Cal 51 (53) 20 Ind Cas 823 (824) *Protab Norain Mukerji v Bivaj Das*
(1926) A I R 1926 Cal 952 (953) 95 Ind Cas 101 *Sadanand Mandal v Jyotish Kanta Ray*
(1929) A I R 1929 Cal 47 (49) 105 Ind Cas 85 *Jamiruddes Naskar v Bosanta Kumar Roy*
(1924) A I R 1924 Mad 292 (294) 47 Mad 203 79 Ind Cas 510, *Appanna v Chinnaveadu*
(1878) 4 Cal 327 (329) 2 Shome L R 106 *Dejoy Chunder Banerji v Kally Prasanno Mookerji*
(1917) A I R 1917 Cal 369 (371) 36 Ind Cas 11 *Nadim Chandra Ghosh v Nilkamal Mukhopadhyaya*
(1908) 35 Cal 470 (476) 28 Cal W N 636 7 Cal L Jour 499 *Jeharan Singh v Nilmony Balidhar*
(1868) 10 Suth W R 253 (254) 1 Beng L R (3 N) 25a *Domun v Shudul Koolali*
(1925) A I R 1925 Cal 1189 (1191) 69 Ind Cas 747, *Swarnamoy v Sourendra Nath Mitra*
(1924) A I R 1924 Cal 45 (47) 50 Cal 487 74 Ind Cas 193, *Bharabendra Norain v Rajendra Narain*
(1922) A I R 1922 Cal 185 (186) 68 Ind Cas 1003 *Ujir Ali Sirdar v Shadhas Behara*
(1922) A I R 1922 Cal 193 (194) 69 Ind Cas 7 *Satyendra Nath Banerjee v Krishnasakha Kar*
(1914) A I R 1914 Cal 743 (743) 18 Ind Cas 616 *Kalicharan Shaha v Dabtruddin Ahmad*
(1914) A I R 1914 Cal 173 (174) 19 Ind Cas 853 *Mohi Lal v Kalu Mandal*

15 Special or local Act — Where a special or local law prescribes a period for suits for possession by a landlord against a tenant this Article will not apply. The suit would be governed by the special or local law.¹ See also Notes to Section 29 *ante*.

16 Tenancy at will — A tenant at will is not a mere trespasser.¹ His possession is a *lawful* possession unlike that of a tenant holding over after the determination of the tenancy. There is a great difference between a tenant at will and a tenant on sufferance: the former is always in his right but the latter holds over by wrong after the expiration of a lawful title.² A tenancy at will is, however, determinable at the will of either the landlord or the tenant.³ No previous notice is necessary before bringing a suit for ejectment.⁴

- (1905) 2 Cal L Jour 125 (135, 136) *Iskan Chandra v Raja Ramranjan*
(1870) 5 Beng L R 667 (667) (Note) *Telaetnee Goura Kumari v Bengal Coal Company*
(1573) 19 Suth W R 252 (254) 2 Suther 606 (P C) *Telaetnee Gour Coomaree v Mt Saroo Coomaree*
(1937) A I R 1937 Oudh 165 (169) 12 Luck 516 164 Ind Cas 1003 *Gurdin Sah v Badri*
[See (1913) 18 Ind Cas 616 (616) (Cal) *Kalicharan Saha v Dabiruddin Ahmad*]
[See also (1921) A I R 1921 Mad 410 (411) 44 Mad 946 64 Ind Cas 329 *Sontyanagopala Dasa v I Rams* (Any person can acquire by prescription a limited interest as much as an absolute ownership)]
[But see (1913) 17 Ind Cas 606 (608, 609) 8 Nag L R 163 *Kanhaya Lal v Dular Singh* (Case under O P Tenancy Act)]

Note 15

- 1 (1939) A I R 1939 All 213 (215) 175 Ind Cas 20 *Fakhruddin Husain v Abdul Wahid* (Suit under Agra Tenancy Act)
(1915) 29 Ind Cas 474 (474) (All) *Lekhraj Mal v Nathu* (Do)
(1915) 29 Ind Cas 36 (36) (All) *Pyare Lal v Ram Bharose* (Do)
(1915) 29 Ind Cas 907 (909) (All) *Pershad v Parshoram Narain* (Do)
(1915) 29 Ind Cas 691 (692) (All) *Mt Kishan Das v Ram Kishan*
(1922) A I R 1922 P C 142 (142, 146) 1 Pat 340 66 Ind Cas 337 49 Ind App 81 (P C) *Jagannath Das v Janki Singh* (Case governed by Bengal Tenancy Act—Not governed by this Act)
[See (1913) 22 Ind Cas 67 (69) (Cal) *Durbinjoy Mander v Daman Bhagat* (Bengal Tenancy Act)]

Note 16

- 1 (1859) 8 Moo Ind App 43 (65) 4 Suth W R 51 13 Moo P C 169 1 Suther 393 (P C) *Sreemutty Anundomohey v John Doe*
[But see (1890) 5 Cal 679 (683) 5 Cal L R 527 *Gobind Lal Seal v Debendronath Mullick*]
2 Woodfall Landlord and Tenant 22nd Edit on page 283
See also (1897) 22 Bom 893 (893) *Kantheppa Raddi v Sheshappa*
3 (1926) A I R 1926 Sind 71 (74, 75) 90 Ind Cas 1007 21 Sind L R 165 *Sadik Haje Yacub v Mahomed Faruq* (Repudiation by tenant)
(1922) A I R 1922 Lah 70 (70, 71) 64 Ind Cas 352, *Fazal v Mishankhan* (Do)
4 (1878) 2 Mad 846 (351) 3 Ind Jur 160 *Abdulla Rowutan v Subbarsayyar*

Article 139
Notes
16—18

The tenancy would be determinable by the bringing of a suit for ejectment⁵

17. Permanent tenancy. — A permanent tenancy cannot be determined by notice to quit. No suit will therefore lie to eject a permanent tenant on the basis of such a notice.¹

Where in a suit for ejectment, the defendant sets up a permanent tenancy, the onus is upon him to substantiate his claim.² Mere proof of long possession is not sufficient to discharge the onus.³ As to whether a tenant who has entered under a tenancy which is not permanent can subsequently, by adverse possession, acquire a permanent tenancy, see Notes 12 and 13, *ante*

18. Possession under void lease — Where a person enters on a property under a void lease, there is no relationship of landlord and tenant between the owner of the property and such person and the latter's possession would be adverse to the owner to the extent

5 (1859) 8 Moo Ind App 43 (65) 4 Suth W R P C 51 13 Moo P C 163 1 Suther 383 (P C) *Sreemutty Anundmokey v John Doe*

Note 17

- 1 (1923) A I R 1923 All 496 (487) 71 Ind Cas 870 *Nobin Chandra Bose v Bandi*
- (1927) A I R 1927 All 342 (344) 100 Ind Cas 479, *Shahjahan Begum v Munna*
- (1917) A I R 1917 Cal 236 (239) 34 Ind Cas 833 *Dwarkanath v Mathura Nath* (Permanent lease is terminable by forfeiture)
- 2 (1970) A I R 1920 P C 67 (69) 48 Mad 567 56 Ind Cas 117 47 Ind App 76 (P C) *Sethurathnam Iyer v Venkatachala Gaundam*
- (1926) 92 Ind Cas 961 (961) (Cal), *Bangshi Badan Halder v Ratan*
- (1929) A I R 1929 P C 156 (158) 52 Mad 549 116 Ind Cas 601 56 Ind App 248 (P C), *Subramania Chettiar v Subramanya Mudaliar*
- (1902) 25 Mad 507 (510) 12 Mad L Jour 119 *Seshamma Shethali v Chikkaya Hegade*
- (1929) A I R 1929 Cal 37 (38, 41) 116 Ind Cas 378 56 Cal 739 *Kamal Kumar v Nandalal Dubey*
- (1931) A I R 1931 Mad 577 (579) 133 Ind Cas 369 *Gopala Kudra v Juvappa Kamathi*
- (1924) A I R 1924 Mad 828 (828, 829) 79 Ind Cas 845, *Chellamma v Peraiyga*
- (1925) A I R 1925 Mad 477 (479) 56 Ind Cas 162 *Thiruputhi Gaundam v Shamanna Gaundam* (Occupancy right claimed)
- (1927) A I R 1927 Mad 331 (333) 99 Ind Cas 991, *Venkata Rattamma v Chalasani Sreeramulu*
- (1921) A I R 1921 Mad 462 (463) 70 Ind Cas 27 *Ponnalaigu Konan v Sanniah Odayan*
- (1921) A I R 1921 Mad 233 (233) 62 Ind Cas 750, *Subramania Karayalam v Sivasubramania Pillai* (Right of occupancy)
- (1929) A I R 1929 Mad 617 (617, 618) 118 Ind Cas 279 *Ayyanarasand Kanipala Swamigal Kott Devasthanam v Periakaruppa Thevar*
- (1928) A I R 1928 Cal 315 (319) 107 Ind Cas 81 53 Cal 335 *Mosmotha Nath v Rajeshwar Rao*
- (1914) A I R 1914 Mad 564 (566) 37 Mad 1 7 Ind Cas 202 *Rajah of Venkatagiri v Narasayya*
- 3 (1920) A I R 1920 P C 67 (69) 43 Mad 567 56 Ind Cas 117 47 Ind App 76 (P C) *Sethurathnam Iyer v Venkatachala Gaundam*

of the right in the assertion of which the property is possessed¹ Where, however, under the belief that the lease is valid, the owner goes on receiving rent from the tenant, the relationship of landlord and tenant will be created between the parties and a suit by the owner for possession against the person who enters on the property under the invalid lease will be governed by this Article²

As to the position of a person who has entered under a lease which is valid during the lifetime of the grantor but becomes void on his death, see Note 4a, *supra*

19. Encroachment by tenant. — A tenant encroaching upon other property of the landlord does not, merely by reason of such encroachment, become a *tenant* of such property also, and the landlord can sue him in ejectment³ But, if he continues in possession of the property encroached upon for twelve years, he will acquire over such property the same rights of tenancy as he had over the land originally demised and a suit by the landlord for ejecting him will be barred² He can, however, prescribe for a higher

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Note 18

- 1 (1855) 9 Mad 244 (246) 10 Ind Jur 61, *Madhava v Narayana* (Invalid *kanam*—Possession under is adverse to owner—Suit is governed by Article 144)
- (1912) 16 Ind Cas 53 (55) (Mad) *Narasaya Udpa v Venkatarammanna Bhatta*
- (1921) 64 Ind Cas 756 (757) (Cal), *Poorna Chandra Das v Joy Lal Payada*
- (1928) A I R 1928 Bom 377 (380) 114 Ind Cas 266, *Gulabhai Ranchhodhbhai v Bhagwan Kesur*
- (1902) 25 Mad 507 (511) 12 Mad L Jour 119, *Seshamma Shettlati v Chichaya Hegade* (Article 144 would apply)
- (1937) A I R 1937 Mad 126 (127) 168 Ind Cas 101, *Athiramanikutti v Uppari*
- (1929) A I R 1929 Bom 174 (176) 117 Ind Cas 438 *Narhar Narayan v. Canapats Hari* (Void permanent lease by *kulkarni vatandar*—Lease void against successor—But successor allowing twelve years to elapse without setting it aside—Defendant gets title to leasehold interest by adverse possession)
- 2 (1896) 22 Bom 1 (4 5) *Jugmohandas Vundrawandas v Pallonjee Edulji*
- (1870) 13 Suth W R 267 (268) 4 Beng L R App 86, *Bunuari Lal Roy v Mahima Chandra Kunal*

Note 19

- 1 (1897) 25 Cal 302 (304) *Prohlad Teor v Kedarnath Bose*
- (1905) 1 Cal L Jour 95n (95)
- (1905) 2 Cal L Jour 125 (135) *Ishan Chandra Miller v Ramranjan Chackerbutty*
- 2 (1911) 11 Ind Cas 90 (31) (Cal) *Tavan Chandra v Ganendra Nath* (2 Cal L Jour 125 and 8 Cal L Jour 557, Followed)
- (1928) A I R 1928 Pat 63 (64) 104 Ind Cas 124 *Sheonandan Singh v Kesho Prasad Singh* (11 Ind Cas 30, Referred to)
- (1908) 31 Mad 168 (166) 18 Mad L Jour 26 3 Mad L Tim 256 *Narsimham v Daronamraju Sestharamamurthy*
- (1917) A I R 1917 Pat 471 (473) 41 Ind Cas 114 2 Pat L J 506, *Midnapore Zamindari Co v Pandey Sardar*

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Note 19

title provided that he has asserted such title to the knowledge of the landlord for the statutory period³

A tenant encroaching upon an adjoining land belonging to a *third party* and obtaining it by adverse possession, obtains it for the benefit of the landlord who gets a title to the land encroached upon⁴

As regards the liability of the tenant for the land encroached upon, it has been held that where the land belongs to the landlord and the tenant has been holding the land for twelve years in the assertion that it forms part of the original holding and that he is not liable to pay any additional rent, he acquires by prescription a right

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- (1929) A I R 1929 Lah 469 (470) 117 Ind Cas 810, *Amar Nath v Thakru*
 (1911) 10 Ind Cas 575 (576) 35 Mad 618, *Muthurakkoo Thevan v Robert Gordon Orr*
 (1925) A I R 1925 Cal 193 (194) 84 Ind Cas 657, *Nekjannessa Bibi v Abbas Molla*
 (1919) A I R 1919 Cal 725 (726) 53 Ind Cas 184, *Jnanada Sundari v Jalapa Bewa*
 (1918) A I R 1918 Cal 154 (155) 43 Ind Cas 844, *Muralidhar Roy v Sasa dhur Pal*
 (1905) 2 Cal L Jour 125 (131, 185), *Ishan Chandra v Ramranjan Chacker butty*
 (1908) 8 Cal L Jour 557 (560) *Raktoo Singh v Sudhram Ahir*
 (1918) A I R 1918 Cal 28 (29) 52 Ind Cas 650 *Armat v Bishun Pralad Narain Singh*
 (1917) A I R 1917 Cal 644 (645) 35 Ind Cas 60, *Bijoy Chand Mohalab v Iswar Chandra*
 (1926) A I R 1926 Oudh 393 (395 396) 94 Ind Cas 1034 1 Luck 469 *Hulas v Barkatunnissa*
 (1884) 10 Cal 820 (821), *Nuddyarchand Shaha v Meajan*
 (1912) 14 Ind Cas 212 (212) (Cal), *Gopal Krishna Jana v Lakhiram Sardar*
 [But see (1926) A I R 1926 Nag 99 (106) 89 Ind Cas 752 *Banau v Hanjit Singh*]
 3 (1908) 8 Cal L Jour 557 (559) *Raktoo Singh v Sudhram Ahir*
 (1915) A I R 1915 Cal 557 (558) 30 Ind Cas 942, *Birendra Kishore v Ramcharan*
 (1905) 2 Cal L Jour 125 (135) *Ishan Chandra v Raja Ram Ranjan*
 (1874) 22 Suth W R 246 (247) *Gooroodoos Roy v Insur Chunder Bose*
 (1921) A I R 1921 Cal 577 (580) 67 Ind Cas 170 *Jogendra Nath Saha v Jagadindra Nath Ray*
 (1917) A I R 1917 Cal 469 (479) 36 Ind Cas 890 *Ramchandra Sil v Ramanmans Das*
 (1915) A I R 1915 Cal 386 (387) 30 Ind Cas 896 *Birendra Kishore v Lakshmi*
 4 (1884) 10 Cal 820 (821) *Nuddyarchand Shaha v Meajan*
 (1916) A I R 1916 Cal 596 (597) 29 Ind Cas 216 *Tepu Mahomed v Tefayit Mahomed*
 (1919) A I R 1919 Cal 378 (379) 51 Ind Cas 797, *Rakhai Chandra Ghose v Mofendra Narain Sen*
 (1935) A I R 1935 Cal 771 (772) 159 Ind Cas 685 *Saroj Kumar Bose v Suryya Kanta Sarkar*
 (1928) A I R 1928 Lah 351 (352) 107 Ind Cas 386 *Nanah Chand v Gaman*.

to hold the land without any additional liability for rent.⁵ Where the land encroached upon was that of a third party and was acquired by the tenant by adverse possession for the statutory period, it was held in the undermentioned case⁶ that no additional rent could be claimed by the landlord in respect of the land encroached upon. This view has been dissented from in a later case and it has been held that a landlord will be entitled to additional rent.⁷

20 Onus of proof.—In a suit for possession, the initial onus of proof is on the plaintiff to show that he is entitled to possession.¹ Where the plaintiff proves his title to the property, the onus may shift according to the defence of the defendant. If the defendant pleads adverse possession for the statutory period, it is for him to show when such adverse possession commenced.² If he pleads a tenancy, it is for him to prove the tenancy where a tenancy is shown to have once existed, it is for the plaintiff to prove that it has determined, the reason being that otherwise he will not be entitled to possession.³ Where the fact of the determination of the tenancy is proved, the onus will shift to the defendant to prove when the tenancy determined. In other words, it is for the defendant to prove that the tenancy determined beyond twelve years from the date of the suit.⁴

5 (1911) 11 Ind Cas 30 (30) (Cal) *Taran Chandra Ghose v Jnanendra Nath Roy*

(1929) A I R 1929 Pat 63 (64) 104 Ind Cas 121 *Sheonandan Singh v Kesho Prasad Singh*

(1929) A I R 1929 Lah 469 (470) 117 Ind Cas 810 *Amar Nath v Thakru* (Where he does not make any such assertion the landlord's right to additional rent will not be barred.)

6 (1929) A I R 1928 Cal 142 (143) 105 Ind Cas 737, *Jatindra Nath v Trai Lakyanath*

7 (1935) A I R 1935 Cal 771 (772) 159 Ind Cas 695, *Saroj Kumar Bose v Surjya Kanta Sarkar* (A I R 1928 Cal 142 distinguished.)

Note 20

1 (1929) 113 Ind Cas 575 (576) (Cal) *Nagendra Nath Vasu v Kshiradar Ruidas*

(1894) 10 Cal 374 (378) *Copaul Chunder v Nilmoney Mitter*

2 (1902) 26 Bom 442 (444) 4 Bom L R 99 *Talshibhai Naranbhai v Ranchhod Gobar*

(1935) A I R 1935 Mad 754 (755) 156 Ind Cas 591 *Sulaiman Rowther v Dawood Khan Sahab* (A I R 1925 Mad 834 and A I R 1927 Mad 287 followed.)

(1927) A I R 1927 Lah 32 (32) 91 Ind Cas 1017 *Santa Singh v Narain Singh*

3 (1929) 113 Ind Cas 575 (576) (Cal) *Nagendra Nath Vasu v Kshiradar Ruidas*

(1925) 112 Ind Cas 257 (258) (Mad) *Kadiyum Bayudu v Kamarasu Veerajulu*

(1924) A I R 1924 Mad 907 (908) 82 Ind Cas 623 *Subbarayudu v Narasimha Rao*

4 (1887) 3 Mad 118 (120) *Perumal Nadan v Sangunien*

(1902) 26 Bom 442 (444) 4 Bom L R 92 *Talshibhai Naranbhai v Ranchhod Gobar*

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Notes
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Under Section 109 of the Evidence Act where it is shown that the relationship of landlord and tenant has once existed between two persons the burden of proving that such relationship has ceased to exist is on the person who affirms that the relationship has ceased. This Section contains the principle on which the propositions stated above as to the onus of proving the determination of a tenancy and the date of its determination are based.

See also the undermentioned cases ⁵

21 Pleading — A defendant in a suit for possession can plead in the alternative both tenancy and the bar of limitation ¹

22 Suit against third party getting into possession during tenancy — Limitation — See Notes under Article 144 *infra*

(1938) A I R 1938 Mad 73 (74) *Sitharamiah v Ramaswamy*
 (1969) 12 Suth W R 250 (251) *Ramdhun Satra v Nobin Chander Chowdhury*

(1931) 1981 Pun Re No 110 page 255 *Attar Singh v Ramditta*
 (1901) 1901 Pun Re No 65 page 210 (212) 1901 Pun L R 105 *Honda v Dhakhu*

(1928) A I R 1923 Lah 35 (38) 69 Ind Cas 363 *Ran Das v Chand*
 (Tenant at will — Onus is not discharged by fact that rent which he paid did not exceed the amount of revenue and cesses)

(1915) A I R 1915 Lah 84 30 Ind Cas 29 *Mt Nawab Begam v Muham*
mad Mirajuddin

(1920) A I R 1920 Lah 217 (217) 57 Ind Cas 269 *Des Raj v Janai Singh*
 (Case of tenancy at will)

[See (1979) 2 All 517 (520) 4 Ind Jur 650 (F B) *Prem Sukh Das v Bhupia*]

[See also (1930) A I R 1930 Lah 437 (437) 129 Ind Cas 889 *Allah Ditta v Dudha*]

⁵ (1910) 5 Ind Cas 350 (351) (All) *Bhagwan Das v Hara Ram* (Tenancy determined more than twelve years before suit—Landlord must to succeed show that by receipt of rent or assent a fresh tenancy was created and determined)

(1910) 5 Ind Cas 907 (907) (Mad) *Sangla v Maruti amuthu*

(1888) 1888 Pun Re No 18 page 47 (48) *Tota v Sakotia*

Notes 21

¹ (1914) A I R 1914 Cal 173 (174) 19 Ind Cas 853 (854) *Moti Lal Roy v Kalu Mandar*

(1892) 7 Bom 96 (99) *Maidan Saiba v Nagapa*

(1908) 8 Cal L Jour 557 (559) *Raktoo Singh v Sudhram Alur*

(1903) 7 Cal W N 294 (296) *Keamudda v Hara Mohan Mondul*

(1874) 21 Suth W R 70 (70) 12 Beng L R 274 (F B) *Dinomoney Dabee v Doorgapershad Mosoomdar*

(1926) A I R 1926 Cal 364 (365) 90 Ind Cas 617 *Chha kuddan v Ram Nara Jan*

[But see (1867) 7 Suth W R 895 (393) *Watson & Co v Ramesh Shuru Soondures Debia*]

140. By a remainderman, a reversioner (other than a landlord) or a devisee, for possession of immovable property. Twelve years When his estate falls into possession

Article 140

Synopsis

1. Legislative changes.
2. Scope of Article
3. "Remainderman"
4. "Reversioner."
5. Suit by landlord for possession
- 6 Article applies also to suit by successor of remainderman, etc.
7. Suit must be for possession of immovable property.
8. Starting point of limitation.
9. Burden of proof.

Other Topics

Adopted son succeeding to estate — Not reversioner	See Note 4 Pt 6
Birt does are not immovable property	See Note 7 Pt 3
Possibility of reverter and reversion	See Note 4 Pt 7
Successive life-interests — Starting point	See Note 8, Pt 2a
Suit by landlord against third party who has dispossessed tenant	See Note 5 Pt 3, Note 8 Pt 3
Suit for possession by landlord on termination of tenancy — cable	Article not applicable See Note 5, Pt 2

1. Legislative changes. — There was no specific provision corresponding to this Article in the Act of 1859 The Article was first introduced in the Act of 1871 and has been re enacted without any change in the later Acts

2 Scope of Article. — This Article applies to a suit by a remainderman, reversioner or devisee for possession of immovable property to which the plaintiff is entitled as *such remainderman, reversioner or devisee*¹

The Article contemplates cases in which the suit is based on a cause of action accruing in favour of the *remainderman* etc, or of

* Act of 1877, Article 140 and Act of 1871, Article 141

Same as above

Act of 1859

No corresponding provision

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Note 2

some person claiming through such remainderman, etc. Where the suit is based on a cause of action which has already accrued to the person from whom the remainderman, etc. derives his title, this Article will not apply. Thus, where *A* grants by his will a life estate to *B* with remainder to *C*, but during *A*'s lifetime *D* wrongfully takes possession of the property, *C*'s cause of action for a suit against *D* will be the same as that of *A*. In other words, *C* will have no fresh cause of action on his becoming entitled to the possession of the estate conferred on him, on the termination of the life estate in favour of *B*. Hence, this Article will not apply to a suit for possession by *C* against *D*. In such cases, time begins to run against *A*, and *C* will not have a fresh starting point of limitation on his becoming entitled to the possession of the estate, the principle being that when once limitation has begun to run in respect of a cause of action it will continue to do so unless it is stopped by virtue of an express statutory provision² (See Notes to Section 9, *ante*). But where in the above illustration, the trespass by *D* takes place during the currency of the life estate in favour of *B*, *C*'s suit against *D* will be governed by this Article and *C* will be entitled to a period of twelve years from the time when his estate falls into possession on the death of *B*. The reason is that *C* does not derive his title from or through *B* but claims on an independent title³. In such cases, a person in *C*'s position has an independent cause of action to sue for possession which only accrues on the termination of the prior estate on which the plaintiff's estate depends. In other words, adverse possession against a life tenant will not bar the reversioner or remainderman succeeding to the estate on the death of the life tenant⁴. Similarly, on the death of the life tenant the remainderman or reversioner gets a cause of action for a suit for possession against the representatives of the life tenant who may be continuing in possession. Such a suit will be within this Article⁵.

2 (1929) A I R 1929 P C 158 (162) 51 All 367 117 Ind Cas 22 56 Ind App 192 (P C) *James Richard, Rennel Skinner v Kunwar Nannihal Singh*

(1935) A I R 1935 Cal 702 (704) 159 Ind Cas 1101, *Hemendra Nath Roy v Janendra Prasanna*

[See (1935) A I R 1925 Pat 68 (92) 93 Ind Cas 451 (F B) *Harshar Prasad v Kesho Prasad*

(1924) A I R 1924 Lah 292 (292) 69 Ind Cas 393 *Khillu Ram v Bhagwan Das*

100 Ind Cas 112 to 113

3 (1886) 12 Cal 594 (596), *Asam Bhuyan v Fairsuddin Akman*

4 (1935) A I R 1935 Cal 702 (703) 159 Ind Cas 1101, *Hemendra Nath Roy v Janendra Prasanna*

(1924) A I R 1924 Pat 721 (732) 3 Pat 890 83 Ind Cas 812, *Kesho Prasad v Bhagwan Das*

Bai v Amru
L R 175 100 Ind Cas 416 All

5 See (1912) 15 Ind Cas 146 (153) (Mad), *Ambalasan Chetty v Singaratelu Odayar*

The Article applies only where the remainderman etc has not obtained possession of the property after the estate has fallen into possession⁶ Where he has obtained such possession but subsequently lost it his suit for possession will not fall within this Article Where property is granted by way of remainder etc to two or more persons and one of them takes possession (on the estate falling into possession) his possession will be deemed to be on behalf of all in the absence of evidence of ouster, and a suit for possession by the others will not be governed by this Article⁷

A mortgages certain property to B and then by will, devises the property for life to C with remainder to D During the currency of C's life estate, B, the mortgagee transfers the property for consideration to E C fails to sue for the possession of the property during his lifetime and after his death, D sues E for possession of the property Held that the transfer in favour of E having been made during the existence of the particular estate of C, the case was governed by this Article and not by Article 134 and that D had a period of 12 years from his estate falling into possession within which to bring his suit⁸

3 "Remainderman."—The words "remainderman," etc are used in this Article in the technical sense they have under the English real property law (See Note 4, *infra*) Under that law, a remainderman is a person entitled to a remainder which is defined as follows — 'that expectant portion, remnant or residue of interest which, on the creation of a particular estate is at the same time limited over to another, who is to enjoy it after the determination of such particular estate'

Thus where an estate is granted to A for life with remainder to B, B will be a remainderman within this Article and his estate will fall into possession on the death of A A person to whom property is

[See also (1910) 7 Ind Cas 218 (222) (Cal) *Sheo Lal Singh v Goor*

7 See (1909) 2 Ind Cas 311 (311) (Mad) *Audipurnam Pillai v Appusundaram Pillai* (Where two of three devisees are in possession and there is no evidence of an intention that they hold adversely a suit for possession by the third devisee not in possession is not governed by Article 140)

8 (1929) A I R 1929 P C 158 (161) 56 Ind App 192 51 All 367 117 Ind Cas 22 (P C) *James R R Skinner v Naunihal Singh* (Reversing A I R 1925 All 707)

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Notes
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given by way of a contingent remainder also will be a remainderman within this Article.² Any interest in property can be granted by way of a remainder. Thus, an equity of redemption can be conferred by way of a remainder.³

Illustration

At a partition in a joint Hindu family certain properties are allotted to the father of the family for life, to be divided among the sons after his death. The sons have a vested remainder in the properties.⁴

In the undermentioned case⁵ it was held by Bhashyam Iyengar, J., that where a Hindu widow alienates her husband's property without any legal necessity and then adopts a son, the adoption does not divest the estate from the alienee immediately but the alienee's title is good for the lifetime of the widow. It was held by the learned Judge that in such a case the adopted son takes a vested remainder in the property on his adoption and that such remainder falls into possession on the death of the widow. But the view that the alienation is good during the lifetime of the widow was overruled by a Full Bench of the Madras High Court,⁶ so that the adopted son acquires a complete and absolute title to the alienated property immediately on adoption and not merely a remainder as held by Bhashyam Iyengar, J.

See also Note 4 below

4. "Reversioner." — The terms "remainderman," etc., in this Article are used in the technical sense which they have under the English real property law.¹ Hence, the expression "reversioner" in this Article refers to a person who has a "reversion" in the strict sense of the English law, viz. "that portion left of an estate after a grant of a particular portion of it, short of the whole estate, has been made by the owner to another person."² In other words, the term "reversioner" only applies to a donor or his representative to whom the remainder of an estate *reverts*, such remainder not having been disposed of by the donor.³ Hence, a person entitled under the Hindu

2 (1929) A I R 1929 P C 158 (161) 56 Ind App 192 51 All 367 117 Ind Cas 367 117 Ind Cas

4 (1922) A I R 1922 Bom 337 (337), *Chillo Bhagwant Nadgir v Chillo Nulkanth Nadgir* (Property assigned by son to mother for life for her maintenance with remainder to himself—Son is remainderman)
5 (1903) 26 Mad 143 (149) 12 Mad L Jour 197, *Sreeramulu v Krishnamurti*
6 (1918) A I R 1918 Mad 469 (473) 41 Mad 75 42 Ind Cas 245 (F B), *Fatty Natha Sastri v Sathuram Annal*

Note 4

1 (1908) 1908 P C 158 (161) 56 Ind App 192 51 All 367 117 Ind Cas 367 117 Ind Cas
2 *Madha v Madha*
3 (1902) 26 Mad 143 (147) 12 Mad L Jour 197, *Sreeramulu v Krishnamurti*

law to succeed to an estate on the death of a Hindu widow as the heir to the last male owner of the property is not a reversioner within the meaning of this Article⁴. Similarly, the collateral heir of a person who is entitled under the Punjab Customary Law to succeed to the estate of such person is not a reversioner within the meaning of this Article⁵. So also where a Hindu widow adopts a son and the adopted son succeeds to the estate on such adoption he does not do so as a reversioner within the meaning of this Article⁶.

4. A Hindu, grants by his will an estate to B his widow, for life with remainder to any son that may be adopted by her. She adopts a son but the adoption is set aside as invalid. On the death of the widow, the plaintiff claims the estate as the heir of A. The plaintiff is not a reversioner within the meaning of this Article. The reason is that where a conditional grant is made as in the above case what is left in the grantor is only a possibility of a reverter and not a reversion⁷.

A remainder or a reversion need not necessarily be made dependent on a life estate. Thus where A is entitled to an estate on the death of B to whom a prior estate in the same property has been given A's suit for possession will be within this Article although B's estate may not be a life estate in the strict sense of the term⁸.

A Hindu widow adopts a son. Disputes arising between the widow and the son an arrangement is entered into under which the widow is to have the property left by the widow's deceased husband for life. A suit for possession of the property by the adopted son or his representative after the death of the widow will be a suit by a reversioner within this Article⁹. It has been held that the same principle will apply to cases where the widow is entitled to hold the estate for her life under an ante adoption agreement made with the natural father of the adopted son¹⁰.

(1924) A I R 1924 Pat 721 (728) 3 Pat 680 83 Ind Cas 812 *Kesho Prasad Singh v. Madha Prasad Singh* (Grant to A for life with remainder to B—Gift to B failing and C becoming entitled to property—C is not reversioner or remainderman)

4 (1897) 21 Bom 646 (669) *Vundravandas v. Cursondas*

5 (1895) 1895 Pun Re No. 18 page 78 (F B) *Roda v. Harnam*

(1918) A I R 1918 Lah 21 (21) 47 Ind Cas 189 *Hussain Baksh v. Pala Singh*

sioner within this Article — Submitted assumption is not correct)

*Kistamma
Kisho Prasad*

Wij v. Dina

of State v

10 (1935) A I R 1935 Cal 702 (704) 63 Cal 155 159 Ind Cas 1101 *Hemendra Nath Roy v. Jnanendra Prasanna Bhaduri*

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Notes
4—5

In the undermentioned case,¹¹ the view was expressed that the Article applies only where a person first succeeds to a property as an heir and not to cases where after succeeding to a property as heir he grants the property to another by way of a life-estate or other limited interest and becomes entitled to the property again on the termination of such limited interest. It is submitted that this view is not correct.

5. Suit by landlord for possession.—A person who has given a lease of his immovable property to another is a "reversioner" within the meaning of this Article.¹ But, the expression "other than a landlord" expressly excludes from the applicability of the Article, suits by landlords. Hence, a suit by a landlord for recovery of possession against his tenant on the termination of the tenancy will not fall within this Article.² To such a suit, Article 139 *supra* will apply.

It has been held that the expression "other than a landlord" only means "other than a landlord suing as such, his tenant for possession" and does not include a landlord suing a third party for possession. Hence, it has been held that a suit by a landlord for possession against a third party who has dispossessed the tenant will be within this Article.³

It has also been held that where a tenant has abandoned the tenancy and a third person gets into possession of the property, and claims to hold it adversely both to the landlord and the tenant, the landlord's suit for possession against such third party must be brought within twelve years of such third party entering into possession and that the period cannot be calculated from the expiry of the term for which the lease had been granted.⁴

[But see (1935) A I R 1935 Cal 228 (230), *Jnanana Prasanna Bhaduri v Hemendra Nath Roy* (Such agreement cannot create life estate because no estate can be granted by a person who has himself no title to the property)]

- 11 (1914) A I R 1914 Lah 458 (460) 22 Ind Cas 855, *Baldoo Singh v Mohan Singh*

Note 5

- 1 (1912) 15 Ind Cas 146 (152) (Mad), *Ambalavana Chetty v Singaravelu Odayar*

- (1882) 9 Cal 867 (870) 12 Cal L R 19, *Krishna Gobind Dhur v Hari Churn Dhur*

[Compare (1917) A I R 1 - 22 Ind Cas 827 *Lalji Sahu v Shamlal* - 12, grantor of a *mokarr* - 12, grantee after his death - 12, reversioner, etc., within Article 140)]

- 2 (1910) 6 Ind Cas 839 (340) 37 Cal 674, *Ram Chandra Singh v Bhatkambhar Singh*

- 8 (1882) 9 Cal 867 (870) 12 Cal L R 19, *Krishna Gobind Dhur v Hari Churn Dhur*

- (1922) A I R 1922 Cal 544 (547), *Janendra Mohan Dutt v Umesh Chandra Guha*

[But see (1912) 15 Ind Cas 146 (152) (Mad), *Ambalavana Chetty v Singaravelu Odayar* (Per Sandura Iyer J)]

- 4 (1912) 15 Ind Cas 146 (150) (Mad), *Ambalavana Chetty v Singaravelu Odayar* (Per Abdul Rahim, J)

6. Article applies also to suit by successor of remainderman, etc.—The Article applies also to a suit by the successor of the remainderman, reversioner or devisee who claims as representing the interest of such remainderman, etc.¹

7. Suit must be for possession of immovable property.—The Article applies only to a suit for possession of immovable property. A suit for possession by a remainderman etc. alleging that the instrument under which the defendant is holding the property is not binding on the plaintiff, is governed by this Article. Such a suit is not one to set aside the instrument and therefore is not within Article 91, etc.²

A suit for possession by a remainderman, etc. challenging the adoption under which the defendant claims to be in possession, is governed by this Article and not Article 115. The reason is that Article 115 only applies to suits for declaration pure and simple and not to suits for possession in which the Court has incidentally to determine the validity of an adoption.³

It has been held that *but* dues are not "immoveable property" within this Article.⁴

8. Starting point of limitation.—The starting point of limitation under this Article is the date when the estate falls into possession.⁵ Thus, where a remainderman or reversioner entitled to property on the termination of a life estate sues for possession of the property, the starting point of limitation is the date of the death of the life tenant, that being the date when the plaintiff's estate falls

Note 6

reasoning is not clear))

Note 7

Note 8

1 (1921) A I R 1921 Cal 687 (696) 65 Ind Cas 866 *Secretary of State v Wase?*
Ali Khan
(1922) 65 Ind Cas 826 (829) (Cal) *Promotha Nath Ray v Dinamani Choudhuran*

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into possession² Where successive life interests have been created, the remainderman or reversioner will be in time if he institutes the suit for possession within twelve years of the death of the last life tenant^{2a} Where a landlord sues a third party who has dispossessed his tenant, for possession, limitation for the suit will commence to run under this Article from the date when the tenancy expired³

Under Hindu law, the right of a devisee under a will accrues immediately on the death of the testator and so limitation for a suit by such devisee for possession of immovable property devised to him will begin to run from the death of the testator⁴

As the starting point of limitation under this Article is the date when the plaintiff's estate falls into possession, the question as to when the defendant's possession became adverse to the plaintiff is not relevant under this Article⁵

9. Burden of proof. — The burden of proving that the suit has been brought within twelve years from the date on which the estate fell into possession is on the plaintiff¹ Hence, where the plaintiff claims as a remainderman or reversioner entitled to possession on the termination of a life estate, the burden of proving that the life tenant died within twelve years of the suit is on the plaintiff²

Where a plaintiff sues for possession as a remainderman or reversioner entitled to possession on the termination of a limited estate and the suit is brought within twelve years of the termination of the limited estate, the burden is on the defendant to prove that limitation began to run when the last full owner was in possession so as to avoid the operation of this Article³

- (1893) 9 Cal 934 (937) 13 Cal L R 372 (F B), *Sreenath Kur v Prasanna Kumar Ghose*
 2 (1935) A I R 1935 Cal 702 (703) 159 Ind Cas 1101, *Hamendra Nath Roy v Janendra Prasanna*
 (1891) 14 Mad 495 (497, 498) *Kutty Assan v Mayan*
 2a (1935) A I R 1935 Cal 702 (703) 159 Ind Cas 1101, *Hemendra Nath Roy v Janendra Prasanna*
 3 (1868) 8 Suth W R 135 (136) *Huronath Roy v Indoo Bhoosun Deb Roy*
 (1882) 9 Cal 367 (370) 12 Cal L R 19 *Krishna Gobind v Hari Churn*
 4 (1887) 14 Cal 801 (807) 14 Ind App 168 11 Ind Jur 397 5 Sat 50 (F C) *Mylapore Aiyasamy Vyapoori Mudaliar v Yeo Kay*
 (1890) 17 Cal 272 (276) *Krishna Kinkur Roy v Panchuram Mundul* [The pro

- 5 (1916) A I R 1916 Bom 300 (301) 40 Bom 237 33 Ind Cas 431 *Jivanrao v Ramchandra Narayan*

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- 1 (1916) A I R 1916 Bom 300 (301) 40 Bom 239 33 Ind Cas 431 *Jayanant Jivanrao v Ramchandra Narayan*
 2 (1929) A I R 1922 Lah 124 (125) 66 Ind Cas 1 *Hira Singh v Lal Singh*
 3 (1935) A I R 1935 Cal 702 (701) 159 Ind Cas 1101 *Hemendra Nath Roy v Janendra Prasanna*



THE INDIAN LIMITATION ACT, IX OF 1908

VOLUME II

THE FIRST SCHEDULE

ARTICLES 1 TO 140

WITH SYNOPSES IN PARALLEL COLUMNS

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(b) sale in pursuance of a decree or order of a Collector or other officer of revenue

(c) sale for arrears of Government revenue or for any demand recoverable as such arrears,

(d) sale of a patni talug sold for current arrears of rent

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129. By a Hindu for a declaration of his right to maintenance — Twelve years — When the right is denied

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132. To enforce payment of money charged upon immoveable property

Explanation — For the purposes of this Article —

(a) the allowance and fees respectively called *malikana* and *haqq*,

(b) the value of any agricultural or other produce the right to receive which is secured by a charge upon immoveable property, and

(c) advances secured by mortgage by deposit of title deeds

shall be deemed to be money charged upon immoveable property

— Twelve years —

When the money sued for becomes due

ARTICLES 128 & 129

- 1 Legislative changes p 1775
- 2 Scope of the Articles p 1775
- 3 Article 128 distinguished from Article 129 p 1776
- 4 'By a Hindu' p 1776
- 5 Arrears of maintenance p 1777
- 6 Right to maintenance p 1779
- 7 'When the right is denied' p 1779

- 1 Scope of the Article p 1780
- 2 Right first accrues p 1781

- 7 Suits by Government p 1784

- 1 Legislative changes p 1785
- 2 Scope of the Article p 1785
- 3 Suit for recovery of arrears of payments periodically due 1786
- 4 Suit against co sharer or rival claimant of right p 1788
- 5 'Periodically recurring right' p 1789

- 1 Legislative changes p 1790
- 2 Scope of the Article p 1797
- 3 To enforce payment p 1800
- 4 Charged p 1801
- 5 Suit to enforce a charge created by decree p 1802
- 6 Suit on charge created by award p 1802
- 7 Suit to enforce vendor's lien p 1802
- 8 Suit to enforce charge in other cases p 1803
- 9 Mortgage by a Hindu father — Suit against son's obligation p 1804

p 1804

on renewed mort
to mortgage
m p 1812

1816

- 24 Mortgage for a term certain with d f clause — Starting point p 1819

133. [Omitted by Section 3 of the Indian Limitation (Amendment) Act (1 of 1929)]

134. To recover possession of immoveable property conveyed or bequeathed in trust or mortgaged and afterwards transferred by the trustee or mortgagee for a valuable consideration — Twelve years — When the transfer becomes known to the plaintiff

134A. To set aside a transfer of immoveable property comprised in a Hindu, Muhammadan or Buddhist religious or charitable endowment, made by a manager thereof for a valuable consideration — Twelve years — When the transfer becomes known to the plaintiff

134B. By the manager of a Hindu, Muhammadan or Buddhist religious or charitable endowment to recover possession of immoveable property of the endowment which has been transferred by a previous manager for a valuable consideration — Twelve years — When the resignation or removal of the transferor

- 23 Suspension or revival of cause of action p 1822
 24 Failure to sue on mortgage in time — Effect of p 1822
 25 Claims by mortgagee disallowed — Suit to enforce mortgage p 1823

- 1 Legislative changes p 1825
 2 Scope of Article p 1827
 3 Suit to recover possession p 1829
 4
 5 1

- 6 Section 10 and Article 134 p 1832
 7 Transfer must be for a valuable consideration p 1832
 8 Transfer — "Valid transfer" p 1832

- 12 Transferee getting possession subsequent to transfer — Effect p 1839
 13 "Mortgagee" p 1840
 14 Mortgage, if should be one with possession p 1842
 15 Mortgagee transferring but subsequently getting re transfer — Effect p 1843
 16 Starting point of limitation p 1844
 17 Time for redemption by mortgagor not ripe at date of transfer by mortgagee — Limitation for mortgagor's suit against transferee page 1844
 18 Adverse possession against mortgagee, whether adverse possession against mortgagor p 1844

ARTICLES 134A, 134B & 134C

- movable property transferred by a previous manager (Article 134B) p 1848
 6 "Manager" p 1851
 7 Transferred for valuable consideration page 1852

A. I. R. 1933 Peshawar 61 at 62.

"The law on the subject is ineidly sum-
med up in Chitaley's Commentary on Civil
Procedure Code, Vol. 1, p 182, and is stated
as follows: 'A party . . . them'"

A. I. R. 1934 Allahabad 253 at 256.

"... the reason being that no one can
have vested right in forms of procedure
The subject is discussed in Chitaley's Civil
Procedure Code, Vol 1, pp 4 and 5"

A. I. R. 1934 Peshawar 40 at 42.

"The argument is based on Chitaley's
Commentary, 1933 Edition, p 1889 under
O 21, R 15 of the Code, which is supported
by *Gopendra Krishna v. Moti Lal*, A. I. R.
1929 Cal, 559"

A. I. R. 1934 Peshawar 67 at 61.

"These conflicting views are noted on
pp 746 and 747 in Chitaley's Civil Proce-
dure Code"

A. I. R. 1934 Peshawar 94 at 95.

"Ho (D J) quotes from Chitaley as
follows: 'All co-promisecs . . . se parties'"

"I have no disagreement with this state-
ment of the law, but in the present case the

following enact .

'Where several . . . of snits.'

"That statement of law applies to the
facts of the present case."

A. I. R. 1938 Allahabad 611 at 613.

"The ruling cases on this point are
collected and noted in Chitaley's Civil Pro-
cedure Code, Vol 3, p. 2318, 2nd Edn."

A. I. R. 1938 Nagpur 228 at 230 =

I. L. R. 1937 Nag. 230 at 234.

"The point is well summed up at pages
2469 and 2470 of Chitaley and Rao's Code
of Criminal Procedure, Vol. 3, and the
learned authors rightly point out that the
view of the High Courts, excepting Rangoon,
is consistent with the principles underlying
sub-section 3 of the section."

A. I. R. 1930 Peshawar 37 at 37.

"Counsel for the appellants quotes from
Chitaley's Commentary to the effect that
where the question of costs has been re-
ferred to the arbitrator, or where the whole
matter in dispute has been referred to the
arbitrator, the arbitrator has authority to
award costs in the award."

A. I. R. 1936 Peshawar 209 at 210.

"We have been referred to Note (7)
under S 48 in Chitaley's Commentary on
the Civil Procedure Code where the distinc-
tion between a fresh application and an
application in continuation of a previous
application is illustrated."

A. I. R. 1937 Allahabad 82 at 87.

"The balance of authority seems in 1
that an Appellate Court has no power under
it to interfere to the prejudice of a person
who was a party to a suit, but who was not
impleaded in the appeal: vide "Code of
Civil Procedure," Chitaley & Annaji Rao,
Vol. 3, pp. 3003-3001 (1st Edn.). I am,
therefore, of opinion that defendants B./J
ought not to have been impleaded."

A. I. R. 1937 Calcutta 222 at 224.

"On this point there is a considerable
mass of case law which will be found set out
in Chitaley's Commentary on the Civil
Procedure Code."

A. I. R. 1937 Lahore 41 at 49 =

I. L. R. 1937 Lah. 11 at 39.

"I find it stated in Chitaley and Annaji
Rao's Code of Civil Procedure that this
section (i. e., S. 80) like S 70 enacts only a
rule of procedure. With this view I agree."

A. I. R. 1937 Nagpur 50 at 53 =

I. L. R. 1937 Nag. 277 at 284.

"This question has been well discussed in
Note 10 under S. 163, p 504, of Chitaley
and Annaji Rao's recent Commentary on
the Criminal Procedure Code. The learned
authors favour the view of the Madras and
Calcutta High Courts which is in
with the opinion expressed above."

A. I. R. 1937 Nagpur 216 at 217 =

I. L. R. 1938 Nag. 280 at 282.

"In Chitale and Rao's Civil Procedure Code, Edn. 2, p. 2094 under C. 22, R. 1, it is remarked :

'It, in the first Court, the
.... either party.'

"I agree with these remarks which would apply to a dismissal of the suit in appeal. It is further remarked on the authority of 34 Mad loc. cit. that the appeal cannot be continued even in respect of costs or other relief which are merely incidental to the main reliefs. I accordingly uphold the contention of the respondent."

A. I. R. 1937 Nagpur 268 at 269 =

I. L. R. 1937 Nag. 519 at 520.

"It appears that the weight of authority is in favour of the view that the Appellate Court has such powers. The dissentients from that view are limited to the High Courts of Allahabad and Rangoon and the Chief Court of Oudh : See also Chitale and Rao's Code of Civil Procedure, Vol. I, page 712."

A. I. R. 1937 Oadh 481 at 483 =

I. L. R. 13 Luok. 580 at 585 & 668.

"Messrs. Chitale and Ananji Rao in their Commentary on the Code express the opinion that the present cl. (d) of R. 5 of O. 33 gives effect to the view taken in the Full Bench decision of the Allahabad High Court reported in 7 All 661, and other cases."

A. I. R. 1937 Peshawar 13 at 15.

"In this connexion we may quote the following Note No. 4 from Mr. Chitale's Commentary under R. 63 which is as follows: 'Other decrees. — A decree this rule.'"

A. I. R. 1937 Peshawar 41 at 41.

"On p. 1480 of Mr. Chitale's Commentary on the Civil Procedure Code (Edn. 1) it is noted that 'where a plaint is presented on the re-opening date after court-holidays and the period of limitation has expired during the holidays, the fact that the ground of exemption under S. 4,

Limitation Act, was not specifically mentioned in the plaint will not entail the dismissal of the suit inasmuch as the Court is bound to take judicial notice of the holidays.' This note is supported by reference to rulings in Nagpur, Lahore, Madras and Calcutta Courts, though a Calcutta ruling to contrary is also noted. The proposition as stated appears to me to be correct."

A. I. R. 1937 Peshawar 81 at 81.

"Learned counsel has been unable to show me any decided case in which action of that nature amounts to a public nuisance, and the commentary in Chitale's Civil Procedure Code certainly indicates the contrary."

A. I. R. 1937 Rangoon 891 at 892.

"The learned authors of the Code of Criminal Procedure by Chitale and Ananji Rao; Edn. 1, Vol. 1, at p. 200 say : 'Thus an ... Provision.'

"I agree with this view."

A. I. R. 1938 Calcutta 287 at 289 & 290 =
I. L. R. (1938) 1 Cal. 53 at 58 and 60.

"In the Note to Messrs. Chitale and Ananji Rao's Code of Civil Procedure, at p. 1388, I find the following comment : 'The first parties.'"

"The learned authors of Chitale and Ananji Rao's Code of Civil Procedure in the paragraph to which I have already referred, appear to me to sum up in a few words the substance of the decisions."

A. I. R. 1938 Calcutta 730 at 733 =

I. L. R. (1939) 1 Cal. 112 at 120.

"The expression 'other cause of a like nature' has been the subject of various decisions, most of which will be found mentioned in Chitale's Limitation Act (1938), pp. 567 to 572."

A. I. R. 1938 Lahore 220 at 222.

A. I. R. 1938 Lahore 343 at 346.

"The learned counsel for the present respondents also quoted A I R 1932 All 446, A I R 1933 All 264 (a judgment by a Full Bench, one member of which was the present Honble Chief Justice of the Lahore High Court) and the remarks in the Commentary of Mr Chitaley's Criminal Procedure Code, Vol 1, p 676 "

A. I. R. 1938 Nagpur 122 at 123.

"It was assumed by the Taxing Judge (Bose J) in his order of reference that the present case was similar because he assumed that there was no difference for these purposes between a plaint and a memorandum of appeal. This we think is wrong although there are a larger number of rulings collected at p 44 of Vol 1 of Chitaley's Civil Procedure Code which take that view "

**A. I. R. 1938 Oudh 43 at 47 and 48 =
I. L. R. 13 Luck. 669 at 693 and 695.**

"The learned counsel (for appellant) maintained that that case stands alone, and he has pointed out to us that in the Commentary on the Civil Procedure Code by Chitaley and Annaji Rao this case is submitted to have been wrongly decided vide the Commentary, Vol 1, (Edn 2) p 478, (Note 9, F N 4)

"In my opinion, the contention of the learned counsel for the appellant must be accepted "

**A. I. R. 1938 Oudh 146 at 147 =
I. L. R. 14 Luck. 116 at 118.**

"As has been pointed out in Chitaley's discussion of this matter in his Notes to S 115 at pages 924 and 925 of Vol 1, Edn 2 of the Civil P C, the Allahabad view originally depended on a distinction between cases in which the application had been rejected and cases where it had been accepted "

A. I. R. 1938 Peshawar 4 at 5.

"The general result of this conflict has been clearly set out in Note Nn 9 of the commentary on that Rule in Chitaley's Code

of Civil Procedure and 'virtually all the cases which have been referred to in the course of that Note have been cited before us as well as some other rulings in addition '

A. I. R. 1939 Lahore 338 at 357.

"As pointed out in A I R 1921 Lah 369 and A I R 1928 All 236 the absence of a shifting balance is not decisive see also cases collected in Chitaley's Limitation Act, Vol 2 p 1362 *et seq* "

A. I. R. 1939 Oudh 88 at 89.

"According to Chitaley, (Civil Procedure Code) Vol 1, p 517, Note 7

'A debt . . . debt '

A. I. R. 1939 Oudh 116 at 117 =

I. L. R. 14 Luck. 838 at 841.

"A reference to the Notes to O 40 R 1 on the subject of the appointment of a receiver in execution proceedings both in Chitaley's Code of Civil Procedure and the latest edition of Katjn and Dass Code of Civil Procedure makes it quite clear that there is no such principle as the one suggested by learned counsel "

A. I. R. 1939 Oudh 284 at 285 =

I. L. R. 16 Luck. 19 at 23.

"I take the following passage based on various rulings from p 701 of Chitaley's Commentary on the Code of Criminal Procedure 'On the making of an Section 377

A. I. R. 1940 Allahabad 263 at 286.

In Chitaley's Criminal Procedure Code, Vol 1, p 797, the learned commentators say 'It is Evidence Act ' I agree with their conclusion "

A. I. R. 1940 Peshawar 24 at 25.

"At Note 10 to O 21 R 15 of Chitaley's Civil Procedure Code the following comments are made as regards the right of appeal against an order made under O 21, R 15

"The question whether the non applicant decree holder